STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant/Cross-Appellee

v

Wade H. McCree, P 37626,

Respondent/Appellee/Cross-Appellant

Case No. 14-59-GA

Decided: May 4, 2017

Appearances:

Dina P. Dajani, for the Grievance Administrator, Petitioner/Appellant/Cross-Appellee
Brian D. Einhorn and Colleen H. Burke, for the Respondent/Appellee/Cross-Appellant

BOARD OPINION

Following a finding of judicial misconduct, the Michigan Supreme Court removed Judge Wade H. McCree from office and ordered him conditionally suspended from the bench for six years beginning January 1, 2015. *In re McCree,* 495 Mich 51; 845 NW2d 458 (2014). Based on the findings of the Court and the Judicial Tenure Commission (JTC), the Grievance Administrator filed a three-count formal complaint alleging attorney misconduct pursuant to MCR 9.116(B).[1] Following hearings on misconduct and discipline, Tri-County Hearing Panel #2 imposed an order of discipline suspending respondent's license to practice law for two years. The Grievance Administrator petitioned for review, arguing that the panel erred by imposing insufficient discipline. Respondent filed a cross-petition asserting that the panel erred in imposing a suspension of greater than 90 days, that any suspension should have a retroactive effective date in light of respondent's interim suspension and removal from the bench, and that the panel erred in concluding that it was bound by

[1] MCR 9.116(B) provides in part, "The administrator or commission may take action against a former judge for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court."

the doctrine of collateral estoppel to adopt the findings of the Michigan Supreme Court. For the reasons discussed below, we increase the discipline imposed from a two-year suspension to a three-year suspension.

I. Panel Proceedings

After investigation, the JTC recommended that respondent be removed from office and conditionally suspended for six years without pay for various misconduct. The Michigan Supreme Court affirmed nearly all of the JTC's findings of fact and adopted its recommendation regarding discipline. Specifically, the Court found:

> The evidence establishes that respondent (a) had a sexual relationship with a complaining witness in a case pending before him without recusing himself for several months, (b) engaged in numerous ex parte communications with her concerning the case, as well as concerning another case in which one of her relatives was a party, (c) violated various policies of the courthouse by permitting his mistress to enter the facility through an employee entrance without going through security, allowing her to remain alone in his chambers while he was on the bench, arranging for her to park her vehicle in an area reserved for judges, and sneaking her cell phone into the courthouse for her, (d) transmitted numerous text messages to her while he was on the bench that contained inappropriate and derogatory references to defendants, litigants, and witnesses appearing before him, (e) lied about when and why he finally did recuse himself from the case in which his mistress was the complaining witness, (f) sought to use the prosecuting attorney's office as leverage against his then ex-mistress by concocting charges of stalking and extortion against her, and (g) lied under oath during the JTC proceedings. [*In re McCree* at 55–56.]

The formal complaint in this matter refers to the Supreme Court's order of removal and contains allegations tracking the findings of the Court and asserts that respondent committed violations of the Michigan Court Rules, the Michigan Rules of Professional Conduct, and various Canons of Judicial Ethics, including MCR 9.104(1)–(4), MCR 9.205(B), MCR 9.205(B)(1)(e), MRPC 3.3(a)(1), MRPC 8.4(a)–(c); and Canons 1, 2A–C, 3A(4) and 3C. The matter was assigned to Tri-County Hearing Panel #2. The hearing panel summarized the allegations as follows:

> Count I of the Complaint alleged that during his tenure as a Wayne County Circuit Judge, Respondent engaged in an extra-marital affair

> with a litigant in *People v King*, Wayne Circuit No. 12-003141-01-FH, a child-support case assigned to his courtroom, communicating with the litigant and presiding over various aspects of the case during the course of his affair, and failing to recuse himself for several months.
>
> Count II alleged that Respondent presided over the case of *People v Tillman*, Wayne Circuit No. 12-000686-01-FH, a case involving a relative of the litigant with whom he was having the affair, and that he conferred with her before issuing a bond reduction in the matter.
>
> Count III alleged that Respondent made various false and misleading statements and representations to the Wayne County Prosecutor and the [JTC] relating to his actions in *People v King* and *People v Tillman*. [HP Report 5/26/2015, p 2.]

The panel majority (James E. Wynne, Chairperson, and Gail O. Rodwan, Member) found that it was bound by the Supreme Court's findings of fact and law in *In re McCree* by virtue of the doctrine of collateral estoppel, noting that the formal complaint was based entirely on the Court's findings. Nevertheless, the panel conducted a full hearing, allowing the parties to call several witnesses and offer exhibits. With regard to Counts I and II, the panel majority found that even if it was not bound by collateral estoppel, based on an independent review of the evidence, it would have reached the same result as the Supreme Court. Concerning Count III, the panel majority stated that it disagreed with the Supreme Court's holding in part:

> If we were free to assess the Count III charge independently, however, we would not find that Wade McCree made a false report of stalking against Genie[n]e Mott or that he engaged in misrepresentation when he informed Wayne County Prosecutor Kim Worthy that he was being stalked by Genie[n]e Mott, but failed to reveal that his purported stalker was a litigant in his courtroom with whom he had engaged in a sexual relationship. [HP Report 5/26/15, p 7.]

Although the panel found insufficient evidence to conclude that respondent's stalking allegation and some of the statements he made in relation to that claim amounted to misconduct, it found ample evidence that he made misrepresentations to the JTC relating to Counts I and II. Specifically, respondent lied when he testified to the JTC that he was unaware that Ms. Mott and Mr. Tillman were related. He also misrepresented the time frame of his affair with Ms. Mott, insisting that he terminated the relationship sooner than he actually did. Finally, he claimed that it did not

"dawn" on him to recuse himself from the cases involving Ms. Mott or Mr. Tillman. Text messages from respondent establish a contrary state of mind and a desire to conceal the relationship in light of his role.[2] Accordingly, the panel found that misconduct was established under MCR 9.104(1)–(4), (6)[3] and MRPC (a)–(c).

Dissenting panel member, Jeffrey Caminsky, disagreed that the panel was bound by the doctrine of collateral estoppel to adopt all of the factual and legal findings of *In re McCree*. He argued that MCR 9.116(C), which specifically provides that the JTC record is admissible in attorney discipline proceedings and that either side may introduce additional evidence, indicates that the Court "did not intend to preclude reconsideration of the factual issues at a grievance proceeding." (HP Report 5/26/15, p 9.) Mr. Caminsky also discussed in some detail his reasons for concluding that respondent's interactions with the Wayne County Prosecutor and her staff do not constitute a basis for a finding of attorney misconduct.

During the discipline hearing on July 20, 2015, the panel heard testimony from two witnesses called by respondent in mitigation, and heard testimony from respondent himself. The panel also considered respondent's prior public censure. See *In Re McCree*, 493 Mich 873; 821 NW2d 674 (2012). The Administrator argued for disbarment under the ABA Standards for Imposing Lawyer Sanctions, while respondent argued for suspension of not more than 179 days.

The panel's decision to impose a two-year suspension was unanimous. The reports on misconduct and on sanctions are appended to this opinion. Among the reasons for the panel's decision on discipline are these, set forth in the report on sanctions:

> Disbarment is inappropriate in this case because no actual, discernible harm was caused to any affected party, and respondent obtained no personal financial benefit. The conduct at issue reflected

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[2] For example, in one text message respondent wrote, "Yeah, I'm DEEPLY concerned that certain levels of 'us' remain COMPLETELY UNDETECTED as long as U'r still a litigant N case B4 me & while my nuts R still on a chopping block B4 the JTC." *In re McCree*, 495 Mich at 67. The reference to the JTC "chopping block" must have been in relation to the proceedings reported at *In Re McCree*, 493 Mich 873; 821 NW2d 674 (2012).

[3] The panel report included a finding that respondent violated MCR 9.104(6) although such a violation was not charged in the formal complaint. As a matter of due process, an attorney in Michigan "may only be found guilty of misconduct as charged in the complaint." *State Bar Grievance Administrator v Jackson,* 390 Mich 147, 155; 211 NW2d 38 (1973). *See also In Re Ruffalo,* 390 US 544, 551–552; 88 S Ct 1222, 1226; 20 L Ed 2d 117, 122–123 (1968). As a result, we have not factored the panel's finding of misconduct under MCR 9.104(6) into this decision.

> a personal failing that intruded on his professional responsibilities, rather than a habitual inclination to profit by misusing his professional status. Under the circumstances, a lengthy suspension serves to vindicate the public interest, while not precluding respondent from using his legal training and talents in the future.
>
> Any of respondent's false statements appear to have caused little discernible harm, except to himself. They fooled nobody, with the possible exception of himself.
>
> On the other hand, respondent's arguments appear to ignore the damaging effect that his conduct had on the administration of justice. The specter of a judge using his office to help himself to sexual favors, or as a means to indulge his personal dalliances, undermines public confidence in our judiciary, and was a gross misuse of his responsibilities to the entire legal profession. Under slightly altered circumstances - such as a failure to acknowledge his failings, or a pattern of conduct suggesting predation rather than personal weakness - disbarment may well have been warranted. However, it appears to the panel that respondent's activities ceased before causing actual damage to a litigant, which suggests that a sanction short of disbarment may suffice in this case.
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> A two-year suspension appears to balance all competing concerns, recognizing the deleterious effect that respondent's conduct had on the administration of justice, and that it was a betrayal of the public's trust in the integrity of its judiciary. While it appears to have had no discernible effect on the cases in question, only a stern response from our system of justice would be sufficient to restore the public's faith in our judicial institutions. A stern response need not be a vindictive one, however; and given the lack of actual harm on the affected parties, as well as the harm respondent inflicted on himself, his career, and his family, a two-year suspension from the practice of law strikes the panel as appropriate and fair.
>
> Therefore, taking into consideration the ABA's Standards For Imposing Lawyer Discipline, the seriousness of the misconduct and all mitigating and aggravating information submitted, it is the panel's unanimous conclusion that respondent's license to practice law should be suspended for two years, effective the date the order of suspension is entered. [HP Report 1/22/16, pp 2- 3.]

The Grievance Administrator filed a petition for review, arguing that the hearing panel erred in imposing insufficient discipline in light of the misconduct committed, and urged the Board to

disbar respondent. Respondent filed a cross-petition for review on the grounds that "the hearing panel erroneously concluded that it was 'bound by the doctrine of collateral estoppel to follow *In re McCree* [495 Mich 51].'" In addition, respondent argued that a two-year suspension is unwarranted and asked the Board to reduce the suspension to 90 days or less.

II. Discussion.

As a preliminary matter, we agree with the Administrator that we need not address the question whether collateral estoppel applies. As the Administrator points out, the panel itself determined that the Court's findings with respect to Counts I and II did not differ from the panel's own, and these allegations were either admitted by respondent or sustained by independent findings of the panel. As for Count III, the Administrator noted the panel's disagreement with the finding that respondent's report of stalking involved false statements amounting to misconduct and focused on the panel's findings that respondent "made misrepresentations in his testimony in the JTC proceeding regardless of the conclusiveness of the Supreme Court's findings." Asserting that the issue is moot, the Administrator's response brief states: "Any further analysis concerning the conclusiveness of the Supreme Court's findings is merely academic and unnecessary to the resolution of this matter. The hearing panel's findings regarding misconduct should be affirmed."

The Administrator argues that the hearing panel "erred in imposing a two-year suspension, which is insufficient in relation to the misconduct committed and is inconsistent with the ABA Standards for Imposing Lawyer Sanctions," and requests that this Board remand the matter to the hearing panel for a supplemental report or impose disbarment. As noted, respondent requests a significant decrease in discipline.

This Board reviews a panel's decision on discipline in light of its "responsibility to ensure a level of uniformity and continuity" in disciplinary matters. *Grievance Administrator v Brent S. Hunt,* 12-10-GA (ADB 2012), p 7. We frequently refer to a four-step process when applying the ABA Standards:

> First, the following questions must be addressed: (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?); (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); and, (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious

injury?).

> The second step of the process involves identification of the applicable standard(s) and examination of the recommended sanctions. Third, aggravating and mitigating factors are considered. Finally, "panels and the Board must consider whether the ABA Standards have, in their judgment, led to an appropriate recommended level of discipline in light of factors such as Michigan precedent, and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances." [*Grievance Administrator v Arnold M. Fink (After Remand)*, 96-181-JC (ADB 2001), pp 1-2, lv den 465 Mich 1209 (2001), citing *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000).]

At the hearing on sanctions, the Administrator argued that, because respondent knew that he should have recused himself at the time he was engaging in the affair with Ms. Mott, and knew he should not be engaged in that relationship while she was a litigant in a case before him, the conduct of respondent was intentional.[4] The Administrator also argued, with respect to injury: "The harm done was to the parties' rights to a fair legal process and the public's right to an impartial judiciary. More specifically, . . . Mr. McCree . . . used his judicial position to benefit himself and to benefit a complaining witness in a matter that was before him," causing damage to the integrity of the legal system.[5] Finally, the Administrator argued that Standards 5.2 and 6.1 were relevant, thereby implicating violations of duties to the public and to the legal system, respectively.

A. Counts I & II: Misconduct With Respect to the Handling of *People v King* and *People v Tillman*.

As is set forth more fully in the formal complaint, the reports of the panel, and in the Court's decision in *In Re McCree*, 495 Mich 451, respondent became involved with Ms. Mott, a complaining witness and custodial parent in a criminal matter involving the father's failure to pay child support (*People v King*). Ms. Mott was also related to the defendant in a separate felony nonsupport case, *People v Tillman*, and respondent remained involved with Ms. Mott as she sought to assist her

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[4] Tr, 7/20/2015, pp 70-71.

[5] Tr, 7/20/2015, p 71.

relative.

As the Court said in summarizing the findings of the master in the JTC proceedings with regard to the misconduct surrounding the *King* matter:

> Respondent intentionally used his judicial position to advance his own interests by holding on to the *King* case in order to keep Mott interested in him. According to the master, "He had a hot young lady who was in his words 'eye candy' and a way to keep her interested was to keep her case and be of assistance in the collection of money." Respondent also continuously engaged in ex parte communications with Mott about the case, which led her to believe that she could influence his judicial decisions. "Mott was providing input, without objection by McCree, as to how King should be dealt with," and this "social relationship gave Mott the belief that she was able to influence his judicial duties." [495 Mich at 60-61.]

With regard to the *Tillman* case, which is the subject of Count II in these proceedings, the playbook of respondent appears to have been much the same: "Respondent and Mott engaged in ex parte communications regarding this case as well. Off the record, and in the absence of any motion being filed, respondent signed an order for the reduction of bond relating to Mott's relative." 495 Mich at 58. The Court further described the gravamen of the misconduct related to *Tillman*:

> [T]he master found that when respondent signed the order reducing Tillman's bond, he was just "confirming in the order what had already been done by [Judge Kevin F.] Robbins." However, the master further concluded:
>
> > [Respondent and Mott] were communicating with texts. He was advising what had to be done when the order was signed and how they would get Tillman out of jail. The main import of the matter to me is that he again had a case in which Mott had an interest. He was ethically not to be involved and should not have been signing any orders pertaining to the case. McCree's actions were beyond an appearance of impropriety - they were in violation of the ethical standards. [495 Mich at 61-62.]

In discussing the impact of respondent's conduct, the Court observed:

> In respondent's words in his own defense, "Wade should have recused himself," but the failure to do so resulted in "no harm no foul." We disagree. The "harm" done was to the parties' rights to a fair legal

> process and the public's right to an impartial judiciary, and the "foul" committed was the resulting violation of Michigan's Code of Judicial Conduct. [495 Mich at 56.]

Later in the opinion, the Court further addresses the nature of the misconduct and the harm or injury it caused:

> Respondent argues that his "failure to recuse himself in *King* is 'prejudicial only to the appearance of propriety'" because "King was treated exactly the same as any other felony nonsupport defendant who fails to meet his payment obligations under a delayed sentence agreement . . . ." No one, of course, can ever know with certainty whether respondent would have treated King in exactly the same manner had he not been engaged in an affair with the mother of King's child. However, even assuming that respondent's relationship with Mott, including his ex parte communications with her about the case, had no effect on respondent's treatment of King, and thus was somehow not prejudicial to the actual administration of justice, respondent's other misconduct, including lying under oath and falsely accusing Mott of stalking and extorting him, was certainly prejudicial to the actual administration of justice. [495 Mich at 78 n 34.]

We have quoted the hearing panel's decision on sanctions at some length above, including the panel's finding that:

> Disbarment is inappropriate in this case because no actual, discernible harm was caused to any affected party, and respondent obtained no personal financial benefit. The conduct at issue reflected a personal failing that intruded on his professional responsibilities, rather than a habitual inclination to profit by misusing his professional status. [HP Report, p 2.]

On review, the Administrator argues that "the determination that there was no actual, discernable harm caused to any party and that Respondent obtained no personal financial benefit is simply irrelevant to an analysis under Standard 5.21."

ABA Standard 5.2 reads, in pertinent part, as follows:

> 5.2 Failure to Maintain the Public Trust
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a

> government agency or official:
>
> 5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.
>
> 5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.
>
> 5.23 Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

The Administrator quite rightly points out that Standard 5.21 does not recommend disbarment only when a judge or other government official "knowingly misuses the position . . . with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process." The Standard can also apply when an official "knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another." The Administrator also correctly states that "'benefit' as contemplated by Standard 5.21 need not be financial to be significant."

Respondent argues that application of Standard 5.22 (suspension) is more appropriate than applying Standard 5.21. Citing cases applying the Standards in other jurisdictions, respondent argues that "personal gratification through a consensual affair is not the type of 'benefit or advantage' that Standard 5.21 targets." Rather, respondent argues, Standard 5.21 is reserved primarily for criminal and fraud cases.

We decline to adopt a rule declaring that the benefits or advantages envisioned in Standard 5.21 do, or do not, consist of sex, money, or other such broad categories. Rather, the task of imposing disciplinary sanctions involves a careful weighing of the pertinent factors in light of the unique circumstances of each case. *Grievance Administrator v Deutch*, 455 Mich 149, 163; 565 NW2d 369 (1997). This remains true even after the Standards were adopted to promote consistency in discipline through the application of the Standards' analyses and rubrics. Often, as here, the Standards embody more than one potentially applicable section appearing to offer guidance.

Petitioner and respondent each cite *People v Biddle*, 180 P2d 461 (Colo PDJ, 2007), a case

in which the respondent, while a judge, carried on an affair "for nearly six months" with a deputy district attorney who practiced before him. They "engaged in various trysts both inside and outside the confines of the Douglas County Courthouse" and, at respondent's behest, the deputy DA attempted to dispel rumors of the affair in speaking with her superiors and court personnel. Respondent knew the relationship raised serious ethical questions but continued the affair and when judicial officials confronted him, he denied it.

The court in *Biddle*, citing Standards 5.21 and 5.22, observed that: "The ABA Standards suggest that the presumptive sanction for the misconduct established in this case ranges from suspension to disbarment." 180 P2d at 463. The court found that respondent Biddle's "conduct caused actual injury and serious potential injury to the integrity of the legal process." *Id.* Discipline counsel there argued that respondent Biddle's gratification was a "significant benefit," and conceded that there was no evidence that Biddle "tipped the scales of justice" or provided favorable treatment. After reviewing "extensive legal authority from other jurisdictions," the court found that the cases supporting suspension were more analogous than those calling for disbarment under ABA Standard 5.21 and "conclude[d] that the plain language of the ABA Standards and the relevant case law support[ed]" applying ABA Standard 5.22. The *Biddle* court considered the respondent's deception of the court officials as well and imposed a suspension of three years.

Notwithstanding *Biddle*, petitioner argues that "ABA Standard 5.21 is unquestionably the most applicable here," and cites a Michigan decision involving a Michigan district judge who engaged in touching, kissing, and fondling of two women appearing before him as criminal defendants. *Grievance Administrator v James A. Scandirito*, 01-96-GA (HP Report 7/25/2002). The former judge made offers to "help clear things up" after arranging for private meetings under pretexts with the women. The panel in *Scandirito* observed that the judge's actions "could rise to the level of criminal sexual conduct." The panel also applied Standard 5.21, concluding that: "The respondent misused his position with intent to obtain a significant benefit, that is, sexual relations or contact with the named complainants." *Id.* This Board said, in its order affirming the panel's order of disbarment, that: "The hearing panel appropriately concluded that the respondent's conduct . . . should be considered under ABA Standard 5.21." *Grievance Administrator v James A. Scandirito*, 01-96-GA (ADB Order, 5/27/2003).

At the hearing below, the Administrator's counsel commendably acknowledged that

Scandirito is distinguishable from this case because the conduct there could be "accurately described as predatory."[6] We also think that the cases are distinguishable, and that the Standards are not to be mechanically applied such that certain conduct found to appropriately fit within Standard 5.21 in a given set of circumstances will always, and in all circumstances, amount to acting with the "intent to obtain a significant benefit or advantage," which will inevitably lead to the presumptive sanction of disbarment. In other words, although Scandirito and respondent may have both acted for sexual gratification, the conduct at issue is not the same.

This case should, and does, turn on more than whether whatever "benefit" accrued from respondent's affair with Mott was "significant" – from his perspective, or that of a panel or the Board. In fact, perhaps respondent's willingness to use his position for a benefit to himself (sexual gratification with a litigant he found attractive) that was, in the end, fleeting if not insignificant, speaks most clearly as to why removal from judicial office was necessary and appropriate.

However, as the hearing panel deciding the case of *Grievance Administrator v James A. Justin*, 13-87-RD (HP Report 10/13/2014) observed, disbarment is not always the appropriate or comparable discipline to be imposed in an attorney discipline case predicated on a judicial discipline case resulting in removal. In *Justin*, the panel was not impressed with respondent's argument that he did not derive "substantial benefit or advantage" from his ticket-fixing behavior on behalf of himself, family, and staff members. Instead, the panel focused on the nature of the misconduct, its duration, and the fact that it clearly contravened prohibitions in the lawyer rules of professional conduct against dishonesty as well as conduct prejudicial to the administration of justice and exposing the profession to contempt, censure and reproach. Justin was found to have dismissed tickets on behalf of himself, his spouse, and staff members and to have "knowingly entered false information into the court's judicial information system and altered records which were to be transmitted to the Secretary of State." Disbarment was imposed by the panel.

It was not error for the panel here, in applying the Standards, to consider and weigh the types of benefits and motivations existing in other cases, such as those involving bribery, or even improper disposition of cases based on favoritism, predatory or assaultive conduct, or bartering sex for a given disposition. Indeed, it appears that the panel considered this matter with care and deliberated quite thoughtfully about the appropriate sanction.

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[6] Tr, 7/20/2015, p 76.

The Administrator also argues that, in light of respondent's "deliberate misrepresentations under oath at the JTC proceeding," disbarment is appropriate under ABA Standard 6.1.[7] Respondent cites various authorities, including *Grievance Administrator v Beverly Nettles-Nickerson*, 08-61-GA (HP Report on Discipline 8/26/2010) (former circuit judge who was removed from office for various misconduct suspended from practice of law for two years and 11 months by hearing panel for fabricating false email and submitting it to the JTC); *Grievance Administrator v Valerie Colbert-Osemuede*, 09-46-GA (ADB 2012) (18-month suspension for various misconduct, including false statements of material fact to a tribunal); *Grievance Administrator v Kathy Lynn Henry*, 09-107-JC (ADB 2010) (one-year suspension for contempt conviction for practitioner's misleading statements and actions before a circuit court reduced from three years in light of significant other penalties); and, *Grievance Administrator v Deborah Ross Adams*, 13-84-RD (HP Report 3/31/2014) (180-day suspension of law license, by consent, for conduct leading to removal from judicial office – "false statements under oath; forgery and the filing of forged and unauthorized pleadings; and misrepresentation to the JTC"). We are not persuaded that the panel erred in imposing a suspension for respondent's dishonest conduct in light of precedents in similar cases and others applying ABA Standard 6.1.

III. Conclusion.

While respondent's judicial misconduct is distinguishable from that in *Justin* as well as that in *Scandirito*, it does raise concerns about his fitness as a lawyer in light of his knowing violation of the rules. Although there is no evidence that respondent corruptly affected the outcome of a case, there is ample evidence that he, in the words of the panel, "disregarded the duty of recusal ... or deliberately may have kept the case to curry favor with Ms. Mott." We agree with the panel that a

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[7] ABA Standard 6.1 provides in part:

> 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
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> 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

lengthy suspension is more appropriate in this case than disbarment, but, in light of the totality of respondent's conduct, including the "brazen disregard of his ethical duties," to quote the Colorado court,[8] we believe that a three-year suspension should be imposed for his misconduct as a public official and his deceptive conduct. Accordingly, we will enter an order increasing the suspension to a period of three years from the effective date of the panel's order of discipline.

Board members Louann Van Der Wiele, Rev. Michael Murray, Dulce M. Fuller, James A. Fink, Jonathan E. Lauderbach, and Barbara Williams Forney concur in this decision.

Board members Lawrence G. Campbell and John W. Inhulsen were absent and did not participate.

Board member Rosalind E. Griffin, M.D., was voluntarily recused.

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[8] 180 P3d at 465.

Appendices

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case No. 14-59-GA

WADE H. MCCREE, P 37626,

Respondent.

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MISCONDUCT REPORT OF TRI-COUNTY HEARING PANEL #2

PRESENT: JAMES E. WYNNE, *Chairperson*
GAIL O. RODWAN, *Member*
JEFFREY CAMINSKY, *Member*

APPEARANCES: DINA P. DAJANI, Senior Associate Counsel
for the Attorney Grievance Commission

BRIAN D. EINHORN and COLLEEN BURKE,
for the Respondent

I. EXHIBITS

Petitioner's Exhibits:

A. JTC Record
B. Supreme Court Opinion

Respondent's Exhibits:

1. Memorandum Dated 12/07/12
2. Memorandum Dated 12/11/12
3. Text Message
4. Text Message
5. Text Message

II. WITNESSES

LaVerne McCree
Robert Donaldson
Timothy Matouk
Wade McCree

III. PANEL PROCEEDINGS

On June 6, 2014, the Grievance Administrator filed a Formal Complaint, alleging three counts of attorney misconduct against Attorney Wade H. McCree.

Count I of the Complaint alleged that during his tenure as a Wayne County Circuit Judge, Respondent engaged in an extra-marital affair with a litigant in *People v King*, Wayne Circuit No. 12-003141-01-FH, a child-support case assigned to his courtroom, communicating with the litigant and presiding over various aspects of the case during the course of his affair, and failing to recuse himself for several months.

Count II alleged that Respondent presided over the case of *People v Tillman*, Wayne Circuit No. 12-000686-01-FH, a case involving a relative of the litigant with whom he was having the affair, and that he conferred with her before issuing a bond reduction in the matter.

Count III alleged that Respondent made various false and misleading statements and representations to the Wayne County Prosecutor and the Judicial Tenure Commission ("JTC" below) relating to his actions in *People v King* and *People v Tillman.*

The Complaint alleged that Respondent violated the Michigan Rules of Professional Conduct, as well as various Canons of Judicial Ethics, including conduct prejudicial to the administration of justice, misuse of judicial office for personal gain, conduct exposing the legal profession to reproach, conduct contrary to justice, ethics, honesty, or good morals, and knowingly made false statements of material facts to a tribunal. MCR 9.104(1)-(4), MCR 9.205(B), MCR 9.205(B)(1)(e); MRPC 3.3(a)(1) and 8.4(a)- (c); MCJC, Canons 1, 2A-C, 3A(4) and 3C. Accordingly, the Complaint requested that the Attorney Discipline Board take such disciplinary action against Respondent as the facts and circumstances warranted.

Following full discovery by both sides, this Panel convened in this matter on January 14, 2015, to take evidence and hear arguments from both sides.

IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

Majority Opinion of James E. Wynne (Chairperson) and Gail O. Rodwan (Member)
Before this Panel addresses the three-count charge in Petitioner's Formal Complaint against Wade McCree, the Panel must explain what role, if any, the Michigan Supreme Court decision in *In re McCree,* 495 Mich 51; 845 NW2d 458 (2014), played in its determinations.

Petitioner has argued to this Panel that Respondent is collaterally estopped from relitigating issues that were decided conclusively by this state's highest court, and that the Panel is factually and legally bound by *In re McCree.* (Petitioner's Pre-Trial Brief at 6-7.) Petitioner also has argued that, minimally, the facts in that opinion constitute prima facie evidence. (ADB Hearing at 24.)

In contrast, Respondent has argued that the conclusions of the Michigan Supreme Court in *In re McCree* are "totally irrelevant" (ADB Hearing at 7), and that the Panel is "not in any way bound by what the Supreme Court said or did or what the Master said or did or what the [Judicial Tenure Commission] did." (ADB Hearing at 10.) Counsel for Respondent has gone so far as to offer the

opinion that the Michigan Supreme Court decision should be legally inadmissible in these proceedings. (ADB Hearing at 14.)

We conclude that we are bound by the doctrine of collateral estoppel to follow *In re McCree,* and we note that the Formal Complaint, in its entirety, is based on the Court's findings in that opinion.

In *Monat v State Farm Insurance Company,* 469 Mich 679, 682-684; 677 NW2d 843 (2004), the Court discussed the three elements of the doctrine of collateral estoppel: 1) A question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; 2) The same parties must have had a full and fair opportunity to litigate the issue; 3) There must have been mutuality of estoppel.

"Mutuality of estoppel" means that a party asserting collateral estoppel based on a previous action must have been a party to that action or in privity with a party to that action. *Lichon v American Universal Insurance Co,* 435 Mich 408, 427; 459 NW2d 288 (1990). "Privity" means that there is a connection or mutual interest between parties. www.uslegal.com/privity.

Respondent has argued that Petitioner cannot establish mutuality, so the assertion of collateral estoppel must fail. (Response to Grievance Administrator's Trial Brief at 3-4, no pagination provided.)

As to the first element of the doctrine, questions of fact essential to the judgment were litigated in the Judicial Tenure proceedings and determined by the Michigan Supreme Court in a valid and final judgment.

As to the second element, the parties before the Michigan Supreme Court were the Judicial Tenure Commission and Respondent. The parties in the matter presently before the Attorney Discipline Board are the Attorney Grievance Commission ("AGC" below) and Respondent. Both the Judicial Tenure Commission and the Attorney Grievance Commission are agencies of the State of Michigan and both have the purpose of investigating and offering evidence related to attorney misconduct and discipline, which may in some instances include both attorney and judicial misconduct and discipline.

As to the third element, there *is* mutuality of estoppel because the Attorney Grievance Commission in asserting estoppel was the same party as, or in privity with, the Judicial Tenure Commission in the matter before the Michigan Supreme Court. The AGC was not "a stranger to the judgment," as Respondent contends (Response to Grievance Administrator's Trial Brief at 3, no pagination provided). Rather, it and the JTC are separate arms of the same entity, i.e., the State of Michigan and its attorney disciplinary system, functioning under the authority of the Michigan Supreme Court. *See* MCR 9.103(A). The AGC and the JTC exist to serve the common goals of preserving the integrity of the legal profession and protecting the public, the courts and the attorneys and judges who are governed by the rules as to professional disciplinary proceedings as set forth in Chapter 9 of the Michigan Court Rules. In comparing MCR 9.102, construing rules for the AGC and ADB, with MCR 9.200, construing rules for the JTC, we find the statements of purpose strikingly similar. The Panel concludes that the JTC and AGC are the "same party" under the collateral estoppel doctrine, but, even if they are not, they are in privity due to their connection and mutual interests.

In addition to arguing lack of mutuality, Respondent has argued to this Panel that application of collateral estoppel here would render MCR 9.116(C) a nullity because the rule says that in a proceeding like this one either the Grievance Administrator or Respondent "may introduce additional evidence." We find that this rule is no bar to application of the collateral estoppel doctrine.

MCR 9.116(B) says that the Grievance Administrator may take action against a former judge "for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court." Here, the Grievance Administrator chose to take action against Wade McCree only for the conduct that resulted in his removal from the bench, as determined by our Michigan Supreme Court. In other disciplinary cases, where additional charges may be brought by the Grievance Administrator after a determination as to judicial misconduct, both parties must have the ability to introduce additional evidence, as specified in MCR 9.116(C). Both parties must have the ability to speak specifically to Respondent's fitness as a *lawyer,* and, in every case where misconduct is found, both parties must be able to present additional evidence relative to the appropriate level of discipline.

Collateral estoppel is often called "issue preclusion" because it "precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Porter v Royal Oak,* 214 Mich App 478, 485; 542 NW2d 905 (1995). As to *other* issues that may be raised in a second proceeding, the parties may, of course, introduce additional evidence. There is nothing in the doctrine of collateral estoppel that bars future litigation, and thus the introduction of new evidence, on issues not raised in the original proceeding.

Respondent has argued that the fact that MCR 9.116(C) makes the JTC record "admissible" should not be construed to mean that it also makes it "conclusive," and we agree, but we find Respondent's point irrelevant to the question before us. Nothing is "conclusive" about the record of a JTC proceeding. All the JTC can do is make recommendations to the Michigan Supreme Court, and the Michigan Supreme Court is free to accept, reject or modify those recommendations. MCR 9.225. There is no conflict between MCR 9.116 and the doctrine of collateral estoppel.

The partially dissenting opinion, infra, cites *Storey v Meijer,* 431 Mich 368, 373-374; 429 NW2d 169 (1988), for the proposition that the doctrine of collateral estoppel is inapplicable in the matter before us. We believe that our colleague's reliance on *Storey* is misplaced. The question in that case was whether collateral estoppel applied to the determinations of the Michigan Employment Security Commission, and the Michigan Supreme Court concluded that it did not. The Court found that when the "rendering forum" for the initial determination is an administrative agency, collateral estoppel is to be applied only where the proceedings are adjudicative, a means of appeal is provided, and the Legislature clearly intended the proceedings to be final absent an appeal.

In the *McCree* case, the forum that made the initial determination, i.e., the "rendering forum," was the Michigan Supreme Court, not the Judicial Tenure Commission. As noted above, under MCR

9.225, the JTC plays a unique role where it can do no more than make a recommendation to a court. It cannot be, in any instance, the "rendering forum."

Finally, we conclude that applying the doctrine in this case is entirely consistent with the purpose of promoting the speedy administration of justice by preventing the relitigation of claims that already have resulted in valid final judgments, while at the same time preserving the right of litigants to have relevant new issues heard.

At the January 14, 2015 hearing, the Panel gave Respondent wide latitude in relitigating the claims that resulted in the Supreme Court's *In re McCree* opinion, including allowing Respondent to call four witnesses who had testified previously. In Counts I and II, our conclusions, if reached independently, would be and are the same as the Supreme Court's as to Mr. McCree's misconduct. In Count III, but for application of the collateral estoppel doctrine, our conclusions would be somewhat different. *See, infra.*

On the merits of the Complaint, the Hearing Panel makes the following findings and conclusions:

Count I

In *In re McCree,* 495 Mich 51; 845 NW2d 459, 467-469 (2014), the Michigan Supreme Court found that Respondent Wade McCree engaged in the charged misconduct described in Count I of the Formal Complaint. This Panel agrees. The Panel finds it unnecessary to discuss the details of the charges because Respondent admitted the misconduct and the need for imposition of sanctions related to this misconduct. (Respondent's Trial Brief at 3; Attorney Discipline Board Hearing Transcript of January 14, 2015, at 22.)

Count II

In *In re McCree,* supra, the Michigan Supreme Court also found that Respondent Wade McCree violated MCR 2.003 by failing to recuse himself in *People v Tillman* when he was aware that Defendant Tillman was a relative of Ms. Mott, by engaging in ex parte communications with Ms. Mott about the *Tillman* case, and by signing an order in the *Tillman* case after he should have recused himself. The Court found all of these acts contrary to Const 1963, art 6, sec 30, MCR 9.205, MCR 9.104(1)-(4) and Canons 1-3.

As discussed above, a majority of this Panel deems us bound by the conclusions of our Supreme Court under the doctrine of collateral estoppel. *See Monat v State Farm Insurance Company,* 469 Mich 679, 682-684; 677 NW2d 843 (2004). However, even if this Panel were not bound, it would reach the same conclusions as to misconduct under Count II based on its independent review of the pleadings and exhibits, the report of the Judicial Tenure Commission, the report of the Master, and the testimony taken at the May 2013 Judicial Tenure Commission Hearing and the January 14, 2015, Attorney Discipline Board Hearing.

The felony non-support case of *People v Tillman* first appeared on then-Judge McCree's docket on January 18, 2012, before Judge McCree met Geniene Mott or learned that Geniene Mott and Damone Tillman were related. *See* Petitioner's Exhibit A, File 22, pp 1-3, Register of Actions for Wayne County Circuit Court Case #12-000686-01-FH. Wade McCree testified that he met Ms.

Mott on May 21, 2012, and the two of them began a physically intimate relationship in June that continued until mid-to late October of 2012. *See* JTC Hearing before Master Charles A. Nelson at 394-398. Throughout these proceedings, Mr. McCree has been adamant in stating that he ended the relationship with Ms. Mott no later than October 31, 2012. However, the record of this case is replete with references to communications between Ms. Mott and Mr. McCree that continued well into November of 2012, and Mr. McCree himself testified that he "ceased initiating any contact with that woman" after November 19, 2012. (JTC Hearing at 839.) Wade McCree also testified that he went to Ms. Mott's home on November 10, 2012, and she scratched him down the front of his chest. (JTC Hearing at 917-920.) They had ongoing discussions in November about a possible pregnancy and abortion, and Mr. McCree agreed to pay for the abortion. (ADB Hearing at 146.) On November 20, 2012, Wade McCree wrote Geniene Mott a personal check for $1,000. (Petitioner's Exhibit A, last page, file 6.) So while the sexual relationship may have ended by late October of 2012, other aspects of the personal relationship most certainly had not.

With the above dates in mind, the Panel notes that Mr. McCree testified at the hearing before the Panel on January 14, 2015, that he did not learn until "late fall" of 2012 that Mr. Tillman and Ms. Mott were related, that Mr. Tillman did not personally appear before him that fall, that the private text messages that he and Ms. Mott admittedly exchanged in November about the Tillman case were informational only on his part, and that the misnamed Order to Reduce Bond, which he admitted he signed on November 13, 2012, was routine and administrative in nature. (ADB Hearing at 111-112, 139.)

The Panel compared this testimony with the testimony of Geniene Mott that during the time of her relationship with Wade McCree in 2012 she learned from her family that her cousin Damone Tillman had a felony non-support case in Wayne County Circuit Court. She testified that she discussed the case with McCree. One day in November of 2012 (presumably November 8) when McCree was not at work, Mr. Tillman appeared before another judge who was handling McCree's docket (JTC Hearing at 98-99). Although that judge ordered bond, Mr. Tillman was erroneously (in her view) remanded to jail, and "Wade was supposed to straighten it out." (JTC Hearing at 99-100.) On November 13, 2012, Ms. Mott texted Respondent McCree and informed him that she and her family would be in his courtroom that day on the Tillman matter. They did appear, McCree was on the bench, Tillman did not appear before the court that day, but Mott and McCree exchanged text messages about the case *while* McCree was on the bench (see messages read into the JTC Hearing record at 101-102), and McCree signed the order (ADB Hearing at 140) that sent funds from the jail to a felony non-support office for ultimate transfer to the Friend of the Court, thus facilitating Mr. Tillman's release (Petitioner's Exhibit A, file 22, for copy of order).

It would be difficult for this Panel to conclude that Wade McCree had no understanding of his duty to recuse himself from Damone Tillman's case once he learned of the connection to Ms. Mott. In 2012, Wade McCree was a very experienced judge who had sat for many years on the benches of both 36th District Court and Wayne County Circuit Court. He may have disregarded the duty of recusal, or he deliberately may have kept the case to curry favor with Ms. Mott. Ultimately, it does not matter. Like the Michigan Supreme Court, we conclude that Wade McCree permitted his relationship with Ms. Mott to influence his professional conduct and judgment, and that the misconduct established in Court II was prejudicial to the proper administration of justice. His actions contributed to his misconduct as a lawyer under MRPC 8.4(a) and (c).

Count III

We are bound by the conclusions of the Michigan Supreme Court, and we agree with those conclusions, in part. If we were free to assess the Count III charge independently, however, we would not find that Wade McCree made a false report of stalking against Genieve Mott or that he engaged in misrepresentation when he informed Wayne County Prosecutor Kim Worthy that he was being stalked by Genieve Mott, but failed to reveal that his purported stalker was a litigant in his courtroom with whom he had engaged in a sexual relationship.

The record reflects that Wade McCree had a brief conversation with Prosecutor Worthy, who told him that members of her staff would contact him and investigate the stalking claim. When he talked at much greater length to the investigators whom Prosecutor Worthy had assigned to the matter, he informed them of the nature of his relationship with Ms. Mott. While Respondent may not have been entirely forthcoming in his initial stalking report to Kim Worthy, we do not believe that his omission regarding the details of his relationship with Ms. Mott rises to the level of professional misconduct.

As to the stalking claim itself, we are guided by MCL 750.411i(1)(e), which defines stalking as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

MCL 750.411(1)(a) defines a "course of conduct" as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose."

This Panel recognizes that Genieve Mott had reason to contact Wade McCree after October 31, 2012. They were engaged in ongoing conversations about her claimed pregnancy, and, in relation to that, Wade McCree had agreed to pay Ms. Mott money that he had not yet paid. He conceded that fact when he testified before this Panel on January 14, 2015, that he told Ms. Mott he would pay for an abortion (ADB Hearing at 146).

However, this does not negate the possibility that Ms. Mott engaged in "a willful course of conduct involving repeated or continuing harassment" that reasonably may have caused Respondent and the members of his family to feel frightened, threatened and harassed. The testimony of both Respondent and his wife suggested a pattern of telephone calls, text messages, appearances at the McCree home, in the McCree neighborhood and elsewhere by Ms. Mott evidencing a "continuity of purpose" consistent with stalking. As the partially concurring opinion suggests, *infra,* it was the job of the Wayne County Prosecutor, not Wade McCree, and certainly not the members of this Panel, to decide whether Ms. Mott's actions constituted a crime warranting the filing of criminal charges. Prosecutor Worthy ultimately decided that charges against Ms. Mott were not warranted, but that does not mean that Respondent, or any other citizen, should be punished for taking to law enforcement concerns about being stalked.

While Respondent may not have handled the denouement of his relationship with Ms. Mott with grace, or even rationality, that hardly provides grounds for finding professional misconduct in his allegation of stalking or his brief report to Prosecutor Worthy.

In all other respects, the majority agrees with the findings of the Michigan Supreme Court as to Count III.

A sanction hearing will be scheduled in the near future.

ATTORNEY DISCIPLINE BOARD
TRI-COUNTY HEARING PANEL #2

By: James E. Wynne
JAMES E. WYNNE, *Chairperson*

DATED: May 26, 2015

JEFFREY CAMINSKY, *Member,* concurring in part and dissenting in part.

I fully subscribe to the majority's opinion with regard to Counts I and II of the Complaint. I write separately because I take a different view of the limits placed upon this Panel by the doctrine of collateral estoppel, and its effect on our findings relating to Count III.

The Michigan Supreme Court has defined the elements of collateral estoppel as requiring (1) a question of fact essential to judgment that actually was litigated and determined by a final judgment; (2) the same parties, with a full and fair opportunity to litigate the factual question; and (3) mutuality of estoppel. *Estes v Titus*, 481 Mich 493; 751 NW2d 493, 500 (2008). In this case, the Supreme Court itself determined that the factual questions related to Count III were non-essential:

> "Although we believe that the sanctions recommended by the JTC, and adopted by this Court today, would be warranted even without considering these additional findings of fact, we believe that these additional findings provide relevant background and context and demonstrate more fully the nature and magnitude of respondent's misconduct." *In re McCree*, 495 Mich 51; 895 NW2d 458, 468 (2014).

Since the Supreme Court itself did not deem the factual questions confronting us as "essential to the judgment," I cannot conclude that this Panel is barred from reaching its own conclusions on these particular factual matters. This conclusion also follows from several other sources, as well:

First, MCR 9.116(C) specifically provides that either side can introduce additional evidence in a grievance proceeding against a judge who has been removed from the bench. If this Panel were bound by the Supreme Court's factual findings, this would be a futile act, since neither side could produce evidence that could change the outcome.

Secondly, both the precise issues and the standards of review are different in proceedings before the Judicial Tenure Commission against a judge than they are in disciplinary actions against an attorney: the former case determines a sitting judge's fitness to continue serving on the bench as an impartial arbiter; the latter case decides if an attorney can be recommended to the public to represent clients in a court of law. The same person may be temperamentally unsuited to service as a judicial officer, yet fully competent to represent a client vigorously and capably. Moreover, in reviewing a JTC case, the Supreme Court reviews factual findings, conclusions of law, and disciplinary recommendations *de novo, In re McCree, supra* at 895 NW2d 466-467. In an attorney grievance matter, while the Court gives *de novo* review to questions of law, review of the Discipline Board's factual findings on the question of whether the attorney has violated a rule of professional conduct is limited to determining whether there is "proper evidentiary support" in the record. *Grievance Administrator v Fieger*, 476 Mich 231; 719 NW2d 123, 131 (2006). This implies that while the Court deems itself responsible for controlling the conduct of judges, it is willing to cede responsibility for policing lawyers to the legal profession, and will treat those matters as involving standard legal issues, with the usual distinction between factual questions and questions of law. And this, in turn, leads to another limitation on review, suggesting that the doctrine of collateral estoppel should not apply in the matter before us.

In *Storey v Meijer*, 431 Mich 368, 373-374; 429 NW2d 169 (1988), the Court considered a case in which an administrative agency had determined that an employee was ineligible for unemployment benefits because he had been fired for theft. In holding that this did not preclude a subsequent lawsuit by the employee for wrongful discharge, the Court found that the doctrine of collateral estoppel applied to administrative proceedings only if the proceedings are (a) adjudicative in nature; (b) a method of appeal is provided; and (c) it is clear that the Legislature intended the proceeding to be final in the absence of an appeal. In the case before us, while the JTC proceedings are adjudicative, the fact that the Supreme Court was the ultimate fact-finding body appears to eliminate the chance for an appeal from an adverse factual ruling. In addition, the provisions of MCR 9.116(C) seem to imply that the legislating agency --- in this case, the Supreme Court itself --- did not intend to preclude reconsideration of the factual issues at a grievance proceeding, even if it wished to reserve to itself the ultimate judgment of whether a judge is fit to continue serving on the bench. It follows, therefore, that while we can rely on the JTC record under MCR 9.116(C), we are not bound by the factual resolutions that resulted in our Respondent's removal from office.

Of course, in many respects this question is largely moot. The record provides ample support for the proposition that Respondent was not being honest in many of his representations, and that some of his testimony to the Judicial Tenure Commission was deliberately false. His testimony that he ended his affair with Ms. Mott on October 31, 2012, for example, is flatly contradicted by text messages he sent her well into November; and testimony that his failure to disqualify himself was an "oversight" is inconsistent with his earlier text messages to her about the need for them to keep their affair a secret --- ironically because of an earlier pending matter before the Tenure Commission, about an earlier non-marital lapse of judgment.

I cannot, however, conclude that all of Respondent's alleged falsehoods warrant sanction as attorney misconduct: I cannot conclude that the omission of salacious details from a short conversation with the Wayne County Prosecutor about the matter --- such as the fact that his affair was with a litigant appearing in his own courtroom, cited in Paragraph 47 of the Complaint ---

constitutes misrepresentation warranting attorney discipline, any more than I would conclude that courtroom testimony omitting details never asked about would constitute perjury. This is particularly true since Respondent's interview with the Prosecutor's staff provided many more details, including the admission that he had been having an affair with a litigant. (Hearing Transcript, 1/14/15, pp 94-95). Neither can I conclude that providing a plausible if incomplete basis for his disqualification --- i.e., that his son was a friend of a litigant (Complaint, paragraph 49) --- is a basis for a finding of attorney misconduct: while it might be sufficient to impose discipline on a judge for making an incomplete record it was not, technically speaking, false. And if we are to impose sanctions on attorneys not for lying, but for attempting to put a favorable spin on things --- whether in or out of court --- then the Law is destined to become a very lonely profession. Moreover, given the existing state of the record, it is unclear whether Respondent told the Prosecutor's staff that he recused himself "immediately" in the *King* matter --- but regardless of what such a self-serving account may say of Respondent's fitness to sit on the bench, it strikes me as a weak basis for imposing discipline, particularly since the interview was never reduced to a formal statement, enabling Respondent to review it for inaccuracies or revise it after checking his memory against the relevant court docket entries.

Lastly, I would not impose sanctions based upon Respondent's act of going to the Prosecutor to complain about Ms. Mott's actions. Regardless of his own complicity in bringing trouble upon himself and his family, it seems to me that Respondent has the same right as any citizen to seek help from the authorities. It is the responsibility of the Prosecutor, not the citizen, to determine whether something is a crime and whether charges should be filed, and citizens should not be punished for taking their concerns to law enforcement. In other circumstances, Ms. Mott's actions in constantly texting Respondent, going to his home, and making herself a nuisance might well warrant a complaint for stalking; and if Respondent did not face possible responsibility for medical costs relating to a pregnancy, her request for monetary compensation might well be viewed as extortion. While his actions may appear foolish and self-indulgent to outside observers, neither human frailty nor the inability to be objective in a personal crisis strike me as grounds for attorney misconduct.

I do, however, concur with the Majority's factual conclusions concerning Respondent's lack of truthfulness in testimony that his failure to recuse himself in the King case was due to an "oversight," his statement to the Judicial Tenure Commission that he took no action in the Tillman case in November, 2012, and his insistence that he did not know about a relationship between Tillman and Mott until after his relationship with Ms. Mott had ended. Accordingly, as the evidence proved the allegations charged in paragraphs 50-55 of the Formal Complaint, I agree that some disciplinary sanctions are appropriate with respect to Count III.

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case No. 14-59-GA

WADE H. MCCREE, P 37626,

Respondent.
_____/

SANCTION REPORT OF TRI-COUNTY HEARING PANEL #2

PRESENT: James E. Wynne, Chairperson
Gail O. Rodwan, Member
Jeffrey Caminsky, Member

APPEARANCES: Dina P. Dajani, Senior Associate Counsel
for the Attorney Grievance Commission

Brian D. Einhorn and Colleen H. Burke,
for the Respondent

I. EXHIBITS

Petitioner's Exhibit C Michigan Supreme Court Order of Public Censure, *In Re: Hon. Wade H. McCree*, SC No 145895; Request for Investigation Nos. 2012-19839; 2012-19863, dated October 24, 2012.

II. WITNESSES

Hon. Edward Ewell, Jr.
Hans J. Massaquoi
Wade H. McCree, Respondent

III. PANEL PROCEEDINGS

The Grievance Administrator filed Formal Complaint 14-59-GA on June 6, 2014, alleging that respondent had committed professional misconduct. This matter was assigned to Tri-County Hearing Panel #2 and was scheduled for hearing pursuant to MCR 9.115(G). Respondent McCree's answer to the formal complaint was filed on July 1, 2014.

On May 26, 2015, the Misconduct Report of Tri-County Hearing Panel #2 was issued. In that report, the panel found that Respondent McCree was guilty of misconduct as a lawyer. The panel determined that during his tenure as a Wayne County Circuit Judge, respondent engaged in an extra-marital affair with a litigant in *People v King*, Wayne Circuit No. 12-003141-01-FH, a child-support case assigned to his courtroom, communicating with the litigant and presiding over various aspects of the case during the course of his affair, and failing to recuse himself for several months. The panel also determined that respondent presided over the case of *People v Tillman*, Wayne Circuit No. 12-000686-01-FH, a case involving a relative of the litigant with whom he was having the affair, and that he conferred with her before issuing a bond reduction in the matter. The panel further determined that respondent made false and misleading statements and representations to the Wayne County Prosecutor and the Judicial Tenure Commission relating to his actions in *People v King* and *People v Tillman*. The panel concluded that this misconduct violated MCR 9.104(1), (2), (3), (4) and (6) and MRPC 8.4(a), (b) and (c).

Having made that finding, the panel held a separate hearing under MCR 9.115(J)(2) to determine appropriate discipline on July 20, 2015. At the hearing, with respect to discipline, the panel took testimony in mitigation from Judge Edward Ewell Jr., Mr. Hans Massaquoi, and respondent himself. Judge Ewell has known respondent since about 2003, when he was first appointed as a judge. Lawyer Hans Massaquoi has been associated with Wade McCree for many years, and they were, at one point, working together at the same law firm. He is also a close personal friend of respondent. Both Judge Ewell and Mr. Massaquoi testified as to respondent's character and actions since before his removal from the bench, as soon as his relationship became known and his reaction to it and its impact on him and his family. Respondent testified as to the work he has done since his suspension as a judge and his removal from the bench; his financial situation; the details of the underlying incident; how his mistakes have impacted him and his family; and his remorse.

IV. FINDINGS AND CONCLUSIONS REGARDING SANCTIONS

In addition to the testimony presented, respondent's public censure of October 24, 2012, was likewise taken into account (in aggravation), as were the various arguments of the parties, including petitioner's arguments in favor of disbarment under the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions Standard 9.22, and respondent's insistence that a short suspension - lasting no longer than 179 days - would suffice, given the presence of mitigating factors under ABA Standard 9.32. The panel finds neither set of arguments fully persuasive.

Disbarment is inappropriate in this case because no actual, discernible harm was caused to any affected party, and respondent obtained no personal financial benefit. The conduct at issue reflected a personal failing that intruded on his professional responsibilities, rather than a habitual inclination to profit by misusing his professional status. Under the circumstances, a lengthy suspension serves to vindicate the public interest, while not precluding respondent from using his legal training and talents in the future.

Any of respondent's false statements appear to have caused little discernible harm, except to himself. They fooled nobody, with the possible exception of himself.

On the other hand, respondent's arguments appear to ignore the damaging effect that his conduct had on the administration of justice. The specter of a judge using his office to help himself to sexual favors, or as a means to indulge his personal dalliances, undermines public confidence in our judiciary, and was a gross misuse of his responsibilities to the entire legal profession. Under slightly altered circumstances - such as a failure to acknowledge his failings, or a pattern of conduct suggesting predation rather than personal weakness - disbarment may well have been warranted. However, it appears to the panel that respondent's activities ceased before causing actual damage to a litigant, which suggests that a sanction short of disbarment may suffice in this case.

A two-year suspension appears to balance all competing concerns, recognizing the deleterious effect that respondent's conduct had on the administration of justice, and that it was a betrayal of the public's trust in the integrity of its judiciary. While it appears to have had no discernible effect on the cases in question, only a stern response from our system of justice would be sufficient to restore the public's faith in our judicial institutions. A stern response need not be a vindictive one, however; and given the lack of actual harm on the affected parties, as well as the harm respondent inflicted on himself, his career, and his family, a two-year suspension from the practice of law strikes the panel as appropriate and fair.

Therefore, taking into consideration the ABA's Standards For Imposing Lawyer Discipline, the seriousness of the misconduct and all mitigating and aggravating information submitted, it is the panel's unanimous conclusion that respondent's license to practice law should be suspended for two years, effective the date the order of suspension is entered.

V. SUMMARY OF PRIOR MISCONDUCT

None.

VI. ITEMIZATION OF COSTS

Attorney Grievance Commission:	
(See Itemized Statement filed 07/23/15)	$ 216.61
Attorney Discipline Board:	
Hearing held 01/14/15	$ 902.00
Hearing held 07/20/15	$ 652.50
Administrative Fee [MCR 9.128(B)(1)]	$1,500.00
TOTAL:	**$3,271.11**

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #2

By: James E Wynne
James E. Wynne, Chairperson

DATED: January 22, 2016