

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

-----X  
In the Matter of the Proceeding Pursuant  
To Section 44, subdivision 4, of the  
Judiciary Law in Relation to

*RESPONDENT'S REPLY  
MEMORANDUM TO THE  
COMMISSION*

**BRYAN R. HEDGES**

a Former Judge of the Family Court,  
Onondaga County  
-----X

**I. THE REFEREE'S REPORT IS INCONSISTENT REGARDING  
KEY FINDINGS**

The Referee found that it was not proven by a preponderance of the evidence that  
Respondent ejaculated. The standard he used was:

- a. Ms. [REDACTED]'s failure to recall details regarding Respondent's ejaculations;
- b. Her failure to mention ejaculation when she first gave an account of the event;
- c. The passage of time before she first mentioned ejaculation.

Applying those factors, proof by a preponderance of the evidence has not been  
met as follows:

1. Respondent placed her hand on his penis:
  - a. This fact was not mentioned in 1982 to her mother or to her cousin Beth Stracher. She told her mother Bryan asked her to touch hi, and told her cousin she saw Uncle Bryan naked.

b. This was not mentioned to her mother when she first told her story on December 29, 2011.

c. The details about hand placement, when finally mentioned 40 years later in January of 2012, are contradictory. She told her mother then, the Respondent put her hands on his penis.

d. She also told her mother in January, 2012 that she went upon the bed and was lying next to Respondent, her body next to his, sat up and then was shown how to masturbate him with her hands.

e. She testified that she only kneeled on the bed and used only her left hand to masturbate the Respondent.

None of the foregoing inconsistencies are in any way mentioned, reasoned, rationalized, or even recognized by the Referee. Ms. [REDACTED] failed to recall these details until 2012, didn't mention it in her early accounts, and there was a passage of 40 years before it was mentioned, and then there were inconsistencies

2. The referee found the Respondent motioned his niece into the room, overlooked in his findings as follows:

a. E [REDACTED] first told her mother on December 29, 2001 "she walked into the room and he was naked on the bed with an erection". "He called her over and somehow convinced her to lie on the bed with her body next to him." (Exhibit H) There was no mention of his gesturing her into the room on December 29, 2011, or on any of these dates:

1. To her mother in 1982 when she was 15;
2. To her cousin Beth Stracher in the 1980's.

Therefore, forty years elapsed until this detail was mentioned, it was not mentioned in her first account.

The referee incorrectly finds that R [REDACTED], when E [REDACTED] was 15 years old, had a conversation with Respondent about Ms. [REDACTED]'s disclosure and Respondent

acknowledged that Ms. [REDACTED] had walked into the third floor bedroom of the [REDACTED] family house when she was very young and Respondent was masturbating. (R266-287, 376-378)" (§59 at page 18 Referee Report) Mr. [REDACTED] testified that Ms. [REDACTED]'s mother did not tell him that Bryan had asked E [REDACTED] to touch his penis. (R265) Mr. [REDACTED] testified that Ms. [REDACTED]'s mother told him at that time that:

A. She said that E [REDACTED] had called her to specifically tell her that as a child she had walked in on Bryan in the third floor bedroom of my mother's when he was alone in bed.

Q. And did she describe what E [REDACTED] had told her Bryan was doing?

A. I only remember that it was that he was relieving himself masturbating. (R262)

There is no attempt by the Referee to resolve Ms. [REDACTED]'s following long list of inconsistencies:

- a. Was respondent naked or covered up when she walked into the room? (TR113, 114, Exhibit J).
- b. Did he call her over, gesture her over, or did she just walk up to the bed on her own? (Exhibit H, TR 38, 64, 114)
- c. Did she lie on the bed with her body next to him, sit up and engage in contact with his penis, or did she only kneel? (Exhibit H, R172)
- d. The duration of the event was unknown, a brief period or took some time. (TR 115, Exhibit B, TR 98, Exhibit J, TR 214)
- e. Did he guide her left hand or both hands to his penis? If either, why wasn't that mentioned when she was 15 years old? (R39, 40, 212)
- e. Did he ejaculate or not? The Referee concludes that was not proven.
- f. Did she tell her mother when she was 15 years old:

- The complete story? (Exhibit B, Exhibit C)
- That she touched Bryan? (R57) (R62)
- That she touched Bryan's private parts? (R64)
- That she walked in while he was masturbating? (TR262)
- That she was someplace where she wasn't supposed to be and saw Uncle Bryan naked? (R300)

g. Did she tell her cousin about the incident years ago which she acknowledged in a recent email to her mother, or does she not remember, as she testified? (TR 71, TR191, 192)

h. Did the Respondent never talk to her about anything as she testified or did he frequently talk with her when she stayed at his homes or when she called him for legal advice as the proof demonstrated? (Exhibit H)

i. Did she or did she not leave the Respondent to care for her children? The proof shows she did, given the testimony of Beth Stracher, her father, and the Respondent.

j. She is deeply troubled by the event of 40 years ago, but failed to tell the halfway house in which she stayed due to marital problems about the event with Bryan, (TR 121-123) and failed to tell her cousin about it. (R303)

k. Did she tell her husband about the details years ago when her son was two, or in January, 2012 after she started counseling as she acknowledged in direct conversation? (TR 121-123) (TR 116-117)

k. Is her trauma caused by this incident or spousal abuse? (TR116-123)

l. Did she ask Bryan for money in December, 2011? She denies it ("No never") only to be confronted by Exhibit 5. (TR77-78)

m. Was she planning to ask him for money before going to the District Attorney? She denies it, only to be confronted by her e-mail and to be contradicted by her mother's testimony. (TR79-81) (TR 206-209)

n. Did she consult an attorney? She denies it in the hearing, but her email to her mother contradicts that assertion. (TR207-209)

It is likewise difficult to respond to the Referee's reasoning on page 7 that if this event were incidental contact, it would be likely the Respondent would have informed E■■■■'s parents of this accidental, unintended, embarrassing encounter. The Referee goes on to assure that in 1972 it was well known that this brief encounter would cause longstanding problems for E■■■■.

The record reflects that Bryan Hedges was mortified by being interrupted while masturbating in bed in the morning, early in his marriage, and in his very formal mother-in-law's home. Bryan described it to be embarrassing in his testimony and particularly given the formal nature of his mother-in-law. The Referee ignores the facts which strongly support that the event 40 years ago was an interruption of masturbation only:

1. E■■■■'s father testified that he was told that by E■■■■'s mother in 1982 when she repeated E■■■■'s story.
2. E■■■■'s mother wrote to Bryan characterizing his actions as "careless" on December 20, 2011. (Exhibit G). The only version of the story that is consistent with careless is the interrupted masturbation.

There is also no proof that it was well known that such inadvertent contact would likely have an adverse impact on a child, and that is a failure of proof on the part of the Commission Staff. There is no question it would have been the right thing to advise the family, but to assume that not telling the very Roman Catholic E■■■■ family he was masturbating means something worse happened, is flawed logic, unfair, and an inference not supported by the evidence.

**II. PROOF OF MS. [REDACTED]'S ALLEGED HARM IS INADMISSIBLE. THE RESPONDENT WAS WRONGLY PREVENTED FROM EXAMINING ABOUT THAT PROOF.**

The referee at page 21, paragraphs 74-77 wrongly makes factual findings regarding the effect of this event on Ms. [REDACTED], to wit, "sticks" to her, it is always there, the trauma still continues, that it has ultimately impacted her marriage and that she has to stop and walk out during sexual relations. These findings are not supported by any medical evidence which is required as an absolute necessity in any civil trial using bench trial rules.

In order to reach this conclusion the Referee had to overlook Ms. [REDACTED]'s conflicting claims about what she had told her husband about the incident. She testified initially she told her husband about the time when her son was two, which is a number of years ago, that she was having "flashbacks:"

A. And I, I didn't tell my husband until my son was two, two years old and then I told my husband. I told him what happened.

Q. Did you tell your husband the details?

A. Yes, yes I told, talked to him about that and every time that we would make love together I would stop and walk out because I would have flashbacks and made my husband very frustrated with me through, all the way through this. (R116-117)

This testimony directly contradicts what Ms. [REDACTED] told her mother in a recent email in which she said her husband did not want to know the details. When confronted with the email, she contradicted the prior testimony, and testified that she only told her

husband the details of the 40 year old event in January of 2012 after she started counseling. (R118)

There simply is no medical proof that this incident has caused flashbacks, has impacted her marriage or created trauma. Respondent was prevented from asking about an interviewing event which directly impacts the marriage claim and the trauma for spousal abuse and stayed for an extended period of time at a halfway house, and thereafter, stayed with her cousin Beth Stracher for several days in Massachusetts. The Respondent, based on staff objection, was prevented by the Referee from asking E [REDACTED] about several weeks she spent in a halfway house having alleged spousal abuse in 2010. (R119-123) Respondent was prevented by the Referee from asking Ms. [REDACTED] if she had reported the same spouse who the Referee found had sexual relationship problems caused by Respondent's alleged abuse. (R119)

Commission Counsel, in an attempt to prejudice this panel, put forth E [REDACTED]'s medically unconnected claims of harm due to the Respondent's alleged actions.

This claim is not only unproven, it is outside of the Amended Formal Complaint. The panel is directed to the causation charge of PJI Civil 2:70. Without competent medical testimony the claim of injury is unconnected, particularly given the prior charge of spousal abuse, a stay at a halfway house, during which E [REDACTED] acknowledged she did not tell the halfway house professional(s) everything about Bryan's alleged prior abuse. (R122)

The Commission would do well to follow E [REDACTED]'s mother's advice not to risk her every life problem to her claims against Bryan because E [REDACTED] had made some poor life choices.

A medical expert may give an opinion as to nature, cause, extent and duration of a person's injury or disease, or as to the cause of death, *Meiselman v. Crown Heights Hospital*, 285 N.Y. 661.

Lay witnesses are not entitled to testify with regard to interval conditions not readily linked by observation:

d. The apparent physical condition of a person, which is open to ordinary observation. For example, a lay witness may testify as to a person's strength, vigor, feebleness, illness, and comparative condition from day to day. But a lay witness may not testify as to the existence or character of internal conditions, such as particular knowledge and experience of an expert. *St. Louis Mining & Smelting v State Industrial Commission*, 113 Okla 179, 241 Pac 170; *Rawls v American Mutual Life Ins*, 27 NY 282. See also *Cotilletta v. Tepedino*, 151 Misc2d 660, 573 NYS2d 396. Farrell, Prince Richardson on Evidence, 11<sup>th</sup> Ed., p. 446.

Therefore, no legally permissible connection has been made with regard to Ms. [REDACTED]'s alleged trauma and harm and the same should not be considered by this tribunal.

**III. THE FACTUAL SETTING WAS NOT PROPERLY WEIGHED BY THE REFEREE**

This case commenced before the Commission with the presentation of Exhibit D, a letter from the Onondaga County District Attorney to the Commission which complained about Judge Hedges conduct prior to his taking Judicial Office as reported to him by E [REDACTED]. The letter is noteworthy because:

- 1) It assumes, if not declares, Judge Hedges guilty;

- 2) It acknowledges that E [REDACTED] was influenced by the Sandusky/Fine scandals;
- 3) It fails to provide E [REDACTED]'s email to Bryan Hedges asking for money on December 4, 2011; (Exhibit 5)
- 4) It fails to disclose that E [REDACTED] was seeking money from Judge Hedges even though the District Attorney apparently was aware of that;
- 5) It wrongly advises the Commission that E [REDACTED] disclosed the entire lurid story to her mother prior to December 2011;
- 6) It incorrectly described E [REDACTED] reaching out to her mother and "the two had a very lengthy conversation on what to which eventually led E [REDACTED] to making contact with me."
- 7) It fails to point out that E [REDACTED] and her mother constructed the new story over many days while they were contemporaneously contemplating getting money from Judge Hedges;
- 8) It fails to point out that there were consultations with civil attorneys;
- 9) It refers to Judge Hedges with conclusory words such as "the felonious conduct of Judge Hedges," and as "predator" as examples of the inflammatory and conclusory language used.

The Commission apparently received the complaint and interviewed E [REDACTED]. The undated summary of the interview -- (that is correct, undated) consists of two short paragraphs. (Exhibit C)

A Formal Written Complaint was ultimately filed against Judge Hedges. At paragraph 8 of the original complaint the Commission correctly asserts that Bryan and Liz were overnight guests on the day in a guestroom at Liz's mother's house and it further alleges incorrectly that "at the same time, R [REDACTED] and M [REDACTED] and their daughter E [REDACTED], were also overnight guests at the same house." Respondent

denied that allegation in the complaint. Commission Counsel stipulated only during the hearing that the original allegation is incorrect and that R ■■■, M ■■■ and E ■■■ were not overnight guests.

That concession is crucial. Judge Hedges does not deny that E ■■■ interrupted him while he was in the bedroom he had occupied overnight into the morning. Judge Hedges' recollection, which is the most credible recollection in this case, is that he became aware of E ■■■ being present in his room as she literally came up in to the bed while he was engaged in the act of masturbation. E ■■■ reached in and briefly placed her hand on his for 3 or 4 seconds, while he masturbated. He then recoiled, pulled up covers, and rolled over. (R 322-323)

Accepting Judge Hedge's testimony as the more credible version, the only issue is whether his actions, i.e. the act of masturbating and the delay of 3 to 4 seconds are actions which reflect adversely on his qualifications and fitness to perform the duties of a judge etc. as set forth in paragraph 13 of the formal complaint.

It is undisputed that Bryan Hedges began that day without any knowledge that E ■■■ or her sister were in the house. It is undisputed that the 3<sup>rd</sup> floor attic bedroom Judge Hedges was occupying was in a remote area of the house. (R184) (R235-236) His first awareness of her presence was when she enters into the bedroom unannounced and awakens Bryan and Liz Hedges. (R 322-323) Liz left the room with E ■■■ and takes her downstairs. (R322-323) It is undisputed thereafter that E ■■■ enters the bedroom alone. (R 322-324)

Accepting Judge Hedge's recollection of events, he had only a sleepy, groggy awareness of E [REDACTED] entering the bedroom while he is sleeping with Liz. E [REDACTED] leaves the room with Liz. While Judge Hedges remains in bed in a sleepy and relaxed mode, he commences that act of masturbation. He thought he was alone and having a private moment. (R382) E [REDACTED] reentered the room, was upon him and reaches briefly onto his hand, touches his hand, he is surprised and responds within 3 to 4 seconds. (R 322-324)

It is significant that he acknowledged to R [REDACTED] that E [REDACTED] interrupted him in the act of masturbation in 1982. He easily could have denied it. It is also significant that E [REDACTED] acknowledges to her cousin Elizabeth [REDACTED] that she "was someplace where she wasn't supposed to be and saw Uncle Bryan naked." (R300) It is also significant that M [REDACTED] on December 20, 2011, based on all of the information E [REDACTED] had provided to her to date, had characterized Bryan Hedge's conduct as "careless." (Exhibit G) All of this information strongly supports Bryan Hedge's recollection of the 1970's event. It is also significant that E [REDACTED]'s father and cousin each testified to a recollection of the story which is consistent with Judge Hedge's testimony.

The Commission Counsel argues that Judge Hedges confirmed that E [REDACTED] was accurate as to virtually every major detail. (Brief 17-18) While certain points agreed upon at R 363-364 are consistent with Judge Hedges' testimony about the events of that morning, Commission Counsel asserts an incorrect and an unfair conclusion. There is a major disagreement regarding the material facts. (R 322-323)

Moreover, E [REDACTED] cannot agree with herself regarding crucial details that she has volunteered since December 29, 2011, such as:

1) Whether Bryan Hedges was under the covers or naked when E [REDACTED] entered the room; (See pages 17-19 of Respondent's proposed Findings of Fact; Exhibit C, R113-114, Exhibit J, R239-240)

2) Whether he placed her left hand or placed both of her hands on his penis; (See Respondent's proposed Findings of Fact pages 20-21; Exhibit H, R39-40)

3) Whether she kneeled on the bed, sat on the bed or was prone on the bed next to him, her body next to his; (See Respondent's proposed Findings of Fact pages 19-20; Exhibit H, R55, 172, 212)

4) Whether the alleged masturbation of Bryan Hedges took a short time or some time. (R115, Exhibit B, R98, Exhibit J, R214) (See Respondent's proposed Findings of Fact pages 36-37)

The foregoing are major points of conflict coupled with other inconsistencies that were offered by Mrs. [REDACTED] to give added flourish to her story such as:

1) Bryan Hedges never talked to her except to say hi or bye. (R108, Exhibit H) This allegation is refuted by her father and cousin and on cross examination she acknowledged she had consulted Bryan on several occasions for legal advice. (R108-109, R272 and R308-309) (R352-355) Bryan Hedges gave specific details of their hundreds of conversations. (R352-355)

2) E [REDACTED] has been afraid of Bryan Hedges and afraid for his children and grandchildren. Not only has E [REDACTED] attended family events frequently with Bryan Hedges at his home, she has used his house with frequency as recently as July, 2011, when she stayed overnight with Bryon alone and Liz absent with her daughter. (R349-351) Moreover she has left her children in Bryan Hedges care on a number of occasions --a

fact that she acknowledged. (R349-351) Her cousin, Elizabeth Stracher, testified about certain of these events as did Bryan Hedges in detail.

(R305) Her father R [REDACTED] testified E [REDACTED] and her children have stayed in Bryan's home, Bryan has provided care and supervision for her children and she has never expressed concern or hesitation about Bryan to her father. (R272-273)

3) Her 1982 report to her mother was incomplete because of an inability to communicate, sexual immaturity or embarrassment. Her mother reports that E [REDACTED] was able to tell her that:

- Bryan was naked in a bed upstairs in her grandmother's house
- And that she was very young when it happened
- And that he had asked her to touch his penis (R156, 158)

4) In fact, according to her mother, she was able to give the above details. Her cousin testified that when E [REDACTED] was 16 she had a boyfriend and her mother asked her cousin Elizabeth not to leave them alone. (R301) Her mother reported that her speech was improved at the time she was 15 and they used American Sign Language to communicate since she was 8 years old. (R233-248) It should be noted that every sexual word reported in this record was signed by E [REDACTED] to an interpreter. American Sign Language permits the use of sexual words. Indeed Mrs. [REDACTED]

acknowledged that when she brought the 1970's incident to her mother's attention when she was about 15 that she was able to write in long hand but that her:

- "English skills were not that great, I had very bad grammar." (R66)
- Her cousin testified that E [REDACTED] was very verbal in high school and that she understood her. (R303)

5) She does recall being able to tell her mother that:

- She touched Uncle Bryan's private parts (R65)
- ....I remember saying "lying in bed." (R66)
- "I said just call dad." (R67)

6) E [REDACTED]'s excuse regarding her failure to accurately report the 1972 event to her mother when 15 due to a lack of communication skills is simply inaccurate and disingenuous.

7) Her parents did not obtain counseling for her:

A) If the stories about the 1982 disclosure as presently testified to by E [REDACTED] and M [REDACTED] are true, counseling for E [REDACTED] would logically have been obtained and the police called. Mrs. [REDACTED] and Mr. [REDACTED] had already obtained extensive help for their daughter over the years based on her deafness and the problems associated with that condition including attending

American Sign Language Camp, Albany Medical Center School, Johns Hopkins, and enrolling her in Rome School for the Deaf. (R229-233) (R259) If the story was that compelling and/or if Mrs. [REDACTED] was in significant distress, it is incredible that counseling would not have been sought. The credible evidence suggest that both the cousin Liz Stracher who spoke directly with E [REDACTED] in that time frame and her father R [REDACTED] each tell the accurate version – E [REDACTED] was someplace where she wasn't supposed to be, she walked into the bedroom, she saw Uncle Bryan naked and interrupted him in the act of masturbation. (R300) (R361-362)

8) In this proceeding E [REDACTED] first testified that she told her mother when she was 15 that she had touched Bryan, not that she had touched his penis.

Q: What story about Bryan did you tell your mother, not all the details you told today what details did you tell your mother when you were 15?

A: I remember telling her that, you know, I touched Bryan and that's why I asked mom to call my dad, and so dad could talk to Bryan. It was not easy to talk about this.

Q: And is that it? Is that all you told your mother, that you had touched Bryan?

A: It was something like that, but I, I know I kept everything to myself. (R70) (See also the same answer on R57, line 10)

Of course this version is consistent with Judge Hedge's recollection that E [REDACTED], age 5, did touch his hand. (R322-323)

#### IV. THE COMMISSION'S MEMORANDUM UNFAIRLY REPRESENTS JUDGE HEDGES'S TESTIMONY

Judge Hedges testified at length that when he characterized his conduct as "abhorrent" he was not referring to E██████████'s story. He was clearly referring to the events that he recounted to M██████████ as recorded by the wire and as he testified about twice, once by deposition and thereafter in this proceeding. (R336-337) The commission stipulated that his description was consistent each time. He clearly explained in his testimony that he regretted masturbating that morning in his bed with the door open, that was the abhorrent behavior and that he wished that he reacted more quickly than 3 or 4 seconds to E██████████'s presence and her touching of his hand. (R345, 326, 327, 338, 339, 336-337) As he testified "my entire approach was stupid and wrong." (R337)

In no way did he encourage E██████████ to touch him. When he stated in conversation with M██████████, "I do not think I did" his voice inflection is not of uncertainty, it is contradicting the very notion that he did encourage E██████████. He testified clearly that he did not intend to engage in any sexual activity with E██████████ and that he did not have her participate in the manual stroking of his penis. (R342)

#### V. WHY DOES E██████████ HAVE A NEW STORY?

The record clearly lays out why E██████████ has a new story -- she had an awful argument with Liz Hedges that causes her to cry and leave the Hedges Long Island home in the car in the late summer. (R307-308, R88) On December 4, 2011 she emailed Bryan Hedges asking for money to sponsor her son's soccer team. (Exhibit 5) She has 4

children either in college and approaching college age. (R273) On December 27, 2011 she sent an angry and threatening email to her mother asserting that Bryan needs to do a "makeup" and looking for him to "pay his consequences." (R206) Ma [REDACTED] testified that E [REDACTED] was contemplating getting money from Bryan. (R205-210) On December 29, 2011 the new story with its lurid details is created by email by M [REDACTED] M [REDACTED] and sent to R [REDACTED] (Exhibit H) On January 7, 2012 M [REDACTED] advises R [REDACTED] that she has new details about Bryan's conduct. (Exhibit K) On January 9, 2012 on the same day E [REDACTED] by email to her mother contemplates that Bryan could pay for college for her children, a new enhanced version of the story is published to R [REDACTED]. (R80, Exhibit J) Thereafter E [REDACTED] discusses with her mother obtaining a lawyer, and outlined a lawyer explanation of the civil contingency fee system under which she could obtain money from Bryan Hedges. (R206-209) Moreover was advised by her mother that when she consulted the District Attorney she would lose control over the case and "the dominos would start to fall." (R210)

It is telling that E [REDACTED], when asked on cross examination if she had ever asked Bryan Hedges for money, denied it, only to be confronted with Exhibit 5. (R76-78) It is also telling that E [REDACTED] when asked if she was considering getting money from Bryan Hedges to pay for college denied it and was then contradicted by her email and the testimony of her mother. (R78-81) (R205-210)

E [REDACTED] did not tell an accurate, consistent, or truthful version of the events of 1972. She has not been truthful regarding her relationship with Bryan Hedges after that time, she was not honest about what she told her mother in 1982, she as not honest about her circa 1982 conversation with Liz Stracher, she was not honest when asked if she had

asked Bryan Hedges for money, she was not truthful about considering having Bryan pay for college for her children, she was not truthful when she was asked if she had seen a lawyer, and she has not told the same various of the 1972 incident twice regarding the crucial details to her mother, the District Attorney, Commission Counsel, and at trial. She is not credible.

It is respectfully asserted that the Commission has been given clear evidence as to why E [REDACTED]'s cousin and father testified that she had a poor reputation for truthfulness within the family. (R209, R374)

VI. COMMISSION COUNSEL'S SUBMISSION VIOLATES DUE PROCESS

Commission Counsel cites five cases involving sexual abuse of children decided by the Respondent while he was an Onondaga County Family Court Judge. The Formal Written Complaint does not reference these cases. The Formal Written Complaint does not allege any failure during his tenure to decide cases fairly or to properly apply the law. Not once did the Commission Counsel in the mad dash to try this matter disclose these cases and not once did the Commission Counsel mention any of these cases in cross examination. How exactly is Judge Hedges to respond to this procedural and substantive defect? The record is closed. Indeed until July 13, 2012, Respondent was unaware that these specific cases were an issue or that there were any specific complaints about his judicial tenure.

Commission Counsel argues that Judge Hedges violated three sections of the New York State Penal Law in 1972. That claim was not alleged in the Formal Written Complaint, was not raised at trial, and is now only inserted into the post proceeding

process to the prejudice of the Respondent. Paragraph 13 of the Formal Written Complaint alleges that "by reason of the foregoing" the respondent "engaged in conduct that reflects adversely on his qualifications and fitness to perform the duties of a judge." The Referee in this case is experienced in the practice followed by Commission Counsel in pleading a Formal Written Complaint. If the criticism is that Judge Hedges has wrongly ruled as well as having engaged in dishonorable conduct, shouldn't that have been plead? Shouldn't Judge Hedges have had an opportunity to respond?

Of the five cases decided by Judge Hedges that were cited by the Commission, Commission Counsel is critical of his decision in one case, extracting a small part of the Appellate Division decision. The fact is that in the other cited cases decided by Judge Hedges were affirmed by the Appellate Court. In each case Judge Hedges found abuse or neglect. In each case his decision was unanimously affirmed. Likewise, as noted in another section of this brief, the Commission Counsel without notice and competent proof, claims a harm to E [REDACTED], which the Referee wrongly adopts in his findings of facts.

These proffers by Commission Counsel are highly prejudicial and compel the Respondent to ask for a new hearing, or in the alternative, a ruling by the Commission that the information will not be considered because it is palpably improper. The procedural rules of the Commission are at best bare bones. Both Section 44 of the Judiciary Law and 22NYCRR Section 7000.1(g) entitled "Formal Written Complaint" requires a description of the specificity of the charges. 2000.1(g) provides the following definition of Formal Written Complaint:

...means a writing signed and verified by the administrator of the commission, containing allegations of judicial misconduct against a Judge for determination at a hearing.

In this case the complaint in paragraph 6 alleges one charge, sets forth only that the Judge in 1972, 13 years before he took the bench, "had" his niece "participate with her hand in the manual stroking of his penis." The specifications to Charge I alleged events that occurred in 1972, restating that he "had E [REDACTED] participate with her hand in the manual stroking of his penis." Paragraph 13 asserts that by "reason of the foregoing" he violated specific language pursuant to Article 6 Section 22 subdivision (a) of the Constitution and Section 44 Subdivision 1 of the Judiciary Law. No specific injury or harm to E [REDACTED] is claimed. Indeed at the hearing, Counsel claimed she was not the complainant.

The complaint does not allege any specific events that occurred in office. No specific allegation was made about any failure by the Judge to specifically perform his responsibilities during his over two decades on the bench. No allegation was made in the complaint that the conduct alleged made it impossible or problematic for the Judge to apply any Sections of the Penal Law, the Criminal Procedural Law, the Family Court Act, the Domestic Relations Law or the Civil Procedure Laws and Rules.

The Formal Written Compliant launching this proceeding was based in its entirety on the 1972 incident. Now that the proof is closed the Commission Counsel, through its brief, improperly and with prejudice to the Respondent, argues that Judge Hedges was adversely impacted in deciding a specific case. It is customary for the Commission Counsel to plead with specificity the charges alleged. In *Spargo*, for example, the Commission alleges specific acts engaged in by Spargo while a judge and a judicial

candidate setting forth specific events and dates in the customary manner of pleading well known to achieve compliance with state and federal constitutional due process. That was not done here. *Spargo et al v. New York State Commission on Judicial Conduct*, 351 F3d65 (2003) (only the 2<sup>nd</sup> Circuit decision is cited;) see also in the *Matter of the Proceeding of Marie Roller, Commission on Judicial Conduct* (2008), in which specific detailed charges were brought in the Formal Written Complaint against that Judge regarding her failures in office.

For the purpose of comparison, consider CPL 100.35 which specifies the requirements for a prosecutor's information:

...it should be in the form prescribed for an indictment, pursuant to section 200.50, and must, in one or more counts, allege the offense or offenses charged and a plain and concise statement of the conduct constituting each such offense. (Emphasis added)

Section 200.50 of the CPL provides in part with regard to the form and content of indictments as follows:

3. A separate accusation or count addressed to each offence charged, if there be more than one;
  
6. A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time;

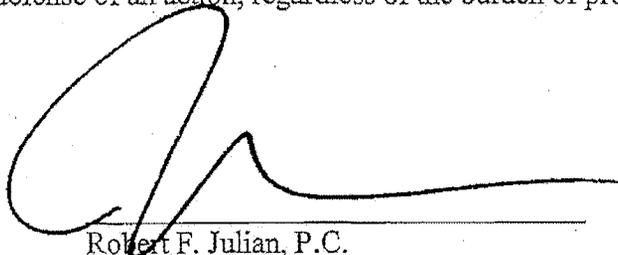
7. A plain and concise factual statement in each count which, without allegations of evidentiary nature,

a) Asserts facts supporting every element of the offense charged and the defendant or defendants commission thereof, with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation. (Emphasis added)

If this were a civil case pursuant to the CPLR the respondent would be entitled to: receive a complaint which alleges specificity Rule 3013, states: "statements in a pleading sufficiently particular to give the parties notice of the transactions occurrences...and the material elements of each cause of action or defense;" make a demand for a verified bill of particulars pursuant to setting forth very specific details pursuant to Rule 3044; and notice and take depositions pursuant to Rule 3109. The rules of the Commission provide for none of these. However one must infer at minimum that CPLR pleading specificity such as in a civil complaint and the detail of a bill of particulars is obviously implied in this proceeding as the rules of evidence in a Commission proceeding are to be applied as they would in a bench trial. In a criminal or civil bench trial the rules of evidence cannot be fairly applied without pleading specificity. Moreover, given the civil proceeding burden of proof of preponderance of the evidence, the scope of disclosures should be viewed as consistent with CPLR 3101 which provides:

"There shall be full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof..."

Dated: August 6, 2012

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a long horizontal line extending to the right.

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Robert F. Julian, P.C.  
Attorney for the Respondent  
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Utica, NY 13505  
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