

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

RICHARD H. MILLER, II,

a Judge of the Family Court,
Broome County.

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PRELIMINARY STATEMENT

The lying and deceitfulness of Rachelle Gallagher and Mark Kachadourian is a toxic prescription for injustice.

At the heart of the Commission's case against the Hon. Richard Miller are two individuals found by a distinguished Referee appointed by the Commission to be liars, deceitful and false witnesses. Numerous individuals including court employees and former colleagues attested to Ms. Gallagher's negative reputation for truth and veracity averring that she is "untruthful," "manipulator, troublemaker, liar, evil" and "not credible, she's not truthful." A review of the cold record of both Ms. Gallagher's and Mr. Kachadourian's testimony, reveals their astonishing lack of candor and that they were intent on destroying the reputations of Judge Miller and others for their own personal gain.

Yet, the Commission Counsel conveniently ignores one of the Referee's most important and striking applications of a legal principle i.e., "*Falsus in uno, falsus in omnibus*," namely that if Gallagher and Kachadourian intentionally testified falsely as to material facts, their entire testimony should be disregarded. As each testified, their revelations became less and less credible, evincing a pattern emerging of uncorroborated allegations, admitted gaps in memory and what the Referee concluded was "rehearsed and coordinated testimony." (Referee's Report, p. 19). The Referee noted the financial motive underlying their testimony resulting from a lawsuit they filed (on the eve of the Commission hearing) against the NYS Office of Court Administration and Judge Miller. While professing to accept the Referee's Report and the principle that a Referee's credibility determinations are entitled deference (Commission's Brief, p. 54, n.10), Commission Counsel disingenuously proceeds to attack the Referee's credibility findings, findings of fact and mitigation determinations. The Referee was in the best position to

assess the veracity of witnesses and is appointed to make findings of fact. He should be given deference, especially where, as here, his Report was meticulously well reasoned.

Even after the Referee concluded that the Commission's key witnesses' allegations "defy reason" and "make no sense" (Report pp. 11-12), the Commission Counsel tries to resurrect and repackaging their allegations as the basis for findings against Judge Miller to depict him as lacking candor to justify the sanction of removal which is inappropriate. As amply demonstrated in the Referee's Report as well as our Letter Brief and herein, the allegations which the Referee found failed to meet the preponderance of evidence requirement in these proceedings. Indeed, Commission Counsel's constrained efforts to sidestep the findings as to the incredulity of their two main witnesses, to ignore the testimony and record, to disregard the Referee's Report and Findings, misstates and misapplies the law in an apparent attempt to justify their recommended sanction.

On the other hand, the Referee heard and credited the unrebutted testimony about Judge Miller's reputation and history for truthfulness, as well as his judicial temperament and courteous behavior toward court personnel and litigants. This testimony about Judge Miller crossed the spectrum of individuals an experienced Judge would encounter: court clerks, past and present, an attorney and an Office of Court Administration court security supervisor who observes Judge Miller on a daily basis. (See T1203) ("I can speak for my officers and me included, you know, never seen anything that was—anything less than professional."). Kate Fitzgerald, Esq., a highly regarded family law practitioner with close to four decades courtroom experience echoed the testimony of several witnesses that Judge Miller "has exactly the kind of judicial temperament you want to find in a judge. Fair, calm, reasonable, courteous to people in his courtroom, which

is always welcome. Not too familiar, just what, personally, I like to see and I believe colleagues like to see.” (T980-81).

Judge Miller was candid and forthright in admitting he is not perfect. He did not contest that he asked his secretary on one occasion to prepare a four-sentence letter with respect to a legal matter he handled just prior to assuming the bench. Nor did he contest that he raised his voice during a particularly busy and stressful emergency petition session in Family Court. And he recognized that he made inappropriate comments to a clerk which the Referee noted were not graphic in nature. Judge Miller acknowledged that the language he used might be perceived as offensive to those present; apologized for making such comments; and, averred that he will refrain from making any such comments in the future, even in jest. These comments appear to be aberrational given the fact that character witnesses and even some of the witnesses called by Commission Counsel attested that he is respectful, honest, trustworthy and a productive judge. As to his financial disclosures, Judge Miller’s accountant provided unchallenged testimony that he sought to correct his tax returns and financial disclosures well before any inquiry by the Commission into his tax returns or financial disclosures. Here too Judge Miller acknowledged that he was responsible to ensure that they were filed and that he did file them, albeit late, but the part of the delay was due to the fact that the records he had collected were subpoenaed by the Commission so he did not have access to them for a substantial period of time. He also averred that he would ensure that they are accurately and timely filed in the future.

As set forth below and in our previous submissions, the Referee rightfully dismissed most charges relating to the testimony of Mr. Kachadourian as well as Ms. Gallagher because they were simply incredible. We respectfully urge the Commission to review the allegations and charges sustained by the Referee, as well as the substantial un rebutted mitigation evidence as to

Judge Miller's work ethic, his acknowledgment and remorse for his conduct, his volunteer work in the community at large. In so doing, it is submitted that the appropriate sanction to be imposed in this matter is no greater than a Censure.

Accordingly, for the reasons set forth below and in our previous submissions, we urge the Commission to:

- abide by and give deference to the Referee's Report as to the facts, the charges sustained, and the credibility of the witnesses;
- to disregard Commission counsel's attempts to reinstate the unsubstantiated charges because the Referee's findings should be afforded deference since he was able to personally review the evidence and to observe each witness and thereby based his findings on the credible evidence;
- to consider the substantial mitigation presented; and , impose no greater than a Censure for Judge Miller's actions.

ARGUMENT

I. The Referee Correctly Found That No Adverse Inference Would Be Drawn Against The Respondent For Not Calling David Iannone As A Witness

"A missing witness charge is appropriate when three conditions are met. First, the witness's knowledge must be material to the trial. Second, the witness must be expected to give noncumulative testimony favorable to the party against whom the charge is sought. Third, the witness must be available to that party." People v. Smith, 33 N.Y.3d 454, 458 (2019) . The Referee found that the missing witness charge was not appropriate for two important reasons: first, that Mr. Iannone was "not under the 'control' of respondent and [wa]s 'equally available' to both the Commission and Respondent;" and, second, that "it [wa]s far from certain that Mr.

Iannone would have offered testimony **favorable** to Respondent.” (Referee’s Report, pp. 9-10) (emphasis in original). Contrary to the Commission counsel’s argument, both findings are amply supported by the record and should not be reversed. Furthermore, although the Referee did not make a finding as to materiality, Respondent reiterates his earlier argument that Mr. Iannone’s testimony was not material.¹

A. Mr. Iannone’s Testimony Was Not Material

At the outset it is important to remember what Judge Miller is accused of and what he is not accused of. Judge Miller is *not* accused of misconduct for engaging in conversations of a sexual nature with Mr. Iannone or receiving an illicit photograph from Mr. Iannone.² In other words, Judge Miller is not accused of misconduct for his interactions with Mr. Iannone. Instead, Judge Miller is accused of misconduct for allegedly displaying an illicit photograph to *Mr. Kachadourian* and allegedly engaging in sexual discussions within earshot of *Ms. Gallagher and*

¹ The Commission submits that Respondent’s “sole argument” in opposition to their missing witness request was that “Mr. Iannone was ‘equally available’ to be called by Commission counsel (Tr 1290).” (Commission’s Brief, pp. 61-63). This assertion is belied by the record. Following Ms. Cenci’s statement during the hearing that “[w]e are going to be asking for a missing witness charge as to Mr. Iannone,” the Referee immediately responded that “[m]y understanding of the missing witness inference is that it’s a witness that ought to have been called and wouldn’t Mr. Iannone be equally available to the Commission?” (T1289). Counsel for Respondent agreed with the Referee’s understanding that Mr. Iannone was equally available to both parties and noted that “the Commission subpoenaed him, he appeared and they have his testimony.” (T1290). Judge Miller’s attorney was not, however, limiting his argument to this one point. Instead, Respondent’s counsel suggested a briefing schedule, but the Referee declined the suggestion. (T1292-93). The Commission then included its written request for a missing witness charge in its post-hearing submission. (Commission’s Post-Hearing Brief, pp. 56-59). Counsel for Respondent offered a much more robust argument when responding to the Commission’s Post-Hearing Brief, including arguing that Mr. Iannone was not under the “control” of Respondent and that Mr. Iannone’s testimony was not material. Nor was the Referee limited to Judge Miller’s arguments for, as the Referee stated during the hearing, he was very familiar with the missing witness charge.

² Judge Miller reiterates his hearing testimony in which he emphatically denied engaging in those activities with Mr. Iannone. (T1394-95; T1477-80).

Mr. Kachadourian, both of whom were found to be incredible with respect to the overwhelming majority of allegations they made, and therefore, the majority of the charges that relied on their testimony were dismissed.³ However, there was no testimony that Mr. Iannone was present when Mr. Kachadourian claims that the picture was displayed. Nor was Mr. Iannone physically present during the purported sexual discussions, as those discussions purportedly occurred via telephone. Accordingly, Mr. Iannone could neither prove nor disprove that Judge Miller acted improperly with respect to Mr. Kachadourian or Ms. Gallagher.

Furthermore, the Commission counsel made Mr. Iannone the prominent figure in Judge Miller's hearing. By including Mr. Iannone's name in the Complaint, the Commission counsel necessarily thrust him into the spotlight which made him a likely witness for the Commission. The Commission's counsel then challenged Mr. Iannone's credibility throughout the hearing by questioning witnesses and attempting to introduce collateral evidence concerning Mr. Iannone's criminal history (T222-23, T280, T821, T891-97), a deadly threat he allegedly made against Mr. Kachadourian and Ms. Gallagher (T54-55, T574), and the revocation of his pistol permit (T896-97). Notably, there is no evidence that Judge Miller had any connection to any of these issues. There is not one single instance where Judge Miller stated or even suggested that Mr. Iannone would corroborate his testimony. Indeed, except for a general denial of the each and every allegation contained in the complaint, a few of which refer to Mr. Iannone (T1393-95), Mr. Iannone's name is never mentioned during Judge Miller's direct testimony. Judge Miller only testifies about Mr. Iannone because the Commission's counsel questioned him about the nature

³ The only allegation that was sustained that involved Ms. Gallagher related to the letter that she drafted on behalf of Judge Miller with regard to the Estate of Roger Funk. (T597). Notably, Judge Miller admitted this happened and thereby the allegation did not rest solely on purported information provided by an incredible witness. (T1390, T1400-1401, T1454-1459).

of their relationship on cross-examination. (T1477). Thus, insofar as Mr. Iannone could have material testimony, it is due solely to the fact that the Commission counsel created that materiality. It is disingenuous for the Commission counsel to argue that Judge Miller should be faulted for not calling a witness when that witness is only relevant because of the Commission counsel's theory of the complaint.

Accordingly, although the Referee did not make a finding as to materiality, Respondent respectfully submits that Mr. Iannone's testimony was not material to Respondent's defense.

B. Mr. Iannone Is Not Under The "Control" Of Judge Miller

Judge Miller described Mr. Iannone as "an acquaintance" and "a gentleman that [he] got to know over the years." (T1477, T816). Mr. Iannone, on occasion would perform "handyman" duties for various properties connected with Judge Miller⁴ and had some involvement in Judge Miller's campaign. (T1477, T523-24, T818, T832). When Ms. L [REDACTED] was looking for an individual to do tile work at her home in January 2017, Judge Miller provided her with Mr. Iannone's telephone number. (T1477, T297). Ms. L [REDACTED] and Mr. Iannone met the following day to discuss the tile work. (T265). They then began an approximately yearlong intimate relationship. (T265-66). During that time period, Mr. Iannone and Ms. L [REDACTED] attended a New Year's Eve party at Judge Miller's mother's house with many other individuals. (T278, T306). This New Year's Party (presumably on December 31, 2017), an event shortly after Judge Miller

⁴ We note that the Commission's counsel asserts that Mr. Iannone is Judge Miller's employee, but the record is devoid of any information or evidence to establish the claim he is or was an employee. Indeed, the Commission did not ask any of its own witnesses, including Ms. L [REDACTED] about whether Mr. Iannone was an "employee" of Judge Miller. Moreover, the testimony was that Ms. L [REDACTED] sought to have her bathroom redone and that Judge Miller called Mr. Iannone, who then met her to discuss the same. Thus, it is reasonable to infer that Mr. Iannone was an independent contractor. (T1477, T297, T265-66).

took office when Mr. Iannone assisted in moving furniture (presumably early 2015) (T695), and a vague lunch date in approximately 2015 (T696) constitute the only social encounters testified to between Mr. Iannone and Judge Miller. These few social engagements over the course of several years is consistent with Judge Miller's testimony that he did not talk frequently with Mr. Iannone (T1479), did not recall ever having texted with Mr. Iannone (T1480), and the last time he spoke with Mr. Iannone was "last year" (T1480).

The Commission's counsel without foundation argues that the Referee's finding against them on this issue was "perhaps [due to his] misunderstanding the legal definition of control."⁵ (Commission's Brief, p. 63). This disparaging assertion is baseless. Following Ms. Cenci's statement during the hearing that the Commission's counsel would "be asking for a missing witness charge as to Mr. Iannone" (T1289), the Referee stated that he had "looked at this question previously and [had] written on it" (T1292). He then went on to state that he was "pretty familiar with the issue and [he would] address it in [his] report" and that he "was going to do it anyway, because there are other names that have come up and [he did not] know whether they [we]re or [we]re not available." (T1293).

Furthermore, the Commission's counsel fully briefed the issue in its post-hearing submission relying on many of the same cases as it does now. (Commission's Post-Hearing Submission, pp. 56-59). Thus, for the Commission's counsel to suggest that the Referee "perhaps misunderstood[] the legal definition of control" is not only offensive, but it is also directly contradicted by the Referee's own statements and the Commission's submission. That the

⁵ Referee Barrer is an experienced lawyer and Referee. See e.g. Matter of Maija Dixon, Determination of the Commission on Judicial Conduct, May 26, 2016, (2017 Annual Report 100).

Referee rejected the Commission counsel's request does not suggest that he was ignorant of the law.

In the seminal missing witness case, the New York Court of Appeals explains that a witness is not under the "control" of a party where "the witness, by nature of his status or otherwise, would not be expected to testify favorably to one party and adversely to the other." People v. Gonzalez, 68 N.Y.2d 424, 429 (1986). Conversely, "control" exists where "there was such a relationship, in legal status or on the facts, as to make it natural to expect the party to have called the witness to testify in his favor." Id. As the Commission counsel's own cases make clear, the type of "control" relationship envisioned by the Court of Appeals simply does not exist between Judge Miller and Mr. Iannone as they are only acquaintances. See Id. at 426 (trial court erred in not giving missing witness charge where the People failed to call "the complainant's common-law husband" who had witnessed the robbery); People v. Keen, 94 N.Y.2d 533, 539-40 (2000) ("it could be reasonably inferred that Jordan was under defendant's control" where "defense counsel told the jury in his opening statement that 'defendant was with his girlfriend Charlotte Jordan' on the night of the shooting and that Jordan would be in court to testify" and "[t]he defendant's testimony closely paralleled that position"). Notably, in many of the cases cited by the Commission, the relationship between the parties is so strong such that "control" is essentially a non-issue. See Smith, 33 N.Y.3d at 457 (trial court erred in not giving missing witness charge where the People failed to call the complainant's boyfriend who witnessed the attempted murder and "the People did not dispute their control" of the witness); People v. Kitching, 78 N.Y.2d 532 (1991) (trial court erred in not giving missing witness charge where the People failed to call a police officer who could have witnessed the incident where the People did not argue that the police officer was not in their control).

The Commission’s counsel claims that “[t]he Court of Appeals has specifically found that uncalled witnesses who are friends and/or employees of a party are under the ‘control’ of, and would naturally be expected to testify favorably to, the party,” and cites People v. Savinon, 100 N.Y.2d 192 (2003), as authority. Contrary to the Commission counsel’s assertion, Savinon is easily distinguishable and does not support the Commission’s position. When discussing the relationship between the defendant and the missing witness, the Court of Appeals in Savinon noted that they “had been friends and business associates. Indeed, under either side’s version of the alleged crime, defendant *was so bonded with [the witness]* as to have had sex with complainant with [the witness] nearby. The *closeness of this relationship*, even if it had not remained current, was enough to substantiate the prosecution’s request for a missing witness instruction.” Id. at 201 (emphasis added). Notably, the defendant in Savinon did not contest that the witness was under his control or that they had a close relationship – he merely argued that their close relationship was mitigated by the fact that the witness also had a friendship with the complainant. See id. (“Defendant acknowledges his friendship with [the witness], but points to [the witness’s] relationship with the complainant as evidence that he would have been no less favorable to her.”). However, here, no such “close relationship” exists. The acquaintance relationship between Judge Miller and Mr. Iannone does not meet the significant relationship envisioned by the Court of Appeals in Gonzalez or the “close[] . . . relationship” referred to by the Court of Appeals in Savinon.

It is also worth remembering that the Commission’s counsel successfully subpoenaed Mr. Iannone and took his testimony when investigating Judge Miller. (T1290-91, T1480-81). Had the Commission’s counsel procured testimony from Mr. Iannone establishing Judge Miller’s “control” over Mr. Iannone, no doubt the Commission would have raised that argument and

testimony with the Referee in support of its missing witness request. The Commission counsel's failure to submit such evidence or testimony, either during the hearing when first making the request, in its post-hearing submission to the Referee, or in its current submission, contradicts the Commission counsel's conclusory assertion that Mr. Iannone is under Judge Miller's "control."

Finally, as the Referee indicated, the record demonstrates that Mr. Iannone is instead under the "control" of the Commission. It is undisputed that Mr. Iannone and Ms. L [REDACTED] had a close, intimate relationship for over a year. Ms. Gallagher's testimony reveals that Mr. Iannone cared deeply for Ms. L [REDACTED] and was concerned about her welfare. (T697-700). The Court of Appeals in both Gonzalez and Keen makes clear that "control" is much more likely to be found in an intimate relationship such as the one between Mr. Iannone and Ms. L [REDACTED]. Gonzalez, 68 N.Y.2d at 426 common-law husband); Keen, 94 N.Y.2d at 539-40 (2000) (girlfriend and mother of his child). This "close[] . . . relationship," Savinon, 100 N.Y.2d at 201, coupled with the fact that the Commission subpoenaed Mr. Iannone and took his testimony in a prior proceeding (T1290-91, T1480-81), supports the Referee's finding that "a better argument could be made that an adverse inference should be drawn against the Commission on this issue." Referee's Report, p. 10, n. 19.

Judge Miller therefore respectfully submits that Mr. Iannone was not under his "control", and therefore, no adverse inference should be drawn against him.

C. "It Is Far From Certain That Mr. Iannone Would Have Offered Testimony Favorable To Respondent"

The Referee's Report sets forth several facts supporting his finding that "it is far from certain that Mr. Iannone would have offered testimony **favorable** to Respondent." Referee's Report, p. 9 (emphasis in original). The Referee referred to the Complaint in which, essentially,

Mr. Iannone is accused by the Commission's counsel of being a co-conspirator in Judge Miller's misconduct. Id. The Referee reasoned that "the Commission seeks an adverse inference against Respondent seemingly on the assumption that Mr. Iannone would falsely deny this version of the event." Id. at 9-10.

Furthermore, Judge Miller never insinuated that Mr. Iannone would corroborate his testimony. As the Referee correctly noted, the allegation concerning Mr. Iannone "finds its way into the Complaint because it is believed by counsel for the Commission to be accurate." Referee's Report, p. 9.

Finally, as previously discussed, the Commission's counsel went to great lengths to disparage Mr. Iannone's character. The Commission questioned witnesses and attempted to introduce evidence concerning Mr. Iannone's criminal history (T222-23, T280, T821, T891-97), a deadly threat he allegedly made against Mr. Kachadourian and Ms. Gallagher (T54-55, T574), and the revocation of his pistol permit. (T896-97). And again, there was no evidence indicating that Judge Miller had any connection to these issues which solely involved Mr. Iannone. Thus, insofar as Mr. Iannone would have corroborated Judge Miller's testimony, it was the Commission counsel that rendered him incredible. Corroborating testimony from an individual whom the Commission's counsel claims is a death-threat making criminal is hardly "favorable" to anyone, let alone Judge Miller.

Respondent therefore respectfully submits that "it is far from certain that Mr. Iannone would have offered testimony favorable to Respondent."

C. Conclusion

Based on the foregoing, Judge Miller respectfully submits that the Referee's finding with respect to the missing witness charge is supported by the record and should not be overturned.

II. The Commission Should Reject Commission Counsel's Effort To Overrule The Referee's Determination That Judge Miller's Conduct With Respect To The Allegation That Judge Miller Displayed An Illicit Photograph To Mr. Kachadourian And Engaged In Sexual Discussions Within Earshot Of Ms. Gallagher And Mr. Kachadourian.

Referee Barrer having heard all the evidence concerning the that Judge Miller displayed photographs of nude women on his cellphone to Mark Kachadourian, unequivocally found that this allegation was not proven he stated in pertinent part:

... there was no credible⁶ or admissible evidence received to establish that such a photograph was ever on Respondent's cell phone. At best, Ms. L [REDACTED]'s testimony established that the photograph was on Mr. Iannone's cell phone... Ms. L [REDACTED]'s testimony that Mr. Iannone said that he (Mr. Iannone) showed the photograph to Respondent and Mr. Kachadourian while at a restaurant is both hearsay and contrary to the allegations in the Complaint that Respondent showed a photograph on his cell phone to Mr. Kachadourian while in Chambers. Indeed, Ms. L [REDACTED]'s testimony about what Mr. Iannone allegedly told her about the display or the photograph was not accepted for the truth of the matter. [Tr. 270.] Given the inconsistency in accounts and the lack of credible corroborating evidence, I find that the allegation was not proved.

(Referee's Report, pp. 18-19).

Here again, it is important to reiterate that Judge Miller is *not* accused of misconduct for engaging in conversations of a sexual nature with Mr. Iannone or receiving an illicit photograph from Mr. Iannone. Nor is Judge Miller accused of misconduct for his interactions with Mr. Iannone. Rather, the Commission counsel asserts that Judge Miller is accused of misconduct for allegedly displaying an illicit photograph to *Mr. Kachadourian* and engaging in sexual discussions within earshot of *Ms. Gallagher and Mr. Kachadourian*. And again, we note that both Ms. Gallagher and Mr. Kachadourian were found to be incredible with respect to the

⁶ For the reasons previously discussed, Mr. Kachadourian was not a credible witness.

overwhelming majority of allegations they made and therefore most of the charges that relied on their testimony were dismissed. Indeed, as Mr. Iannone was neither present when Mr. Kachadourian claims that the picture was displayed, nor during the sexual discussions as those discussions occurred via telephone, the sole witness that claims that these events occurred is Mr. Kachadourian. (T694-695).

Even Ms. Gallagher conceded that “Mark” told her about it – she did not see the photograph. (T559). Thus, her testimony in this regard is hearsay and thereby is irrelevant. She could not and did not testify or present any other evidence that she had personally observed Judge Miller viewing, sharing or discussing the photograph.

Moreover, Ms. L [REDACTED] acknowledged that Mr. Iannone gave her conflicting accounts about what may have happened. Ms. L [REDACTED] testified she had no knowledge of any conversation between Judge Miller and Mr. Iannone concerning any photograph. (T272-73). Ms. L [REDACTED] could not definitively aver that she was sure that the naked torso depicted in the photograph that she later received from Mr. Iannone was her. It was not until she was pressed by Commission counsel that she identified an elephant necklace as her own. Even so, she likewise did not testify or present any direct evidence whatsoever that she had personally observed Judge Miller viewing, sharing or discussing the photograph. Likewise, her testimony in this regard is hearsay, and thereby, it is irrelevant.

Moreover, as stated previously, there was never any evidence presented by Commission counsel that Judge Miller’s telephone received or displayed any photographs with any sexual content from Mr. Iannone. Commission Counsel could have sought telephone records directly

from Judge Miller or subpoenaed⁷ the telephone service provider that he used during its investigation, or even in the one-month hiatus for the hearing to present them in rebuttal. Yet, any such records remain conspicuously absent from these proceedings. And, no photograph was ever produced by the Commission.

Accordingly, we must again examine the incredible and uncorroborated testimony of Mr. Kachadourian, who had every reason to lie⁸ and indeed was repeatedly found to be incredible by the Referee on every issue. (See Referee's Report at pp. 12). As stated in our findings of fact and conclusions of law, one of the claims that Mr. Kachadourian asserted was:

- viewing a photograph on Judge Miller's telephone in chambers which purportedly was taken by Mr. Iannone of Ms. L [REDACTED]'s torso. Interestingly, Mr. Kachadourian claimed that he could identify Ms. L [REDACTED] because of "D [REDACTED]'s build-- D [REDACTED]'s build-- I've worked with her, you know, the last-- prior to that photograph, probably the last two years, you know and we've seen each other on a daily basis. She has a very thin frame and she does have large breasts and you know, it just-- you could recognize who it was by--..." (T40). Moreover, there was never any evidence produced indicating that Judge Miller's telephone did contain such a photograph or for that matter other nude photographs from a strip club that Mr. Kachadourian claims that Judge Miller also showed him on his telephone. Judge Miller denied the allegations. (T1394-98). And, as Ms. L [REDACTED]

⁷ They subpoenaed the boxes of Judge Miller's personal records relating to his taxes and financial disclosure requirements.

⁸ He along with Ms. Gallagher are the Plaintiffs in a federal civil action against the OCA and Judge Miller. *Gallagher v. NYS Office of Court Administration et al.*, N.D.N. Y. 2:18-cv-01476). (See Referee's Report, p. 8).

herself was unable to say with certainty that she was in the photograph, but did say that Mr. Iannone⁹ later admitted that he had taken the photograph and shown it to Mr. Kachadourian at a local restaurant. (T270-271). Notably, there are discrepancies as to the location: Mr. Kachadourian claims it was in the Judge's Chambers on the Judge's cell phone, but Ms. L [REDACTED] testified that Mr. Iannone admitted that he showed it to Mr. Kachadourian on his cell phone at a restaurant. (T270-271).

The Referee's findings were well reasoned; it was based on his assessment of the lack of direct evidence as well as the lack of credibility of the witness. Based on the precedent as set forth in our September 2019 letter brief at pp. 2-3, Referee Barrer was in the best position to assess the credibility of the witnesses and his findings should not be disturbed given the lack of any independent corroboration of Mr. Kachadourian's allegations.

Simply stated, the record is devoid of any credible evidence that Judge Miller possessed, displayed, shared or discussed a photograph of a nude torso to anyone at any time. As a result, this allegation and the related charge warrants dismissal.

III. The Commission Should Reject Commission Counsel's Effort To Overrule The Referee's Determination That Judge Miller's Conduct With Respect To The *Estate Of Saraceno* Was Proper And Did Not Constitute The Practice of Law.

Referee Barrer having heard all the evidence concerning the *Estate of Jerry Behal* and *Estate of Saraceno* determined unequivocally that "Respondent's conduct regarding these matters fell within the ambit of permitted activities." (Referee's Report, p. 40). The Referee's

⁹ Mr. Iannone did not testify in these proceedings.

finding was well reasoned; it was based on his assessment of the credible facts and the ethics advisory opinions.

The Referee references multiple ethical advisory opinions permitting a judge “to perform limited administrative functions in order to assist on the transition of work to substitute counsel.” (Referee’s Report, p. 27). The Commission counsel also cites many opinions on the practice of law. (Commission’s Brief, p. 73-74). Notably, the Commission cannot cite even one case which employs or defines the phrase “impression of the practice of law.” Judge Miller believed after the distribution of all estate assets that the *Estate of Saraceno* was concluded prior to his becoming Family Court judge. (T1318). In August 2016, Judge Miller responded to a letter of the Tioga Surrogate’s Court inquiring about the Saraceno Estate’s status with a telephone call advising a substitution of attorney would be filed and inquiring whether the Estate could be closed by motion. The Commission’s counsel seeks to bootstrap this sliver of testimony into misconduct while conceding they failed to sustain the allegations in Charge III relating to the practice of law. (Commission’s Brief, p. 73). Interestingly, Commission counsel omits two key words from its own charge in the Formal Written Complaint in its brief. The unedited version of the allegation is: “Respondent engaged in the practice of law and/or conveyed the impression that he was still engaged in the practice of law.” (Complaint ¶34) (emphasis added). In so doing, Commission’s counsel seeks to overturn the Referee’s finding that “[t]here was no testimony from any witness that Respondent told the Clerk that **he** was still handling the matter or that a motion to close the estate, if allowed, would be filed by **him**.” (Referee’s Report, p. 28) (emphasis in original). The Referee found that the testimony of Barbara Saraceno, the wife of the Executor, (who was called as a witness by the Commission counsel) supported the determination Judge Miller did not engage in the practice of law. (Referee’s Report, pp. 28-31). The Referee further found that

Clerk Deborah “Stone’s testimony did not establish that Respondent performed legal work on the *Saraceno* Estate.” (Referee’s Report, p. 31). The Referee unequivocally concluded that Respondent “did not tell the Clerk he was still handling the Estate and performed no legal work toward closure of the estate.” (Referee’s Report, p. 31). Indeed, as noted below, Clerk Stone admitted that Judge Miller specifically stated to her that he could not handle the Estate, and therefore Judge Miller was not practicing law. (T452-54).

The record supports the Referee’s determination. Viewing the record on the *Saraceno* matter in its entirety reflects that Judge Miller clearly indicated he was not handling the estate and not practicing any longer --- the exact opposite of the “impression he was practicing law,” whatever that phrase may mean.

According to the Surrogate Court records, Mrs. Saraceno contacted the Tioga Surrogate’s Court on August 15, 2016, and informed a Surrogate’s Court employee (Kiyoko “Kiki” Matsuhashi) that: 1) she was told by Respondent’s former office assistant, Donna Filip, that “Richard Miller is a judge now and no longer practicing;” 2) her husband, the Executor, is in a nursing home; and, 3) one beneficiary is refusing to accept a piano, but that all other distributions seem to be complete. (T428, T451; Comm. 5A). By letter dated August 16, 2016, Ms. Matsuhashi advised Mr. Saraceno, that “The Court has been informed that Richard H. Miller II, Esq. no longer represents this estate.” (Comm. 5NN).

Judge Miller had two very limited calls with the Tioga Surrogate’s Court concerning the *Saraceno Estate*, on October 12, 2016 and October 14, 2016, respectively. October 12, 2016 was the first time Clerk Stone had direct contact with Judge Miller. (T454). During that telephone call, Judge Miller informed Ms. Stone that he was a judge, and as such, was not permitted to practice law; that another attorney would be handling the case; and “didn’t ask

anything to be done.” (T1402-03). Ms. Stone similarly testified that she told the Commission’s investigator that Judge Miller specifically told her that he could not handle the estate. (T452-54). Judge Miller did not ask for anything to be done, including requesting that the estate be closed by motion instead of a formal accounting. (T1403, T1448). October 14, 2016 is the last time Ms. Stone ever spoke to Judge Miller. (T458). During that telephone call, Judge Miller reaffirmed that he could not handle the *Saraceno* Estate and that Attorney Serjanej would be finishing up the estate. (T1403).

Clerk Stone confirmed that since October 12, 2016, Judge Miller never called or wrote the Tioga County Surrogate’s Court. (T455). Clerk Stone further testified that she has no information that Judge Miller prepared any legal document submitted to the Tioga’s County Surrogate’s Court with respect to the *Estate of Saraceno* after he became judge on January 1, 2015. (T455-56). Finally, Clerk Stone has no information that Judge Miller assisted in the preparation of any legal document submitted to Surrogate’s Court with respect to the *Estate of Saraceno* after he became judge. (T456).

In short, as documented in the August 15, 2016 Surrogate’s Court Sticky Note (Comm. 5A) and the August 16, 2016 Surrogate’s Court letter (Comm. 5NN), and Clerk Stone’s testimony that Judge Miller told her that he could not handle the estate (T452-54), Judge Miller repeatedly and appropriately informed both Mrs. Saraceno as well as the Court that he was no longer practicing law—the exact opposite of any impression that he “*was still*” engaged in the practice of law. (Complaint, ¶34).

IV. The Commission's Counsel Misstates The Testimony Concerning The Four-Sentence Letter Judge Miller Asked Be Typed

Judge Miller candidly acknowledged in his testimony that a four-sentence letter prepared by his secretary should not have been prepared in chambers. (T1459). This is the only instance the Referee found in which Judge Miller involved himself or his staff in a private matter. Not content to accept the Referee's Findings, and the actual testimony of the witnesses, the Commission's Counsel seeks to create a new finding of lack of candor on the theory that Judge Miller "directed Ms. Gallagher to draft the letter" rather than she "volunteered to do so." (Commission's Brief, p. 72).¹⁰ The Commission's Counsel then berates the Referee for failing to resolve "the discrepancy" and urges you to find that Judge Miller lacked candor in his testimony, which the Referee did not find. Id. There is no discrepancy to resolve.

To make its argument, the Commission's Counsel omits any reference to the testimony. Ms. Gallagher testified that, "I don't believe he dictated it. He just asked me to do something brief and then he had me change it like two more times, even though it was pretty generic." (T597). Neither Gallagher nor Kachadourian ever use the word "direct," command or importune.¹¹ Judge Miller "just asked" and Ms. Gallagher did a four-sentence letter. While the difficulty of recalling the details of a four-sentence letter over three years later is challenging at best, Ms. Gallagher's recollection of Judge Miller "just ask[ing]" is consistent with Judge Miller's testimony and inconsistent with someone "directing" an act be performed.

¹⁰ As to the letter with the checks, Judge Miller explained that it never went out. (T1401; Comm. 2V, 2W).

¹¹ Kachadourian testified that Gallagher was "asked" to type the letter. (T71).

V. The Commission’s Counsel Seeks To Create “Lack of Candor” By Rewriting The Record, Disregarding The Referee’s Report And Findings And Ignoring the Law

The Commission Counsel’s contrived argument that Judge Miller’s acknowledgment that the four-sentence letter he “just asked” to be typed reflects lack of candor is precisely the misapplication of the “lack of candor” argument cautioned against by the Court of Appeals. In Matter of Kiley, 74 N.Y.2d 364 (1989), the Court of Appeals set the standard for evaluating a Judge’s statements and whether they reflect lack of candor. Kiley held that for an incorrect statement to rise to lack of candor the court has required the statement to be “patently false” based on “contrary objective proof.” Id. at 370.¹² The Referee made no such finding. The Commission’s Counsel Brief triggers the very danger the Kiley holding seeks to guard against, namely, that by avoiding a “failure to cooperate” charge and testifying at the hearing, Judge Miller is now being unfairly attacked on “lack of candor” charges. The Court of Appeals gave perspective and guidance in holding:

Judges facing misconduct investigations are in the unenviable position of having to choose between speaking with Commission representatives and refusing to speak. If they choose the latter course, they risk being charged with “failure to cooperate” as an aggravating factor for the imposed sanction. [Citation omitted.] On the other hand, if they cooperate by speaking to Commission investigators or testifying at their own hearings, they run the risk of provoking “lack of candor” charges based upon *inadvertent factual misstatements, testimonial inconsistencies or even poor judgment in responding to searching, unanticipated questions*. If a Judge has acted with extremely poor judgment but not necessarily with a particular subjective intention which the Commission would like to attribute to him or her, the Judge can either admit an intention that

¹² See also, Matter of Skinner, 91 N.Y.2d 142, 144 (1997) (reducing sanction of removal to censure notwithstanding discrepancies in judge’s testimony since “the discrepancies in [Judge’s] testimony before the Commission did not necessarily reflect dishonesty or evasiveness”).

he or she did not possess, or truthfully deny the intention and yet face an additional charge of lack of candor. This result is both undesirable and unnecessary. While a Judge's dishonesty or evasiveness before Commission investigators is not to be condoned, the use of a Judge's "lack of candor" as an aggravating circumstance should be approached cautiously to minimize the risk that the investigative process itself will be used to generate more serious sanctions.

Id. at 370-71 (emphasis added).

The Commission's counsel tosses in a one sentence "lack of candor" statement as part of its sanctions argument to claim that Judge Miller's explanation of his efforts to amend his tax returns, and financial disclosures is somehow lack of candor. (Commission's Brief, p. 88). Unlike the case cited by Commission Counsel, Matter of Doyle, Determination of the Commission on Judicial Conduct, February 26, 2007, (2008 Annual Rep 11)¹³ the Referee in Judge Miller's hearing made no finding of lack of candor. On the contrary, the Referee found quite the opposite -- "the **timing** of Respondent's amendment of his FDF's and tax returns is a matter in mitigation" (Referee's Report, p. 39) (emphasis in original). As documented at pages 8-12 of the Respondent's letter-memorandum, Judge Miller's accountant Robin Dean's uncontested testimony is that Judge Miller came to her to amend his tax returns, which would naturally require amending his FDF's, only weeks after the tax returns were filed on April 15 and "well before any formal notice that the Commission was looking into these issues."¹⁴ (Referee's Report, p. 36). Accordingly, Judge Miller's intent was to amend and correct his

¹³ In Doyle the Referee found the Judge's initial interview lacked candor and contained "overly technical" responses. The Commission found "many inconsistencies and . . . shifting and evasive responses" by the Judge but constrained by Kiley, the Commission did not remove the Judge. "Indeed, in cases involving false testimony where judges have been removed, the underlying misconduct has been extremely serious." Doyle, p.15.

¹⁴ Judge Miller went to his accountant before the July 2017 date which the Commission asserts that Judge Miller had notice.

returns and financial disclosures well before any inquiry and prior to the Commission's seizure of records delaying those amendments and corrections. It is disingenuous for the Committee to make such an allegation given the unrebutted record.

VI. Judge Miller's Sanction Warrants No Greater Than Censure

As set forth in our letter brief, Judge Miller has accepted the findings of the Referee and even admitted where he was wrong, explained that his mistakes were unintentional, and he was contrite. And, while he has a prior history, based on the record before the Commission, we respectfully submit that his conduct was not so egregious to warrant removal.

Unfortunately, we must address the fact that Commission counsel seeks to reinstate charges which would enhance the sanction to be imposed. Specifically, they chose the two allegations that the Referee dismissed as unfounded, which if reinstated, would seem to indicate that Judge Miller had not learned his lesson from the prior matters before this Commission. The allegations and charges they want reinstate relate to his "practice of law" on the *Estate of Saraceno* and the purported nude torso photograph which he displayed on his telephone. Indeed, they not only chose the following tag line from his 2003 Censure based on the record before the Commission: "In its totality, respondent's conduct showed insensitivity and inattention to his ethical responsibilities and, in particular, to the special ethical obligations of judges who are permitted to practice law," but also cited the "Me Too" movement. Respectfully, this deliberate attempt to depict Judge Miller in a manner that is dehors the evidence should not be countenanced.

This Commission as well as the Court of Appeals has repeatedly stated that it has the authority to review the entire record to determine the findings of fact and the mitigating circumstances to determine sanction and that removal is reserved for the most egregious

misconduct. In Matter of Edward J. Williams, Determination of the Commission on Judicial Conduct, November 13, 2007, (2008 Annual Report 227), notwithstanding the fact that the judge had a prior history that included a 2002 Censure, a 1993 Letter of Dismissal and Caution and a 2001 Admonition, the Commission imposed a Censure. Williams is similar to the instant case in that only two of four charges were sustained based on the record and Commission Counsel recommended the judge's removal. However, the Commission did not reinstate the other two charges. And, even though he had previously been disciplined for prior similar behavior the Commission declined to recommend removal, stating in pertinent part:

We conclude, however, that respondent's misconduct, although serious, does not rise to the level of "truly egregious" misbehavior requiring the sanction of removal. As the Court of Appeals has stated, "Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances..." *Matter of Cunningham*, 57 NY2d 270,275 (1982); see also, e.g., *Matter of Going*, 97 NY2d 121, 127 (2001). The evidence is uncontroverted that respondent did not seek out the trooper to investigate the defendant's credibility, but spoke to him in a chance encounter out of court for the purpose of advising him not to tell defendants the potential outcome of a charge. Thus, this case can be distinguished from cases involving judges who have been disciplined for repeatedly conducting ex parte investigations out of court... (citations omitted)...Moreover, respondent's disclosure of the conversation to the defendant's attorney indicates that he recognized the impropriety of his ex parte communication and may have been an attempt to "cure" his misconduct. But for that disclosure, the episode would likely not have come to light. We also note that respondent has acknowledged the impropriety of his conduct and has pledged to avoid such misconduct in the future.¹

This is the fourth time in a 25-year judicial career that respondent has faced disciplinary proceedings. The Court of Appeals has held that prior discipline is an aggravating factor militating in favor of a strict sanction, especially where the prior discipline was based on similar misconduct. *Matter of Rater*, 69 NY2d 208, 209-10 (1987). In 2002 respondent was censured for making an improper ex parte request to another judge to rescind an

order of protection issued against respondent's friend (Matter of Williams, 2003 Annual Report 200 [Comm on Judicial Conduct]). In addition, in 1993 respondent was issued a Letter of Dismissal and Caution for discourtesy to an attorney, and in 2001 he was admonished for improper political activity and other misbehavior. In view of this disciplinary history, this decision places respondent on notice that any future ethical lapses will be viewed with appropriate severity.

¹We are compelled to note that, in reaching its conclusions, the concurrence inappropriately relies on matters not in the record regarding Judge Williams' personal life. (1987).

See also, Matter of Maija Dixon, Determination of the Commission on Judicial Conduct, May 26, 2016, (2017 Annual Report 100) (Commission counsel urged removal, but Censure imposed based on the fact that the judge “acted out of an “emotional” reaction and that she now recognizes the impropriety of her conduct... and her assurance that she has learned valuable lessons from these events and that she is committed to ensuring that her conduct in the future will comport with the high standards of conduct required of every judge.”); Matter of Shari Michels, Determination of the Commission on Judicial Conduct, November 17, 2011, (2012 Annual Report 130) (Judge Admonished for improprieties on a campaign palm card. We note that she received a second Admonition for invoking here judicial title in a personal matter. See Determination dated December 27, 2018. But see Matter of Marshall, 8 N.Y.3d 741 (2007).

Last, we note that the Court of Appeals has repeatedly stated that they have the authority to address the appropriate sanction and that the purpose of these proceedings is not to punish but rather to safeguard the Bench. In In re Watson, 100 N.Y.2d 290 (2003), the Court of Appeals imposed a Censure as the appropriate sanction notwithstanding Commission's Determination imposing removal for conduct, finding in pertinent part:

... “[T]he purpose of judicial disciplinary proceedings is not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents” (Matter of Esworthy, 77 N.Y.2d at 283 [internal quotation marks and citation omitted]). In this case, petitioner expressed remorse and acknowledged before the Commission that he exercised extremely poor judgment in the conduct of his campaign. He attributed his misconduct in part to his inexperience as a candidate, and his failure to enlist aid from people knowledgeable in the conduct of judicial campaigns. While this is no excuse, we find it relevant in weighing the appropriate sanction. We also note that the Commission makes no claim of inappropriate behavior in the performance of petitioner's judicial duties.

Although petitioner's transgressions are serious, we are unpersuaded that his continued performance in judicial office presently threatens the proper administration of justice or that he has irredeemably damaged public confidence in his own impartiality or that of the *state judiciary* as a whole. We determine that the appropriate sanction is censure....

Also, in Matter of Skinner, 91 N.Y.2d 142 (1997), the Court imposed a Censure despite the Commission's Determination imposing removal. The judge appealed and the Court found that removal was unduly severe based on “two isolated incidents” of misconduct. Id. at 144. The Court reasoned that the judge had been “for nearly four decades [] the elected choice of the voters to hold the office of Town Justice, with no evidence of any prior complaints regarding his judicial service. . . . [T]here is no indication that petitioner was motivated by personal profit, vindictiveness or ill will . . . [and] the discrepancies in petitioner's testimony before the Commission did not necessarily reflect dishonesty or evasiveness.” Id. (citations omitted); see also, Matter of Francis Alessandro, 13 N.Y.3d 238, 249 (2009) (Court of Appeals imposed Admonition notwithstanding Commission Determination imposing removal for conduct including failure to fully disclose financial information on his FDF filings and a loan application

because there was no evidence in the record that he intentionally failed to disclose them “Nevertheless, we are unable to conclude by a preponderance of the evidence that any of the omissions was intentional. Careless omissions from a financial disclosure statement are not the type of "truly egregious" conduct that warrants removal from judicial office (Matter of Cunningham, 57 NY2d 270, 275, 442 NE2d 434, 456 NYS2d 36 (1982)).” Under these circumstances, the sanction of removal is too harsh).

Based on the allegations and charges sustained by the Referee as well as the substantial unrebutted mitigation evidence as to Judge Miller’s work ethic, his acknowledgment and remorse for his conduct, his volunteer work in the community at large, we respectfully submit that the appropriate sanction is no greater than a Censure.

Accordingly, we urge the Commission to:

- abide by and give deference to the Referee’s Report as to the facts, the charges sustained, and the credibility of the witnesses;
- to disregard Commission counsel’s attempts to reinstate the unsubstantiated charges because the Referee’s findings should be afforded deference since he was able to personally review the evidence and to observe each witness and thereby based his findings on the credible evidence;
- to consider the substantial mitigation presented; and impose no greater than a Censure for Judge Miller’s actions.

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Respectfully submitted,



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