

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of a Proceeding  
Pursuant to Section 44, Subdivision 4,  
of the Judiciary Law in Relation to

**MICHAEL F. McGUIRE,**

a Judge/Justice of the County and Surrogate's Court, an  
Acting Judge of the Family Court and an Acting Justice of  
the Supreme Court, Sullivan County.

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**RESPONDENT'S  
POST HEARING SUBMISSION  
REPLY**

Michael F. McGuire, Pro Se

[REDACTED]  
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## UNFAVORABLE INFERENCE FOR FAILING TO CALL KENNETH McGUIRE, ESQ.

At the conclusion of Respondent's case, the Referee inquired "Is either side going to claim that I should or should not draw any negative inferences from the fact that Ken McGuire did not testify here? And the reason I'm raising it that now is, if the answer is going to be yes, I'd like to inquire about his availability to both sides". (R. 2701) In response, counsel for the Commission advised that the Respondent's failure to call his brother "...is something we would reflect upon" (R. 2703). The Commission did not raise the issue prior to the close of proof and does not argue that Kenneth McGuire, Esq., was in anyway unavailable to the Commission.

It is submitted that had Respondent called Kenneth McGuire, Judge McGuire's brother, the Commission would have argued his testimony should be accorded little weight given the familial relationship. The Commission has failed to identify testimony which could have been provided by Ken McGuire which would have been non-cumulative of the direct testimony of Judge McGuire or Corinne McGuire. There can be no meaningful dispute that Kenneth McGuire was available to both the Commission and Respondent. It also, from a review of the entire record in this matter, that the Commission never contacted Kenneth McGuire in apparent recognition that his testimony would only bolster testimony to be offered by Respondent.

A party seeking the missing witness charge must sustain an initial burden of showing that the opposing party has failed to call a witness who could be expected to have knowledge regarding a material issue in the case and would provide testimony favorable to the opposing party; see *People v. Gonzalez*, 68 NY2d 424, 426-427 [1986], see also, *People v. Kitching*, 78 N.Y.2d 532, 536-537 (1991)). The burden then shifts to the opposing party, in order to defeat the request, "to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that although material or relevant,

the testimony would be cumulative to other evidence [...]”*People v. Kitching, supra*, at 537 citing *People v. Gonzalez, supra*, at 428.

In *People v. Keen*, 94 N.Y.2d 533 (2000) relied upon by the Commission in their submission, the Court of Appeals held that where a witness is under the control of one party, that witness is, in a pragmatic sense, unavailable to the opposing party. However, as a member of the bar of the State of New York, Ken McGuire should be assumed to have been available to the Commission. Particularly whereas in this case, the Commission does not allege that his testimony was sought.

The cases relied upon by the Commission in support of their application each involve criminal prosecutions where a party failed to call a witness under their control who possessed material evidence that could be expected to be favorable to the non-moving party. In *People v. Rodriguez*, 38 N.Y.2d 95 (1975) the claimed missing witness was the wife of the defendant who was present at the time of his arrest and was not called after the defendant testified that he had been “framed” and police had stolen \$800 from him. In *Rodriguez*, the Court found a sharp factual dispute between the testimony of police and the defendant that may have been resolved through the testimony of the claimed missing witness. In this matter, the Commission has failed to identify a factual dispute in the testimony regarding the Moore’s transaction. The only evidence adducted at trial was that the Moore’s wished to proceed pro-se (R. 680; R. 686; R. 687; R. 701; R. 1406; R.2385; R. 2580). Their daughter was handling the matter for her elderly parents, noting that the Commission neither called Heather Depew nor any other witness to corroborate or refute the testimony of Judge McGuire (R. 677; R. 686; R. 693; R. 696; R. 699; R. 700 – 701; R 2134; R.2385; R. 2580). In *People v. Macana*, 84 N.Y.2d 173 (1994) the Court of Appeals found denial of a missing witness charge was warranted although the prosecution failed

to call the officer who allegedly found the gun on a table when the defense claimed that the gun was locked in a hutch to keep it from a suicidal individual. In denying the application by the defense, the trial court granted the prosecution request as to the defendant's father, despite the argument that the father would likely invoke the 5<sup>th</sup> Amendment. In so holding, the Court observed that there was no indication the missing officer would have testified differently or in accordance with defendant's version. Rather, there is ample support in the record that the missing officer's testimony would have been cumulative and therefore not a proper subject of a missing witness charge.

In *People v. Gonzalez*, 68 N.Y.2d 424 (1986) the Court of Appeals held that where the veracity of identification testimony by the complaining witness was at issue, the failure of defendant to call her common law husband who witnessed the offense warranted the charge because the witness as the spouse was deemed in the control of defendant. Kenneth McGuire, a member in good standing of the bar, cannot be said to be under the control of Respondent. Particularly whereas in this case, the Commission does not allege that it made any effort to contact Mr. McGuire.

In *Keen*, 94 N.Y.2d 533, the Court of Appeals held that the trial court did not err in providing a missing witness charge when, in opening, the defense represented that the jury would hear from the girlfriend and then did not call her. Similarly, in *People v. Paylor*, 70 N.Y.2d 146 (1987) the Court of Appeals held that where an alibi defense was asserted and the defendant's mother testified that on the night of the crime the defendant was at home with a friend, the failure to call the friend entitled the prosecution to a missing witness charge. The Court of Appeals noting that the fact finder may not speculate about what the witness would have said,

nor may it assume that the witness could have provided positive evidence corroborating or filling gaps in the People's proof.

A party should not be prejudiced by inferences from their failure to call as witnesses persons whose testimony will be merely cumulative or corroborative of testimony already given. In *Leahy v. Allen*, 221 A.D.2d 88 (3d Dept. 1996), the Third Department held that “one person’s testimony properly may be considered cumulative of another’s only when both individuals are testifying in favor of the same party” (*id.* at 92) noting that to hold “otherwise would lead to an anomalous result. Similarly, in *Oswald v. Heaney*, 70 A.D.2d 653 (1979), the Second Department provided that “The failure of a party to call a witness to prove facts does not give rise to an inference that the testimony of the witness, if he or she had been called, would have been unfavorable to such party, where other qualified witnesses have testified for the party concerning such facts, so that the testimony of the uncalled witness would have been merely cumulative or corroborative.”

The Commission argues that Kenneth McGuire, by virtue of his family relationship with Judge McGuire, was somehow under the exclusive control of Judge McGuire. By virtue of his status as an Attorney, he was available and readily accessible to the Commission given his professional obligation to cooperate in such matters. Pursuant to the Rules of Professional Conduct, an attorney “[...] who possesses knowledge or evidence concerning [...] a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.” 22 *NYCRR 1200.0, Rule 8.3c* (2018).

The Commission sought testimony of others who had relationships with Judge McGuire. The Commission also chose not to call several witness who were available to them and who had material information that would presumably been favorable to them. The Commission did not

call Stacey Benton, the Deputy Chief Clerk who was identified by Sgt. Oliveri as an eyewitness to the exchange between Sgt. Oliveri and Judge McGuire on February 25, 2013 (R. 320). The Commission also chose not to call Alexandra Bourne, Esq, who was identified as an eyewitness to the Ro█ interaction; she was present as the Attorney for the Child in that matter (Testimony of John Ferrara, Esq., at R. 1123 and Testimony of K.C. Garn, Esq., at R. 516). They failed to call George Matisko after having taken a deposition from him regarding his involvement with Ms. Weiner although his testimony may have resolved a factual dispute. They did not call Edward Bruno, Esq., the prosecutor from the Town of Wawarsing, regarding the matter of the *People v. Corinne McGuire* despite having spoken with him during their investigation. Likewise, they failed to interview or offer testimony of Heather Depew, the daughter of Mr. and Mrs. Moore, who could have testified relative to the Moore transaction.

In addition to the cumulative nature of the testimony to be offered by Kenneth McGuire given the testimony of Judge McGuire, Corinne McGuire, Eileen Moore and Phillip Moore, the Commission would have no doubt argued that the testimony be accorded little weight in light of his familial relationship. There was no evidence adduced at hearing which created a factual dispute which required Kenneth McGuire's testimony for resolution. Steve DeCarlo, the president of All County Abstract offered that he dealt with no attorney on the Moore matter, corroborating the fact that Judge McGuire had not performed legal services in connection with the transaction. (R. 2246 – 2249; R. 2250 — 2256).

Whereas here the testimony of a witness is deemed to be merely cumulative to the evidence offered by a party with no burden of proof, there can be no missing witness unfavorable inference provided.

## **JUDGE McGUIRE EXHIBITED CANDOR**

As set forth in his initial submission, Judge McGuire has acknowledged his errors with respect to the vast majority of charges. He has argued against a finding with respect to the process employed to clear the back-log of hand gun permit applications. He candidly admitted that he treated litigants in an injudicious manner in findings of contempt and had been chastened by the decision of the Appellate Division in *V [REDACTED] v. G [REDACTED]*. He has amended his practices. No re-occurrence has been cited since December, 2014.

Judge McGuire has also acknowledged that his actions in connection with the legal matters of his son and wife were improper. He has also conceded that he failed to recuse himself on matters involving Zachary Kelson, Esq., and has placed him on his recusal list in all courts. The last noted appearance by Mr. Kelson before Judge McGuire was in 2015 (R. 860).

The disparate versions of events concerning both Matisko and Moore (Charge X), provided by Wendy Weiner and Judge McGuire do not support an adverse finding. Judge McGuire's candor with respect to a majority of the allegations in the petition are supportive of his veracity on all matters at issue.

For the forging reasons it is submitted that Judge Michael McGuire exhibited candor.

## **CONCLUSION**

To the extent the charges contained in the complaint have been admitted or sustained upon the evidence, it is submitted that Judge Michael McGuire should be censured for his conduct. He has taken actions confirming his recognition of his objectionable behavior. His actions both prior to the filing of the complaint in this matter and subsequent thereto have demonstrated an acceptance of responsibility and an ability to improve. He has addressed the

sources of the issues raised in the complaint and improved his performance and modified his manner.

Respectfully submitted,

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