

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.

**MEMORANDUM BY COUNSEL TO THE COMMISSION IN SUPPORT OF
RECOMMENDATION THAT RESPONDENT BE REMOVED FROM OFFICE**

ROBERT H. TEMBECKJIAN, ESQ.
Counsel to the State
Commission on Judicial Conduct
Corning Tower Suite 2301
Empire State Plaza
Albany, New York 12223
(518) 453-4600

Of Counsel:
Cathleen S. Cenci, Esq.
S. Peter Pedrotty, Esq.
Edward Lindner, Esq.

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PRELIMINARY STATEMENT

This Memorandum is respectfully submitted by Counsel to the Commission on Judicial Conduct (“Commission”) in support of the recommendation that the Commission confirm in part and disaffirm in part Referee Robert A. Barrer’s findings of fact and conclusions of law, and render a determination that the Honorable Richard H. Miller, II (“Respondent”) has committed judicial misconduct and should be removed from office.

As to Charge I, the Commission should confirm the Referee’s findings and conclusions that Respondent committed judicial misconduct by making inappropriate and unwelcome sexual comments to Broome County Family Court Chief Clerk Debbi Singer and by rudely admonishing Court Assistant Rebecca Vroman.

Also as to Charge I, the Commission should disaffirm the Referee’s finding that the Commission failed to adequately prove that Respondent showed his court attorney a photograph purporting to depict the nude torso of Senior Court Office Assistant D [REDACTED] L [REDACTED]. The Commission should also conclude that the Referee misinterpreted and misapplied the “missing witness” rule, and should draw an unfavorable inference against Respondent for failing to call his friend and employee, David Iannone, to support his denial that he displayed of the photograph.

As to Charge II, the Commission should confirm the Referee’s finding that Respondent committed judicial misconduct in directing that his chambers secretary, Rachelle Gallagher, type a letter related to an estate Respondent had handled as an attorney prior to becoming a full-time judge, so that Respondent and his former law office secretary could be paid for their work on the estate.

As to Charge III, the Commission should confirm the Referee's finding that Respondent asked the Chief Clerk of the Tioga County Surrogate's Court if the court would allow the *Estate of Antoinette Saraceno*, an estate he had handled prior to becoming a full-time judge, to be closed by motion instead of a formal accounting. However, it should disaffirm the Referee's conclusion that this act did not constitute the practice of law and was not judicial misconduct.

As to Charge IV, the Commission should confirm the Referee's findings and conclusions that Respondent committed judicial misconduct by failing to file timely and accurate disclosure reports of his income from extra-judicial activities with the Ethics Commission for the Unified Court System, the Internal Revenue Service, the New York State Department of Taxation and Finance and the Clerk of the Broome County Family Court, as required.

Standing alone, Respondent's misconduct in displaying to his court attorney a nude photograph purporting to be of a female member of court staff was egregious and warrants his removal. But even if the Commission does not sustain that allegation, the remaining acts of misconduct as found by the Referee warrant his removal. His sexually inappropriate comments to the Chief Clerk of the court and his demeaning behavior toward a court assistant constitute serious misconduct.

His intentional omission of extra-judicial income from tax returns and financial disclosure forms, is particularly egregious, and the Commission has previously found that the intentional failure to disclose such income, on its own, warrants removal.

Finally, Respondent's improper participation as full-time judge in an estate matter in another court, and his request of his court secretary to draft a deceptive letter so that he could receive legal fees also violated the Rules.

All this misconduct, especially when viewed with his prior disciplinary record, which consists of a prior Censure and a cautionary letter, demonstrates that Respondent is not fit to retain judicial office.

PROCEDURAL HISTORY

A. The Formal Written Complaint

Pursuant to Judiciary Law §44(4), the Commission authorized a Formal Written Complaint, dated July 9, 2018, containing four charges. Charge I alleged that Respondent engaged in a pattern of inappropriate behavior toward certain staff members of the Broome County Family Court by, *inter alia*, making unwelcome comments of a sexual nature to and about them, and threatening their physical safety and wellbeing (FWC ¶6).¹

Charge II alleged that Respondent lent the prestige of judicial office to advance his own private interests and/or the interests of others, and failed to conduct his extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that, on multiple occasions, he importuned chambers staff to perform services unrelated to their official duties, including prohibited political activity (FWC ¶27).

¹ References to “FWC” are to the Formal Written Complaint. References to “Ans” are to Respondent’s Answer. References to “Tr” are to the transcript of the hearing before the Referee. References to “Ex” are to exhibits introduced into evidence at the hearing by the Commission. References to “Resp Ex” are to exhibits introduced into evidence at the hearing by Respondent.

Charge III alleged that, in connection with the *Estate of Antoinette Saraceno* and the *Estate of Jerry J. Behal, Jr.*, two estates Respondent had represented before he became a Family Court Judge and that were still pending after he became a Family Court Judge, Respondent engaged in the practice of law and/or conveyed the impression that he was engaged in the practice of law as a full-time judge (FWC ¶34).

Charge IV alleged that Respondent failed to file timely and accurate disclosure reports of his income from extra-judicial activities to the Ethics Commission for the Unified Court System, the Internal Revenue Service, the New York State Department of Taxation and Finance and the Clerk of the Broome County Family Court, as required (FWC ¶63).

B. Respondent's Answer

Respondent filed a Verified Answer to the Formal Written Complaint, dated August 8, 2018. With respect to Charge I, Respondent denied all of the substantive factual allegations (Ans ¶¶6-26).

With respect to Charge II, Respondent denied nearly all the substantive factual allegations (Ans ¶¶27-33). He admitted that Donna Filip “volunteered” in his law office (Ans ¶28), that Ms. Gallagher typed Exhibit A to the Formal Written Complaint² (Ans ¶29) and that, before becoming a Family Court Judge, he represented the *Estate of Jerry J. Behal* (Ans ¶32).

² In evidence as Exhibit 2V.

With respect to Charge III, Respondent admitted the allegations relating to the procedural history of the *Estate of Saraceno* pre-dating his becoming a Family Court Judge but asserted he lacked knowledge and information sufficient to form a belief as to the truth of or denied the substantive factual allegations concerning events occurring thereafter (Ans ¶¶34-45). Respondent admitted that he contacted the Tioga County Surrogate's Court but said he did so to "inquire as to why he was being sent information directed to him as an attorney knowing that he was a Family Court Judge and could not practice law and communicated that there should have been a substitution of attorney filed" (Ans ¶41). Respondent admitted the allegations relating to the procedural history of the *Estate of Behal* pre-dating his becoming a Family Court Judge and admitted that Attorney Artan Serjanej represented the executor, but otherwise denied, or asserted he lacked knowledge and information sufficient to form a belief as to the truth of, each of the substantive factual allegations concerning events occurring after he became a full-time judge (Ans ¶¶46-62).

With respect to Charge IV:

- Respondent admitted the allegations that, in 2015, he received payments for legal work he performed in the *Estate of Deborah Brigham* and the *Estate of Roger Funk* (Ans ¶¶64-65).
- Respondent asserted that he lacked knowledge and information sufficient to form a belief as to the truth of the allegation that, on his 2015 Annual Statement of Financial Disclosure with the Ethics Commission for the Unified Court System, he failed to disclose the income he received in 2015 for legal work he had previously performed in *Brigham* and *Funk* and other matters, and that he did not amend his 2015 Financial Disclosure Form to include this income until in or about November 2017, after he was notified by the Commission about his failure to do so, and affirmatively stated that

he was consulting with his accountant regarding his finances and tax issues prior to receiving notification by the Commission (Ans ¶¶66).

- Respondent denied the allegation that, in 2015-2017, he received monthly rental payment checks from tenant Louis Micha for rental of an apartment located at 2█ North Street, but admitted that rent payments due his wife were made payable to Respondent (Ans ¶¶67).
- Respondent denied the allegations that, in 2015 and 2016, he received payments from David English and Michelle Caforio for the rental of the property located at 3█ Oakdale Road, but he admitted collecting rent payments to 394 Main Street LLC (Ans ¶¶68-69).
- Respondent denied the allegations that, on his Federal Income Tax Return and his New York State Income Tax Return for the years 2015 and 2016, he failed to report the income he had received from the prior practice of law and/or rental income he had received in those years (Ans ¶¶70-71).
- Respondent denied the allegation that he amended his 2015 and 2016 Federal and State income tax returns to include omitted income after he was questioned by the Office of the Inspector General for the Unified Court System (Ans ¶72).
- Respondent asserted that he lacked knowledge and information sufficient to form a belief as to the truth of the allegation that he failed to file any report of outside income with the clerk of the court (Ans ¶73).

C. The Hearing

By Order dated September 18, 2018, the Commission designated Robert A.

Barrer, Esq. to hear and report proposed findings of fact and conclusions of law. The hearing was held in Binghamton, New York, on January 7, 8, 9, 10, and 11, 2019, and in Albany, New York on February 12, 2019. Counsel for the Commission called nine witnesses and introduced 112 exhibits into evidence. Respondent called 13 witnesses, testified on his own behalf and introduced 16 exhibits into evidence. Six items were marked as exhibits of the Referee.

D. The Referee's Report

The Referee issued a Report dated June 20, 2019. With respect to Charge I, the Referee found that Respondent made inappropriate and unwelcome comments to Broome County Family Court Chief Clerk Debbi Singer, including, "You look really hot in that outfit. You should always wear that outfit" and "If I knew you could also cook, I would have gone for the widow" (Rep 23-24). The Referee also found that Respondent had an "incident" in open court with Court Assistant Rebecca Vroman that was "not professional" (Rep 21-22). The Referee concluded that Respondent violated Rules 100.1 and 100.3(B)(3) (Rep 39). The Referee found that the remaining allegations of Charge I were not proven by a preponderance of the evidence after he concluded that Mark Kachadourian and Rachelle Gallagher lacked credibility (Rep 10-24).³

With respect to Charge II, the Referee found that Respondent improperly "request[ed] to have Rachelle Gallagher type a letter regarding the *Estate of Roger L. Funk*," which related to Respondent's former private law practice (Rep 24-25, 40). The Referee concluded that Respondent violated Rule 100.2(C). The Referee did not sustain

³ As indicated below, p 54, n10, Commission Counsel takes vigorous exception to the Referee's finding that Mr. Kachadourian and Ms. Gallagher were not credible. Given the deference normally afforded to such credibility determinations, however, Commission Counsel will not contest the Referee's failure to sustain the specifications in Charges I and II of the Formal Written Complaint that rest solely on their testimony.

Commission Counsel asks, however, that the Commission disaffirm the Referee's finding that Respondent did not show Mr. Kachadourian a photograph depicting the nude torso of Ms. L [REDACTED] because that allegation was corroborated by the testimony of Ms. L [REDACTED] herself and because Respondent's failure to call his friend and employee David Iannone clearly warranted a "missing witness" negative inference.

the remaining allegations of Charge II, based on his finding that Mr. Kachadourian and Ms. Gallagher lacked credibility (Rep 25-26).

The Referee did not sustain the allegations of Charge III. Although he found that Respondent asked Tioga County Surrogate's Court Clerk Deborah Stone "whether the Court would accept a motion instead of an accounting to close the [*Saraceno*] Estate," the Referee concluded that such conduct was permissible and not the improper practice of law (Rep 27-31, 40). The Referee also concluded that Respondent did not engage in the improper practice of law in relation to the *Behal* estate (Rep 31-34, 40).

With respect to Charge IV, the Referee found that Respondent failed to file accurate disclosure reports of his income from extra-judicial activities with the Clerk of the Broome County Family Court, the Ethics Commission for the Unified Court System, the Internal Revenue Service and the New York State Department of Taxation and Finance (Rep 34-39, 40-41). The Referee concluded that Respondent violated Rules 100.2(A), 100.3(C)(1), and 100.4(H)(2) and 100.4(I).

THE EVIDENCE AT THE HEARING

Charge I: Over a period of two and half years, Respondent engaged in a pattern of inappropriate behavior toward certain staff members of the Broome County Family Court by, *inter alia*, making unwelcome comments of a sexual nature to and about them, and threatening their physical safety and wellbeing.

According to testimony from multiple Commission witnesses, from in or about January 2015 until July 2017, Respondent made multiple inappropriate and lewd comments to Broome County Family Court employees, including suggestions that his "sexual needs" should be satisfied by his court secretary. Respondent engaged in graphic

conversations about sexual conduct in front of court staff and displayed a nude photograph purported to depict a female court staff member. In addition, Respondent made comments threatening the physical safety of his court attorney and his court secretary.

A. Respondent was acquainted with Rachelle Gallagher and Mark Kachadourian for years before he named them as his personal appointees in the Broome County Family Court.

Prior to becoming a Judge of the Family Court, Broome County, on January 1, 2015, Respondent served as a part-time Justice of the Union Town Court, Broome County, from 1996 to 2014, and the Johnson City Village Court, Broome County, from 2002 to 2014 (FWC ¶4; Ans ¶4; Tr 1301-02).

When Respondent became a Family Court Judge, he appointed Rachelle Gallagher as his court secretary (FWC ¶7; Ans ¶7; Tr 546-47). Respondent was a childhood friend of Ms. Gallagher's husband, Scott Gallagher (Tr 542, 1312). Respondent and Ms. Gallagher first became acquainted in the early 2000s, and in 2002 Respondent performed the Gallaghers' wedding ceremony (Tr 542, 1326). In 2005, Respondent asked Ms. Gallagher to work for him at the Johnson City Village Court where, for almost 10 years, she served under Respondent as the chief court clerk until December 31, 2014, when Respondent appointed her to be his personal secretary in Family Court (Tr 543-45, 546-47, 1303, 1312, 1325-26). Ms. Gallagher was also active in Respondent's campaign for Family Court Judge, with Respondent giving her a role on his campaign committee (Tr 545).

Respondent appointed Mark Kachadourian as his court attorney in Family Court (FWC ¶7; Ans ¶7; Tr 26-27, 1335-36), prior to which Mr. Kachadourian had practiced family law for approximately 25 to 30 years (Tr 22). Respondent and Mr. Kachadourian had been acquainted in their capacities as practicing attorneys in Broome and Tioga Counties for about 10 to 15 years (Tr 23, 1335-36). Mr. Kachadourian assisted Respondent with his campaign for Family Court Judge by putting up campaign signs, helping him prepare for a debate and attending campaign events (Tr 25, 1336-37). After Respondent won the Family Court election, he asked Mr. Kachadourian to be his court attorney because he believed that Mr. Kachadourian was well qualified to handle the position (Tr 26, 1336).

At the court, Respondent, Mr. Kachadourian and Ms. Gallagher interacted and worked with each other on a daily basis (Tr 30, 33, 548). Respondent's chambers occupied a suite on the first floor of the Broome County Family Court building consisting of his office and Ms. Gallagher's adjoining office (Tr 33-34, 547, 562-63). Although Mr. Kachadourian's office was on the second floor, he primarily conducted his work in Respondent's chambers (Tr 33, 548-49).

Mr. Kachadourian's working relationship with Respondent at the Family Court was initially good, but he noticed that Respondent's behavior began to change for the worse around mid-to-late 2015 (Tr 27-29). Although Ms. Gallagher had good professional and social relationships with Respondent during their 10 years working together at the Johnson City Village Court, she also noticed that his behavior and

demeanor drastically changed after he became a Family Court Judge, when he started making increasingly frequent comments of a sexual and threatening nature (Tr 549-50).

B. According to Mr. Kachadourian and Ms. Gallagher, on multiple occasions between 2015 and 2017, Respondent: (1) told them that his sexual needs were not being met, at times pointing to his genital area, (2) stated that Ms. Gallagher needed to satisfy his sexual needs and (3) stated that he wanted to fire Ms. Gallagher and hire another secretary who would satisfy his sexual needs.

Soon after becoming a Family Court Judge in January 2015, Respondent began angrily commenting to Ms. Gallagher about his lack of sexual relations with his wife and that he and his wife were like “roommates” (Tr 550-51). Ms. Gallagher testified:

[h]e always was maybe a little sexual, but when we started in family court, it became that he was demanding sex and he wanted sex, more sex, and everything revolved around sex and his lack of sex (Tr 551).

Respondent would, at times, point to his genitals while stating that people needed to satisfy his needs (Tr 551-52). Respondent’s sexual comments became more frequent in 2017 (Tr 552).

On numerous occasions from mid-to-late 2015 to mid-2017, Respondent commented to Mr. Kachadourian that he regretted hiring Ms. Gallagher as his court secretary, rather than Lisa Wojdat, who had been a court clerk while Respondent was a justice at the Union Town Court (Tr 28-29, 553-54). Respondent told Mr. Kachadourian and Ms. Gallagher that he had “sexual needs” and that Ms. Wojdat would satisfy those sexual needs (Tr 29-30, 553-54).⁴ Respondent, at times, directed Mr. Kachadourian to

⁴ There is nothing in the record to suggest that this was anything more than offensive and suggestive swagger by Respondent, or that any court employee ever actually engaged in sexual relations with him.

speak with Ms. Gallagher about “what real secretaries are supposed to do,” which according to Respondent, included satisfying Respondent sexually (Tr 30-31, 554-55).

C. Mr. Kachadourian and Ms. Gallagher testified that Respondent engaged in graphic sexual discussions about Senior Court Office Assistant D [REDACTED] L [REDACTED] in their presence at chambers.

In January 2017, Respondent introduced Senior Court Office Assistant D [REDACTED] L [REDACTED] to David Iannone after Ms. L [REDACTED] told Respondent that she needed some tile work done in her bathroom (Tr 34-35, 264-65, 555, 817). Mr. Iannone was a friend of Respondent and did various odd jobs for him (Tr 32, 266, 269, 816, 1477). Mr. Iannone had also assisted Respondent with his Family Court campaign and with managing his rental properties (Tr 32, 523-24, 818, 832). Respondent put Ms. L [REDACTED] in touch with Mr. Iannone, who agreed to come to her house and give her a work estimate (Tr 265-66, 555, 1477-78). Soon thereafter, Ms. L [REDACTED] and Mr. Iannone began an intimate relationship that lasted approximately one year, which Respondent knew based on his discussions with Mr. Iannone (Tr 266, 1478-79).

According to Mr. Kachadourian and Ms. Gallagher, on multiple occasions in chambers in early 2017, Respondent spoke with Mr. Iannone by telephone, using the speaker function, such that Mr. Kachadourian and Ms. Gallagher heard graphic discussions between Respondent and Mr. Iannone about Mr. Iannone’s sexual experiences with Ms. L [REDACTED] (Tr 36-38, 556-59). Respondent acknowledged that he occasionally called Mr. Iannone from chambers (Tr 818). Both Mr. Kachadourian and Ms. Gallagher heard Mr. Iannone respond to Respondent’s questions about Mr. Iannone’s sex with Ms. L [REDACTED] by talking about Ms. L [REDACTED]’s orgasms, such that she was a

“sprayer” and that “the beds were so wet that they had to put towels down so the beds wouldn’t get ruined” (Tr 37, 557). Respondent asked Mr. Iannone for pictures or videos of his sexual experiences with Ms. L [REDACTED] (Tr 557-58) and asked if he – Respondent – “could get in the lineup or get in the rotation” and “reserve a night a week for himself” with Ms. L [REDACTED] (Tr 38, 559).

Jerry Penna is and has been a “family friend” of Respondent’s since he was “very young” (Tr 818). Mr. Penna also acted as the treasurer of Respondent’s Family Court campaign and is his insurance agent (Tr 818). In around March 2017, in chambers, Respondent engaged in a conversation on his cell phone, using its speaker function, with Mr. Penna in which Respondent explicitly described Mr. Iannone’s sexual experiences with Ms. L [REDACTED] (Tr 35-36).

In early 2017, while Mr. Penna was visiting Respondent at chambers, the two men started discussing Ms. L [REDACTED] and Mr. Iannone’s sexual experiences with her (Tr 41-43, 560-61, 563). Respondent then directed Ms. Gallagher to go to Ms. L [REDACTED]’s office and bring her to chambers (Tr 42, 560-61). Ms. Gallagher escorted Ms. L [REDACTED] to chambers where Respondent and Mr. Penna engaged Ms. L [REDACTED] in small talk for a few minutes (Tr 42, 562). Ms. L [REDACTED] testified that she recalled meeting Mr. Penna in Respondent’s chambers (Tr 275). After Ms. L [REDACTED] left chambers, Respondent and Mr. Penna engaged in a conversation about her figure, including the size of her breasts (Tr 42, 563-64). Mr. Kachadourian recalled that a male maintenance worker – who, like Mr. Penna, had fought in the Vietnam War (Tr 42, 922) – was also present for this conversation and that Respondent, Mr. Penna and the maintenance worker also discussed

that women from Southeast Asia had no hair on their genitals (Tr 42-43). Ms. Gallagher recalled a similar conversation between Respondent, Mr. Penna and the maintenance worker about Asian women (Tr 705-06).

According to Ms. L [REDACTED], on at least one occasion in summer 2017, after Respondent commented about the temperature in the courtroom being hot, Respondent added, “Maybe it’s because of D [REDACTED]” (Tr 309-10).

D. Mr. Kachadourian testified that Respondent showed him a photograph purporting to depict the nude torso of Senior Court Office Assistant D [REDACTED] L [REDACTED], and Ms. L [REDACTED] confirmed that she later saw such a photograph.

In about April 2017, Respondent called Mr. Kachadourian to his chambers, took out his cell phone and showed him a photograph of the front torso of a nude woman (Tr 39). Respondent said that the woman in the photograph was D [REDACTED] L [REDACTED] (Tr 39). The woman’s build resembled that of Ms. L [REDACTED] (Tr 39-40). Shocked, Mr. Kachadourian walked away and told Ms. Gallagher what Respondent had shown him (Tr 40).

In late June or early July 2017, Broome County Supreme Court Justice Molly Fitzgerald and a human resources employee notified Ms. L [REDACTED] of the existence of a photograph purporting to depict her nude torso (Tr 267). At the time, Ms. L [REDACTED] was unaware of the existence of any such photograph, but Judge Fitzgerald told her that one had come up in relation to sexual harassment allegations about Respondent (Tr 267-68). Not having made sexual harassment allegations against Respondent, Ms. L [REDACTED] was confused (Tr 267-68).

Knowing that Respondent and Mr. Iannone were friends, Ms. L [REDACTED] repeatedly asked Mr. Iannone if any such picture existed (Tr 269-70). After denying it repeatedly, Mr. Iannone finally took out his cell phone and showed her a photograph of a person nude from the neck to the belly, wearing a silver elephant pendant necklace featuring a pink jewel, and told her that it was the photograph that he had shown to Respondent and Mr. Kachadourian (Tr 270-71, 281-82). Although Ms. L [REDACTED] did not know for sure if the person in the photograph was her, she recognized the person's necklace as one of the seven or eight Avon elephant pendant necklaces that she owned (Tr 270-71, 281-82). Ms. L [REDACTED] asked Mr. Iannone to delete the photograph (Tr 272).

E. Mr. Kachadourian testified that Respondent told him it would be “nice” to have sex with Court Attorney S [REDACTED] L [REDACTED] while she was bent over a desk.

On one occasion, in the hallway outside the offices of Mr. Kachadourian and Court Attorney S [REDACTED] L [REDACTED], Respondent commented to Mr. Kachadourian, “Wouldn’t it be nice to have sex with [Ms. L [REDACTED]] bent over a desk?” (Tr 43-44). Mr. Kachadourian told Respondent that he should not say such things, especially since Ms. L [REDACTED] was within earshot and could have heard his comment (Tr 44).

F. Mr. Kachadourian testified that Respondent showed him photographs of nude women and Ms. Gallagher testified that Respondent showed her drawings of nude women.

On one occasion in around mid-2015, Respondent showed Mr. Kachadourian photographs of nude women Respondent had on his cell phone (Tr 41). Respondent “giggled” when Mr. Kachadourian objected to viewing the photographs (Tr 41).

In April or May 2017, Respondent handed Ms. Gallagher a folded-up piece of paper depicting pieces of fruit and asked her to pick the “juiciest fruit” (Tr 564). When Ms. Gallagher unfolded the paper at Respondent’s instruction, there were drawings of nude women inside (Tr 564, 694). Although Respondent found it hysterical, Ms. Gallagher was embarrassed. She returned the paper to him and walked away (Tr 564).

G. According to Mr. Kachadourian and Ms. Gallagher, Respondent told them that he wanted Ms. Gallagher to perform sexual favors for a state senator so that Respondent could have greater access to the senator.

On or about May 18, 2017, Mr. Kachadourian accompanied Respondent to the State Capitol in Albany, New York, to attend the New York State Family Court Association meeting (Tr 44-45). During a break in scheduled meetings with various state legislators, Respondent suggested to Mr. Kachadourian that they try to meet with Fred Akshar, the state senator for Broome and Tioga Counties (Tr 45, 192). Without an appointment, Respondent and Mr. Kachadourian went to Sen. Akshar’s office and met with him for a few minutes (Tr 45, 192). At the end of the meeting, Respondent asked Sen. Akshar for his cell phone number and the senator declined, telling Respondent to contact him by calling his office (Tr 45-46).

While driving back to Binghamton from Albany with Mr. Kachadourian, Respondent fumed about Sen. Akshar’s refusal to give him his cell phone number and said he would ask Ms. Gallagher to do sexual favors for the senator in order to obtain the senator’s cell phone number (Tr 46, 194). Mr. Kachadourian objected to Respondent’s idea as being “crazy” (Tr 46, 195).

The next day, Respondent returned to chambers and angrily demanded, while banging on Ms. Gallagher's desk, that she go to Albany to "take one for the team" and "take care of [Sen. Akshar's] needs" (Tr 565-66). Ms. Gallagher understood Respondent to mean that he wanted her to have sex with the senator (Tr 566-67). Ms. Gallagher refused (Tr 565). Ms. Gallagher was very upset and after Respondent left for court she called Mr. Kachadourian and told him what had just happened (Tr 566). Mr. Kachadourian then told Ms. Gallagher about Respondent's comments to him that he wanted her to perform sexual favors for the senator (Tr 47-48).

At some point thereafter, Ms. Gallagher reported Respondent's remarks about sexually satisfying Senator Akshar to Chief Clerk Debbi Singer (Tr 362, 568).

H. Debbi Singer, the Chief Clerk of the Broome County Family Court, testified that Respondent made unwanted sexual comments to her.

Prior to her retirement in June 2018, Debbi Singer was the Chief Clerk of the Broome County Family Court (Tr 356, 819). Ms. Singer worked at the court for a total of 27 years and was the deputy chief clerk before becoming the chief clerk (Tr 356). As chief clerk, Ms. Singer oversaw all of the daily operations of the Family Court and supervised all of the Grade 16 and Grade 12 court assistants (Tr 356-57). She had no supervisory duties over the judges' court attorneys or legal secretaries, such as Mr. Kachadourian and Ms. Gallagher (Tr 357, 359). Respondent described his relationship with Ms. Singer as "professional" and "good," and he described her as "truthful," "honest," "helpful," "classy" and "efficient" (Tr 819, 1476).

In May 2017, the Family Court held a “dish to pass” luncheon at the courthouse and Ms. Singer and staff members made dishes to share (Tr 366-67). After the luncheon, Respondent stopped by the office of Ms. Singer, whose husband is deceased, and said, “If I knew you could also cook, I would have gone for the widow” (Tr 367). Respondent knew that Ms. Singer was a widow (Tr 819-20). Ms. Singer was “surprised, shocked, and disgusted” by Respondent’s comment (Tr 367).

In early June 2017, while Respondent was in Ms. Singer’s office, Ms. Singer began having a hot flash and said, “I apologize, I’m having a hot flash” (Tr 368, 400-03). Respondent replied, “It’s nice to know I still have that effect on you” (Tr 403). Ms. Singer later learned that Respondent had gone back to his chambers and told Ms. Gallagher about his comment to Ms. Singer (Tr 403).

On another occasion in June 2017, Ms. Singer was standing in the middle of her office, with the door open, when Respondent walked by, stepped in and said, “You look really hot in that outfit. You should always wear that outfit” (Tr 370). Ms. Singer, who was wearing a professional-looking outfit comprised of a skirt that extended to her knees and a matching top with a cowl neck, was “shocked and disgusted” by Respondent’s comment (Tr 370).

In 2016, Respondent told Mr. Kachadourian that he would like to ride Ms. Singer – who owns horses – like a horse (Tr 227-28).

- I. Ms. Gallagher testified that Respondent made disparaging comments to her about Supervising Court Assistant Rebecca Vroman's physical appearance and Ms. Vroman testified that Respondent angrily admonished her for being too "slow" in court on a day Respondent wanted to leave early.**

In August 2016, after working for two years as a court assistant in the Tompkins County Family Court, Rebecca Vroman became the supervising court assistant (classified as Grade 16) in the Broome County Family Court (Tr 322-23). As such, her duties included, *inter alia*, assisting Respondent in the courtroom by running the court audio recordings, processing paperwork, scheduling Respondent's court appearances, and supervising two lower-level (Grade 12) court assistants (Tr 322-23).

When Ms. Vroman joined the staff as supervising court assistant in Broome County Family Court, Respondent told Ms. Gallagher that Ms. Vroman was "fat and ugly," that he was going to be the "laughing stock" of Broome County and that he intended to get her fired from his team (Tr 591).

On February 6, 2017, Respondent was assigned for the week as the emergency intake judge, to hear petitions in which litigants were seeking emergency relief (Tr 323-24, 1354-55). On this particular date, Respondent was scheduled to hear a full caseload of regular cases during his morning and afternoon court sessions, in addition to any emergency petitions that were filed that day (Tr 325, 1354-55). Although Respondent was scheduled to begin his afternoon session at 1:30 PM and hear seven regular cases, he was late to court because he had physical therapy that morning and did not start afternoon proceedings until after 2:00 PM (Tr 325-26, 1354-55).

Beginning at around 2:30 PM, Ms. Vroman began receiving, via email from the Grade 12 court assistants, a number of emergency petitions that had been filed with the court that afternoon (Tr 324, 326). As soon as she received the petitions, she printed them out and handed them to Respondent for his review (Tr 326). Initially, Respondent accepted the petitions from her without any comment (Tr 326). But between 2:45 PM and shortly after 4:00 PM, Ms. Vroman received six more petitions and, as she was handing them to Respondent, he became increasingly agitated, shaking his head and telling Ms. Vroman that she was going too slow and that she needed to go faster because he had to be somewhere at 4:00 PM (Tr 326-27).

Court proceedings were not supposed to conclude until 4:30 PM, and Respondent had not notified Ms. Vroman that he needed to leave early that day, notwithstanding that Respondent had been scheduled as the emergency intake judge for that week well in advance (Tr 327-29, 1332, 1352).

When the last emergency petition of the day was called, Respondent stood up and, from a distance of three to four feet, yelled at Ms. Vroman that she was not doing her job properly, she was too slow and she needed to move faster (Tr 327-28). Ms. Vroman, who had no control over how many petitions were filed or how long it took for the petitions to get from the courthouse receptionists downstairs to her in the courtroom, was “flabbergasted” by Respondent’s conduct toward her (Tr 325, 327).

Very upset by Respondent’s behavior, Ms. Vroman reported the incident to her supervisors, Deputy Chief Clerk Margaret Raftis and Chief Clerk Debbi Singer, including

documenting it in writing (Tr 329-30, 371). Subsequently, Ms. Vroman learned that Respondent discovered she had made a complaint about him (Tr 330).

Indeed, after learning that Ms. Vroman “may have written a letter to [Ms. Singer]” about “certain issues” regarding Respondent, “the contents of which [Respondent was] uncertain,” Respondent wrote his own letter, dated March 1, 2017, to Ms. Singer complaining about Ms. Vroman (Resp Ex V). Ms. Singer investigated the various issues raised by Respondent, including his complaint that Ms. Vroman typed too loudly, and as she detailed in a written response, found his complaints to be, with a few fixable exceptions, mostly unfounded (Tr 372-73; Ex 12; Resp Ex V). In response to Respondent’s complaint that Ms. Vroman’s “lack of proficiency” caused court cases to run over designated times, Ms. Singer noted that the “more important” reason for such problem was that Respondent “consistently start[ed] the morning and afternoon calendars 30-45 minutes late [which] create[d] a situation that [was] nearly impossible to recover from and it also impact[ed] the rest of our courtrooms” (Ex 12, p 2, ¶5).

Ms. Singer also addressed Respondent’s complaint that Ms. Vroman failed to take into consideration his “physical therapy and personal time” when scheduling cases by noting that Supervising Family Court Judge Rita Connerton had already advised him, prior to the date of his letter about Ms. Vroman, to put his scheduling guidelines in writing and give them to Ms. Singer, so she could share them with Ms. Vroman and Respondent’s entire team, to allow everyone to know exactly when Respondent had physical therapy appointments and needed personal time (Ex 12, p 2, ¶4). Ms. Singer noted that, to date, she had not received his scheduling guidelines (Ex 12, p 2, ¶4).

Ms. Singer concluded that the real reason Respondent complained about Ms. Vroman was to retaliate against her for her complaint about him (Tr 373). Respondent never apologized to Ms. Vroman for his behavior in the courtroom and his demeanor toward her was “very cold” after the incident (Tr 330).

J. According to Mr. Kachadourian and Ms. Gallagher, Respondent threatened their physical safety and wellbeing.

In early 2015, on an occasion when he was walking at the Oakdale Mall with James Stilloe, Respondent telephoned Mr. Kachadourian (Tr 49-50, 52-53). Respondent said, “I’ve got somebody I want you to speak to,” and handed the phone to Mr. Stilloe, who told Mr. Kachadourian if either he or Ms. Gallagher crossed Respondent, they would have to answer to Mr. Stilloe (Tr 49-50, 53). Mr. Kachadourian was speechless and Mr. Stilloe’s threat caused him to be concerned for his personal safety (Tr 49-50).

In various conversations with Mr. Kachadourian and Ms. Gallagher, Respondent referred to friends, including Marty Shaw, David English, Frankie Saraceno, Mr. Iannone and James Stilloe, whom Respondent called his “enforcers,” and who Respondent said would do anything for him (Tr 50-53, 571-73). Respondent’s friendships with these individuals, and his comments about their criminal histories and/or prior bad acts and what they would do for Respondent, caused Mr. Kachadourian and Ms. Gallagher to be concerned for their personal safety (Tr 49-53, 571-73).

Respondent told Mr. Kachadourian that Mr. Shaw was “just out of Attica,” a reference to Mr. Shaw’s prison sentence on a conviction for two counts of Robbery in the first degree (Tr 52, 910-11, 917-18). Mr. Stilloe was convicted of Falsely Reporting an

Incident (Tr 860, 872). Respondent told Ms. Gallagher that Mr. Iannone had a juvenile conviction for threatening to kill a judge (Tr 280, 573, 821). Respondent acknowledged that Mr. English “may” have a criminal record (Tr 821). On one occasion, Mr. Kachadourian overheard a conversation on speaker phone between Respondent and Frankie Saraceno, in which Mr. Saraceno – who Respondent had tasked with collecting a debt owed to Respondent and who then failed to turn over the collection to Respondent – pleaded with Respondent to call off Mr. English, who Respondent had directed to retrieve the debt from Mr. Saraceno (Tr 50-51).

The Referee refused to admit into evidence certified court records showing the criminal convictions of Messrs. Shaw, Stilloe, English and Iannone (Tr 893-905; Ex 1A-1L for identification), ruling that it was “totally irrelevant” whether “it was in fact true” that Respondent’s associates were convicted criminals (Tr 905).⁵

In April or May 2017, in chambers, Respondent engaged in a telephone conversation with Jerry Penna, with the speaker phone function activated, such that Mr. Kachadourian and Ms. Gallagher heard Respondent say that he had “cement boots” in their shoe sizes and that, if they ever betrayed him, they “would be found at the bottom of the river” (Tr 54, 571).

⁵ Paradoxically, in his Report, the Referee accused Ms. Gallagher of concocting a false narrative about Respondent’s association with convicted criminals, writing, “I found that Ms. Gallagher was consciously trying to make Respondent sound ‘connected’ to bad people. If this were really the case, it is surprising that Ms. Gallagher would have wanted, or accepted, the position as secretary given the fact that she had worked closely with Respondent for many years at Johnson City Village Court” (Rep 13).

In March 2018, Broome County Supreme Court Justice Molly Fitzgerald informed Ms. Gallagher that there was credible evidence that David Iannone had received a pistol permit⁶ and had threatened to put a bullet through the heads of Ms. Gallagher and Mr. Kachadourian (Tr 589-90). As a result of the threat, a court officer was stationed at the rear exit of the county building, near Ms. Gallagher's office (Tr 590, 1199, 1205).

K. Respondent was reassigned from presiding over Family Court matters to handling foreclosure matters after allegations of his inappropriate behavior were reported to the Office of Court Administration.

Beginning in mid-to-late 2015, Ms. Gallagher began seeking the guidance and assistance of Ms. Singer with respect to Respondent's behavior (Tr 363, 568-71). While her early complaints related to his being overly controlling (Tr 363), around the summer 2016 Ms. Gallagher's complaints about Respondent's conduct alleged sexual harassment and, eventually, a death threat (Tr 360, 363-64). Each and every time Ms. Gallagher came to Ms. Singer about Respondent, she prefaced her remarks by asking Ms. Singer not to say anything for fear of retaliation and concluded their conversations by reiterating, "Please don't say anything" (Tr 404).

Mr. Kachadourian began coming to Ms. Singer to express his concerns about Respondent's conduct sometime later in 2016 (Tr 364). Initially, Ms. Singer advised Ms. Gallagher to retain a lawyer, speak to her union and/or report her complaints up her chain of command (Tr 364-65). In about June 2017, Ms. Singer reported their complaints about Respondent's sexual harassment and violent threats to her supervisor, then District

⁶ The Referee refused to admit into evidence an Order dated June 4, 2018, permanently revoking Mr. Iannone's pistol permit (Tr 896-97; Ex 1C for identification).

Executive Gregory Gates (Tr 357, 360). On July 11, 2017, after completion of an investigation by the Office of the Inspector General for the Unified Court System, Respondent was locked out of his chambers by court administrators and reassigned from presiding over Family Court matters to handling foreclosure matters in another building (Tr 48-49, 813-14, 1346, 1375, 1418-19).

L. Respondent's Testimony at the Hearing.

Respondent adamantly denied each and every allegation that he made any inappropriate sexual comments to or about Ms. Gallagher, Ms. L [REDACTED], Ms. Wojdat and Ms. L [REDACTED] (Tr 1371, 1392-96, 1398, 1463). Respondent maintained that he mentioned Ms. Wojdat to Mr. Kachadourian only in respect to stating she would have been a good secretary (Tr 1463). Respondent acknowledged that Mr. Penna had visited him in chambers but denied speaking with him about Ms. L [REDACTED] (Tr 1482).

Respondent also denied making any of the inappropriate sexual comments alleged by Ms. Singer, notwithstanding that he considered her to be a "truthful," "honest," "classy" and "professional" person (Tr 819, 1399, 1476). He denied engaging in conversations with Mr. Iannone about Mr. Iannone's sexual experiences with Ms. L [REDACTED], although he acknowledged having called Mr. Iannone from his office and that he would sometimes use the speakerphone function (Tr 1394-95, 1478-79). Respondent denied that he displayed a photograph purporting to depict Ms. L [REDACTED]'s nude torso to Mr. Kachadourian (Tr 1394-95, 1480). Respondent denied that he displayed photographs or drawings of nude females to Mr. Kachadourian or Ms. Gallagher (Tr 1394, 1398, 1480).

Respondent testified that, at Mr. Kachadourian's suggestion, he asked Senator Akshar for his cell phone number but failed to get it during their trip to Albany (Tr 1474). However, he denied he was upset about it and denied stating that he wanted Ms. Gallagher to perform sexual favors for the senator (Tr 1398-99, 1474-76).

Respondent denied calling Ms. Vroman "fat" or "ugly" (Tr 1397) and denied that, on February 6, 2017, he loudly or angrily admonished Ms. Vroman (Tr 1397-98). Respondent denied making any threatening comments to Ms. Gallagher or Mr. Kachadourian (Tr 1392-94, 1396).

Notwithstanding that, as Respondent's personal appointees, Mr. Kachadourian and Ms. Gallagher were dependent upon Respondent for their positions, Respondent claimed that they fabricated these allegations against him because they had "work performance issues" and because they believed that they would be terminated (Tr 1373-74, 1444-45). He conceded, however, that he didn't tell either Mr. Kachadourian or Ms. Gallagher that he wanted to terminate Ms. Gallagher (Tr 1463). The only time that Respondent made any inquiry about terminating Ms. Gallagher and Mr. Kachadourian was on July 10, 2017 – the day before court administrators reassigned him out of Family Court and after the secretary and attorney had already been interviewed by the Inspector General's Office (Tr 1360, 1370-73). Respondent also maintained that Mr. Kachadourian and Ms. Gallagher fabricated the allegations in order to bring a federal lawsuit against him for monetary gain (Tr 1374, 1428-29).

Respondent did not address why Ms. Singer or Ms. Vroman would have fabricated their testimony about Respondent's inappropriate behavior toward them (Tr 1428, 1476).

Nor did Respondent offer any testimony as to why Ms. L [REDACTED] would fabricate her testimony about Mr. Iannone showing her a photograph of a nude woman, wearing an elephant pendant necklace like one Ms. L [REDACTED] owned, which Mr. Iannone told her he had shown to Respondent.

Although Respondent had an opportunity to select a number of others to appoint as his personal secretary when he was elected to Family Court, Respondent claimed that he chose Ms. Gallagher solely because he “felt sorry for her,” notwithstanding that she had served for 10 years as his chief court clerk at Johnson City Village Court and Respondent believed that she had done a “good job” there (Tr 1303, 1312, 1325-27). Respondent acknowledged that when he appointed Ms. Gallagher, he was aware that a hostile workplace claim had been filed against her while at the Johnson City Village Court (Tr 1312, 1325, 1328).⁷

Respondent claimed that he neither drafted nor reviewed performance evaluations of Ms. Gallagher and Mr. Kachadourian, giving them glowing reviews, sent from his court email address, in January 2016 and January 2017, to District Executive Gates and Judge Robert C. Mulvey (Tr 1367-70; Resp Ex NN). Respondent maintained that Mr. Kachadourian sent these evaluations without Respondent’s knowledge or consent (Tr 1369-70).

⁷ Ms. Gallagher testified that, while at Johnson City Village Court, another employee named Kim Cunningham made a complaint against her, the allegations of which were unknown to Ms. Gallagher (Tr 691-93). To Ms. Gallagher’s knowledge, the result of the complaint was that the allegations were unfounded but that she was recommended to attend one counseling session, which she did (Tr 693).

Charge II: Respondent lent the prestige of judicial office to advance his own private interests and/or the interest of others, and failed to conduct his extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that, on multiple occasions, he importuned chambers staff to perform services unrelated to their official duties, including prohibited political activity.

Mr. Kachadourian and Ms. Gallagher testified that, from in or about November 2015 through May 2017, Respondent importuned his court staff to assist him with tasks related to his private law practice and to engage in political activity for his own judicial campaign and for the campaigns of friends and relatives.

A. Background on Respondent's Prior Legal Practice.

From 1994 to 2014, Respondent maintained a private legal practice located at 2█ North Street in Endwell, New York (Tr 824-25, 1032, 1300-02). After Respondent's election to the Family Court, his former legal assistant, Danuta "Donna" Filip continued to work at the 2█ North Street law office for Artan Serjanej, Esq., who came to occupy the space and took over some of Respondent's files (Tr 60, 595, 812, 825 1035).

One of the files from Respondent's private practice that was still open and pending after January 1, 2015, was the *Estate of Roger Funk* (Tr 824, 832-34).

B. Ms. Gallagher testified that Respondent directed her to write correspondence to the executor of the *Estate of Roger Funk* to obtain payment for his legal services.

On November 6, 2015, Respondent picked up the mail from his former law office and brought it to chambers (Tr 1488). Later that day, he walked into Ms. Gallagher's office and opened the law office mail, which included an envelope addressed to Mr.

Serjanej from Thomas Hayes that contained three unsigned checks (Tr 71-72, 597; Ex 2V, p 2). The three unsigned checks were drawn from the *Estate of Roger Funk* (Ex 2V, p 2). One of the checks was payable to Respondent in the amount of \$11,184.60 (Ex 2V, p 2). A second unsigned check was payable to Donna Filip in the amount of \$2,275.00 (Ex 2V, p 2). On both checks, the “For” and signature lines were blank (Ex 2V, p 2).

When he realized that the checks were not signed, Respondent became upset and directed Ms. Gallagher to photocopy the checks and the envelope that they came in, and to write a brief letter returning the three checks to Mr. Hayes for his signature (Tr 71-72, 597). He also told Ms. Gallagher to draft the letter as if Ms. Filip were the author and sender (Tr 598). Respondent explained to Ms. Gallagher that he was receiving payments for legal services he performed “on old files” (Tr 836).

Ms. Gallagher typed the letter at her desk and made a couple of edits at Respondent’s direction (Tr 72, 745, 597). She then gave the letter, original checks and photocopies back to Respondent (Tr 598). Respondent received his “unpaid legal fee” in the form of two checks dated December 1, 2015, and signed by Mr. Hayes in the amounts of \$5,384.00 and \$5,800.60 (Ex 2W).

Respondent’s request that Ms. Gallagher type a letter for his private law practice is consistent with his general practice of using court resources for personal benefit.

Respondent told Ms. Gallagher to make copies of documents for his personal use “on a daily basis” (Tr 226, 596, 599, 600, 603). He directed Ms. Gallagher to accompany him to 2█ North Street to make copies, and he told his chambers staff to take files from his former law office to be photocopied at an off-site location (Tr 596, 655-656, 738). In

April 2016, while in his judicial chambers, Respondent ordered Ms. Gallagher to assist him with his taxes (Tr 554, 739, 770). And on at least one occasion, Mr. Kachadourian expended time and money to collect and photocopy documents and later FedEx the items to Respondent's counsel concerning a private legal matter (Tr 177-78, 234-35).

C. Ms. Gallagher and Mr. Kachadourian testified that, in 2016 and 2017, Respondent asked them to engage in political activity for his personal benefit and that of his friends and relatives.

“Pretty much from the beginning” of his Family Court term, Respondent asked Ms. Gallagher and Mr. Kachadourian to engage in political activity (Tr 592-93, 772). Respondent asked Ms. Gallagher to maintain lists of names for future political campaigns (Tr 727, 736), such as lists of Family Court staff and others he met that included their voter registration status (Tr 592). The list-making continued in November 2015 and into 2016 until Ms. Gallagher no longer had time to maintain it (Tr 736). Respondent also asked Mr. Kachadourian to maintain a list of individuals that Respondent believed “would benefit him politically” in “future campaigns” (Tr 57). Mr. Kachadourian did not follow Respondent's directive (Tr 57).

In May 2016, Respondent requested that Ms. Gallagher perform campaign work with Respondent's mother and offered up the services of his chambers staff to George Phillips who ran for political office in 2016 (Tr 772). Respondent spoke to Mr. Phillips on the phone and told him that his “team” would work for his campaign (Tr 772).

In or about August 2016, Respondent told Ms. Gallagher that she needed “to make [her] office a campaign office” (Tr 592, 772). In the spring of 2017, Respondent told Ms.

Gallagher that she should run a campaign office in the Broome County Family Court for a prospective judicial campaign by Mr. Serjanej (Tr 593, 764).

In June 2017, Respondent demanded that Ms. Gallagher collect signatures for the designating petition of Richard Balles, Respondent's brother-in-law (Tr 57, 593, 965) who ran for mayor of Johnson City in the fall of 2017 (Tr 57, 593, 823). Ms. Gallagher did not collect the signatures because Mr. Kachadourian told her that they were not permitted to do so (Tr 594). When Respondent returned from a work-related trip, he called Mr. Kachadourian "very upset," causing Mr. Kachadourian to think that someone had been hurt (Tr 57). Instead, Respondent was "very angry" that Ms. Gallagher had not collected any signatures for his brother-in-law (Tr 57, 594). Earlier in the year, Mr. Balles had visited Respondent's judicial chambers to have photographs taken for his mayoral campaign (Tr 593, 772).

D. Mr. Kachadourian testified that Respondent asked him to help him finalize the *Estate of Jerry J. Behal, Jr.*

In early 2017, Respondent told Mr. Kachadourian that the Broome County Surrogate's Court had requested a formal accounting in the *Estate of Jerry J. Behal, Jr.* (Tr 61-63). Respondent did not have the required form and asked Mr. Kachadourian to find an attorney to produce the formal accounting and to obtain the form (Tr 61, 63). During their conversation, Respondent showed Mr. Kachadourian emails that were sent to "Rick," "Donna" and the estate executor "Dave Behal" (Tr 62-64, 67-68; Ex 4III). The email address associated with "Rick" was [REDACTED]@aol.com, Respondent's personal email address that he used both prior to and after becoming a Family Court judge (Tr

848, 1376). Mr. Kachadourian did not obtain the form or find an attorney to produce the accounting (Tr 63). Eventually, Respondent obtained the forms he needed from a different attorney (Tr 63).

E. Respondent's Testimony at the Hearing.

Regarding the letter to Mr. Hayes, Respondent testified that he went to his former law office and picked up an open letter addressed to Mr. Serjanej (Tr 1490). He did not open the letter until later in the day, after court, when he had returned to his chambers (Tr 1488, 1490). When he opened the envelope and saw the checks inside, he told Ms. Gallagher, "The checks aren't signed" (Tr 1454, 1488). According to Respondent, the two had a "brief discussion" during which Respondent explained that the checks were compensation for work that he did prior to becoming a judge (Tr 1456-57, 1488) and Ms. Gallagher "volunteered" to draft the letter to Mr. Hayes (Tr 1400, 1454-55, 1456-58). Respondent "[didn't] think" that he told Ms. Gallagher to write the letter as if Ms. Filip were the author and sender (Tr 1455-56). Respondent conceded that it would be improper to direct Ms. Gallagher to type such a letter (Tr 1459). Respondent took the letter to Mr. Serjanej's office because it "had to go out from the law office" (Tr 1401, 1458). He was paid by checks dated December 1, 2015 (Tr 1463-64).

Respondent denied asking Ms. Gallagher or Mr. Kachadourian to engage in any political activity (Tr 1399). He agreed it would be improper to ask his court secretary to keep a list of names for political purposes (Tr 1459) but maintained he did not ask Ms. Gallagher to do so (Tr 1399-1400). Respondent denied asking Mr. Kachadourian or Ms.

Gallagher to assist his brother-in-law's campaign (Tr 1400-01) and denied ever telling his chambers staff that he wanted his chambers to be a campaign office (Tr 1401).

Charge III: As a full-time judge, Respondent engaged in the practice of law and/or conveyed the impression that he was still engaged in the practice of law in the *Estate of Antoinette Saraceno* and the *Estate of Jerry J. Behal, Jr.*

Commission counsel submitted documentary and testimonial evidence that, notwithstanding his status as a full-time Family Court judge, Respondent engaged in the impermissible practice of law, or appeared to do so, with respect to two estate files from his former private law practice that remained pending after he took the bench.

A. Transition from Private Practice to Family Court Bench.

After practicing law for two decades, Respondent had accumulated "many files," some of which remained pending after he assumed the Family Court bench (Tr 824). On the advice of Mr. Kachadourian, Respondent met with David Kapur, Esq., and discussed transferring his client files to Mr. Kapur (Tr 823). Mr. Kapur spent \$1,000 to run advertisements in local newspapers that informed Respondent's clients that he would be handling their legal matters (Tr 133-34). Ultimately, however, Respondent gave Mr. Kapur only a dozen of his open files (Tr 133, 824-25), while the majority remained with Mr. Serjanej, who took over Respondent's law office space in the first quarter of 2015 (Tr 133, 823, 825, 1032).

Artan Serjanej has known Respondent since 2001 (Tr 1029). Mr. Serjanej has a solo practice (Tr 1027-28) concentrated in the areas of criminal law, family law and real estate law (Tr 1029, 1034-35). Prior to taking over Respondent's law office, Mr. Serjanej

had not practiced trusts and estates law as a solo practitioner (Tr 1102). He currently serves as a “family attorney” for Respondent, and Respondent’s wife, mother, and brother-in-law (Tr 1035). Mr. Serjanej pays taxes, utilities and insurance at 2█ North Street in lieu of rent (Tr 825, 1031).

After Respondent’s election to Family Court, his former legal assistant Donna Filip continued to work at the 2█ North Street law office for Mr. Serjanej (Tr 60, 595, 812, 1035). After he took the Family Court bench, Respondent continued to speak to Ms. Filip on a near daily basis, sometimes multiple times a day (Tr 595, 752). She also came to Respondent’s judicial chambers to bring him files from his former law office on North Street (Tr 595). In his first month in office, Ms. Gallagher heard Respondent “screaming and yelling” at Ms. Filip on the phone about various files (Tr 653).

Even after Respondent transferred his practice to Mr. Serjanej, he went to 2█ North Street on a “constant basis” according to Mr. Kachadourian (Tr 29). During these visits, Respondent worked on legal cases, for at least an hour, with Ms. Filip and/or Mr. Serjanej (Tr 60, 173, 176, 229-30). Once, Mr. Kachadourian told Respondent that by continuing to perform legal work he was jeopardizing his elected Family Court position, which he likened to signing a \$2 million contract (Tr 60-61, 172). Nevertheless, Respondent’s visits to his former law office “continued and continued” (Tr 61). On at least 30 occasions, Respondent told Mr. Kachadourian to accompany him to his former law office during lunch, and once there Respondent worked on legal matters (Tr 59-60, 176).

Two of the estates that Respondent worked on after he assumed the bench were the *Estate of Antoinette Saraceno* and the *Estate of Jerry Behal, Jr.* (Tr 61).

B. *Estate of Antoinette Saraceno.*

Antoinette Saraceno died on October 15, 2010, leaving an estate with an approximate value of less than \$150,000 (FWC ¶35; Ans ¶35; Ex 5B, p 4, Ex 5H, p 4). In her will, Ms. Saraceno directed that Respondent “be retained to assist” the executor with the administration of her estate (Ex 5D, p 4).

1. Respondent’s involvement with the *Estate of Saraceno* prior to being elected to Family Court.

On December 10, 2010, Respondent filed a Petition for Probate in the Tioga County Surrogate’s Court in the *Estate of Antoinette Saraceno* (FWC ¶35; Ans ¶35; Exs 5B, 5C). After two of Ms. Saraceno’s brothers renounced their nominations, Frank Saraceno, Sr., became the alternate executor (Ex 5F).

In April 2011, John I. Saraceno, Jr., an estate beneficiary, filed a letter with the Tioga County Surrogate’s Court alleging, *inter alia*, that Respondent, Frank Saraceno, Sr., and Frank Saraceno, Jr., altered Ms. Saraceno’s will (Ex 5P). A hearing was held on April 15, 2011 (Exs 5L, 5N) before Tioga County Surrogate Judge Vincent Sgueglia, who granted Frank Saraceno, Sr., preliminary letters testamentary “with limitations” (Exs 5Q, 5R, 5S) and gave John Saraceno, Jr., 30 days to file objections (Ex 5Q).

On May 9, 2011, John Saraceno, Jr. filed his objections (FWC ¶36; Ans ¶36; Ex 5T) but he did not serve his objections on Respondent until June (Ex 5AA). On August 26, 2011, Judge Sgueglia granted Respondent’s motion for an order dismissing the

objections (FWC ¶36; Ans ¶36; Exs 5Y, 5AA), signed a Decree Granting Probate and issued Letters Testamentary to Frank Saraceno, Sr. (Exs 5BB, 5CC).

The following year, on March 1, 2012, the Surrogate's Court advised Respondent that an inventory of assets had not been filed (Ex 5EE). Respondent filed the inventory on March 1, 2012 (FWC ¶37; Ans ¶37; Ex 5FF) and on April 6, 2012, Respondent received his legal fee in the amount of \$6,960.00 (FWC ¶38; Ans ¶38; Ex 5UU).

More than a year later, on September 12, 2013, the court directed Respondent to explain why the estate had not been fully distributed or, in the alternative, explain why a final accounting had not been filed (Ex 5HH). Three months later, on December 27, 2013, the court faxed Respondent a letter requesting an inventory (Ex 5II). There was no further correspondence until March 20, 2014, when the chief clerk sent Frank Saraceno, Sr., a Citation directing him to appear in court on May 2, 2014 to explain why his Letters Testamentary should not be suspended or revoked (Ex 5JJ).

Ms. Filip called the court on April 7, 2014 and told Chief Clerk Deborah Stone that the inventory would be filed (Ex 5A, p 5). Nearly four months later, on July 28, 2014, Respondent filed a form with the court in which he requested additional time to collect "all the receipts, releases and discharges of beneficiaries" (Ex 5LL, p 2).

Thereafter, nothing further was filed by Respondent in Surrogate's Court.

2. Respondent's involvement with the *Estate of Saraceno* after being elected to Family Court.

On August 2, 2016, more than a year after Respondent assumed the Family Court bench, Kiyoko "Kiki" Matsuhashi, a clerk in the Surrogate's Court, emailed Respondent

a warning letter requesting that he “immediately” file an inventory (Tr 424, 448-49; Exs 5A, p 4, 5MM). Ms. Matsuhashi also mailed the August 2nd letter to Frank Saraceno, Sr. (Tr 449; Ex 5MM).

On August 15, 2016, Ms. Matsuhashi spoke to Barbara Saraceno, the executor’s wife (Tr 427-28; Ex 5A, pp 3-4). At the time of the call, Frank Saraceno, Sr., was in a nursing home and Mrs. Saraceno opened mail addressed to her husband (Tr 474-75; Ex 5A, p 4). Mrs. Saraceno recalled that the court called her several times because the estate “was not resolved yet” (Tr 475). Mrs. Saraceno told Ms. Matsuhashi that she spoke to Ms. Filip who told her that Respondent had become a judge and was “no longer practicing” (Exs 5A, p 4, 5NN).

On October 10, 2016, Mrs. Saraceno called Respondent on his cellphone or at his prior law office (Tr 477). Respondent made a contemporaneous note in his DayMinder calendar that said “Saraceno” (Tr 852). Mrs. Saraceno told Respondent that she had received a letter from the Surrogate’s Court “that things weren’t filed” and the estate was not finalized (Tr 477). Respondent told Mrs. Saraceno that everything would be “taken care of and not to worry about it” (Tr 475, 477).

Two days later, on October 12th, Respondent called Ms. Stone at Tioga County Surrogate’s Court (Tr 424-25). In his DayMinder, Respondent wrote “Frank Saraceno” and circled it (Tr 852-53). He also made the notation “Donna office” and circled the time of 5:15 (Tr 853).

During the telephone conversation with Ms. Stone, Respondent told her that one beneficiary, Greg Saraceno, would not sign a waiver and asked how to close the estate

(Tr 425; Ex 5A, p 3). Ms. Stone told Respondent that if he could not get a beneficiary to cooperate, he may need to file a formal accounting (Tr 425; Ex 5A, p 3).

Ms. Stone testified that Respondent requested that Judge Gerald A. Keene close the estate “by motion” (Ex 5A, p 3; Tr 425). Ms. Stone had made a contemporaneous note of Respondent’s request in the estate file (Ex 5A, p 3). Ms. Stone understood Respondent to be making a request that the estate be informally closed because he could not obtain all of the required documents and did not want to file a formal accounting (Tr 425). On October 14, 2016, Ms. Stone called Respondent who “had left a phone number for me to return his call” (Tr 426) and informed him that Judge Keene was requiring a formal accounting (Tr 426; Ex 5A, p 3). Respondent responded “Okay” and the conversation ended (Tr 426). He did not file a formal accounting (Tr 426).

On December 16, 2016, Mrs. Saraceno called the surrogate’s court and asked Ms. Stone if Respondent had “filed anything since he told [her] he would finish it up” (Ex 5A, p 3). Ms. Stone told Mrs. Saraceno that a substitution of attorneys “was going to be filed but nothing has been filed yet” (Ex 5A, p 3). On March 28, 2017, Ms. Matsunami emailed Respondent a letter “directing” him to “immediately” file a statement pursuant to Rule 207.42 and any outstanding releases and advising that if he did not do so, the court might revoke the Letters Testamentary and demand a formal accounting (Ex 5PP).

Over a year later, by letter dated January 29, 2018, Artan Serjanej filed a Notice of Appearance in the matter (Exs 5RR, 5SS). Mr. Serjanej finalized the estate on January 4, 2019, just six days before his testimony before the Referee (Tr 1038). He was not paid for his work in closing out the estate (Tr 1041).

C. *Estate of Jerry J. Behal, Jr.*

Jerry J. Behal, Jr. died on October 11, 2011, in a motorcycle accident and his brother, David Behal, was appointed to serve as the estate executor (FWC ¶46; Ans ¶46; Ex 4C, p 1; Tr 1116). David Behal and Respondent have been friends since they were four years old and Respondent served as a best man in Mr. Behal's wedding (Tr 847,1116).

1. Respondent's involvement with the *Estate of Jerry Behal* prior to being elected to Family Court.

On October 26, 2011, Respondent filed a petition for probate in the Broome County Surrogate's Court on behalf of Mr. Behal (Ex 4C). There were six beneficiaries of the estate: five of the decedent's nieces and nephews, and a friend of the decedent's (FWC ¶46; Ans ¶46). In November 2011, the decedent's will was admitted to probate (FWC ¶46; Ans ¶46).

In July 2014, Respondent filed a petition on behalf of Mr. Behal for an order authorizing the executor to settle a claim for \$100,000 for the wrongful death of the decedent (FWC ¶47; Ans ¶47). In December 2014, Respondent filed an attorney's affidavit in support of the petition (FWC ¶47; Ans ¶47).

2. Respondent's involvement with the *Estate of Behal* after being elected to Family Court.

By Order dated January 23, 2015 – three weeks after Respondent became a Family Court Judge – Surrogate David Guy approved the settlement (Ex 4Z). The estate received the settlement proceeds on April 20, 2015 (Ex 4PP, p 5). On March 20, 2015, Mr. Behal signed a Consent to Change Attorney, substituting Mr. Serjanej to represent

him in connection with the personal injury action (Ex CC). However, Mr. Serjanej did not file a Notice of Appearance with the surrogate's court until November 23, 2015 (Ex 4CC). Mr. Behal selected Mr. Serjanej to take over the estate based on Respondent's recommendation (Tr 1049, 1117).

On October 13, 2015, Donna Ougheltree, one of the beneficiaries, filed a petition requesting a Compulsory Accounting and Judge Guy ordered Mr. Behal to file an Account by March 31, 2016 (Exs 4AA, 4BB, 4EE). On April 29, 2016, Mr. Serjanej requested and received an extension to file the accounting until May 31, 2016 (Exs 4FF, 4GG).

On September 21, 2016, after Mr. Serjanej failed to file the accounting, Surrogate Guy ordered Mr. Behal to file the accounting by October 7, 2016, or he would be removed as executor (Ex 4II). On the same date that Judge Guy issued his order, Robert Wedlake, Esq. filed a Notice of Appearance on behalf of Joshua Behal, a beneficiary (Ex 4HH).

On October 7, 2016, Mr. Serjanej requested another extension due to the pending sale of a piece of real property (Ex 4JJ) and the Surrogate extended the deadline to November 21, 2016 (Ex 4KK).

In October 2016, Respondent called Mr. Wedlake about an unrelated matter (Tr 513), and Mr. Wedlake asked Respondent about the *Behal* estate (Tr 506). Mr. Wedlake was seeking information to help him advise his client (Tr 514), who was concerned because the estate had been open for five years without any distributions (Tr 490, 506). Mr. Wedlake also expressed concern that Mr. Serjanej "was not experienced" in estate

matters and struggled with handling the estate (Tr 507, 516). For months, Mr. Wedlake tried unsuccessfully to communicate with Mr. Serjanej about the estate (Tr 504). Instead, whenever he called the law office, Mr. Wedlake spoke to “Donna” (Tr 503-04). Ms. Filip even appeared at an attorney conference (Tr 505). Respondent told Mr. Wedlake that Mr. Behal was a friend who would not steal money from the estate (Tr 507).

Mr. Serjanej did not file an accounting; Surrogate Guy scheduled an attorney conference on December 19, 2016 (Ex 4LL) and subsequently issued an Order directing Mr. Behal to file an accounting by May 19, 2017 or he would be “removed as executor of the estate without further notice” (Ex 4NN).

Between March 2017 and May 9, 2017, Mr. Behal emailed Respondent and Ms. Filip multiple times, sending spreadsheets containing estate accounting records; Mr. Serjanej was not copied on the emails (Tr 848, 1106; Ex 4III). Mr. Kachadourian testified that, at some point, Respondent showed him the emails from Mr. Behal containing the estate accounting, and asked Mr. Kachadourian to find an attorney to complete the accounting and to find the proper forms for the account (Tr 61, 63).

On May 10, 2017, Mr. Behal drove from his home in Virginia to Johnson City, NY (Tr 1137). The following day, May 11, 2017, he met with Ms. Filip and Mr. Serjanej at 2█ North Street to go over the estate accounting (Tr 1137).

On May 12th, Mr. Behal went to Respondent’s chambers (Tr 63, 178-79, 848, 1138). When Mr. Behal arrived, Respondent was in court (Tr 1138) and Mr. Kachadourian met Mr. Behal at the public entrance and escorted him to Respondent’s chambers (Tr 1138-40). On the way back to chambers, the two coincidentally saw Mr.

Serjanej in the lobby (Tr 232, 1139). Mr. Kachadourian testified that Mr. Behal told him “how dissatisfied he was with [Mr. Serjanej’s]” handling of the estate (Tr 232).

According to Mr. Kachadourian, when Respondent returned to his chambers, Mr. Kachadourian observed him going over the accounting with Mr. Behal (Tr 63, 185). Mr. Kachadourian overheard Respondent tell Ms. Filip that he wanted “his regular attorney fees” (Tr 64). Respondent and Mr. Serjanej were going to split the fee after assessing what monetary expenses and time Respondent contributed toward the estate versus Mr. Serjanej’s contributions (Tr 1152-53).⁸

The accounting filed by Mr. Serjanej on May 26, 2017 was rejected by Judge Guy as insufficient on June 15, 2017 (Exs 4PP, 4QQ). An amended accounting was not subsequently filed and Surrogate Julie A. Campbell signed a Citation on October 16, 2017 requiring the parties to appear in court (Ex 4TT). A trial was held in the summer of 2018 and the parties reached a settlement (Tr 512, 1051). Mr. Serjanej was paid \$10,950.32 as the entire legal fee; there is no current plan for Respondent to be paid for his portion of the work in the estate (Tr 1104-06; Ex 4HHH).

D. Respondent’s Testimony at the Hearing.

Respondent testified that while he was in private practice he accumulated hundreds of files, some of which were pending when Respondent became a Family Court judge (Tr 1432). Respondent testified that Mr. Kachadourian suggested that David Kapur, Esq., take over the files (Tr 1306, 1432). Respondent confirmed that Mr. Kapur

⁸ In Commission Counsel’s brief to the Referee, the allegation in ¶59 of the Formal Written Complaint that “[o]n or about May 22, 2017, Respondent worked on the Behal estate accounting at his former law office” was withdrawn.

ran an advertisement in the newspaper to notify clients that he would be taking over Respondent's files, but ultimately Mr. Kapur only "took certain files" (Tr 1306). Attorney Brett Noonan took "some of the files" and the remainder remained at his law office with Mr. Serjanej (Tr 1306, 1308, 1313).

Respondent acknowledged that Ms. Filip had served as his legal secretary and he conceded that he maintained contact with her after he became a Family Court judge (Tr 1400, 1433). He continued to visit his former law office for "personal legal matters" that Mr. Serjanej handled for Respondent and other members of his family but estimated that he went there no more than 20 times after January 2, 2015 (Tr 1436-37).

Respondent denied engaging in the practice of law and/or conveying the appearance that he was still engaged in the practice of law (Tr 1401), which he knew was prohibited (Tr 1431). He conceded that the Commission previously censured him for conflicts between his judicial office and his private legal practice (Tr 1433). Respondent acknowledged that he went to his former law office on occasions concerning personal legal matters that Mr. Serjanej was handling (Tr 1436-37). Respondent denied that Mr. Kachadourian told him, in sum or substance, that he was jeopardizing a \$2 million contract by practicing law as a full-time judge (Tr 1432-33).

Respondent testified that he did not do any work, receive any payments, or provide any advice on the *Saraceno* estate after January 1, 2015 (Tr 1319-21). Respondent acknowledged that he spoke to Mrs. Saraceno on the telephone after that date, but maintained that the two did "not speak about specifics" concerning the estate

(Tr 1453). He testified that he may have told her that *he* would take care of the estate for her, but he meant that Mr. Serjanej would (Tr 1320).

Respondent conceded that he had two telephone conversations with the Tioga County Surrogate's Court concerning *Saraceno* (Tr 1318). The first occurred on October 12, 2016 (Tr 1318-19). Respondent testified that he "may" have given the Tioga County Surrogate's Court "a courtesy call" to inform the court that he was a Family Court judge (Tr 1316), even though he claimed "everyone knows who the judges are in each neighboring county" (Tr 1402, 1447).

Respondent acknowledged that he received "a communique" from the Surrogate's Court, but he did not believe he received the letter dated August 2, 2016 (Tr 1402). Respondent stated that he was "perplexed" to have received correspondence from the court because he believed that the estate had been finalized in 2012 (Tr 1318). According to Respondent, he called the court to explain that he could not practice law and that "another attorney would be handling the case and there's nothing I could do with it" (Tr 1316, 1402-03). Respondent allowed that he "may" have also provided the clerk with "some historical information" about *Saraceno* including that the executor was elderly and that one beneficiary would not accept a gift (Tr 1316, 1403, 1448). He also may have told the clerk that if they needed anything, they could contact him, but he did not ask for "anything to be done" on the estate (Tr 1318, 1403).

Respondent specifically denied that he asked Ms. Stone if the *Saraceno* estate could be closed by motion (Tr 1448). He claimed that he was confused to receive a call from the clerk following their October 12th conversation (Tr 1318, 1403). He conceded

that if he asked the court to close the *Saraceno* estate by motion that would be an improper action (Tr 1449).

Respondent has known David Behal since the age of four (Tr 1322). The two grew up across the street from each other, and Respondent described Mr. Behal as his childhood “best friend” (Tr 1322). Respondent admitted that he performed certain legal work on the *Behal* estate through December 2014 (Tr 1405-06). Mr. Behal met with Mr. Serjanej in December 2014 and “chose to have Artan Serjanej handle the case” (Tr 1322). Respondent did not have any knowledge of, or involvement in, legal work performed in the estate after December 2014 (Tr 1406-07).

Respondent testified he met Mr. Behal on occasions in his judicial office for lunch, but they never discussed the “substance of the estate” (Tr 1378, 1407-08, 1438). Respondent maintained that he did not advise or direct Mr. Serjanej in his handling of *Behal* (Tr 1323) and did not speak to Ms. Filip about the estate (Tr 1439). He claimed that he never saw the emails sent by Mr. Behal to Respondent’s AOL account, and that neither Ms. Filip nor Mr. Behal mentioned them to him (Tr 1439).

Respondent denied working on the *Behal* accounting at his former law office (Tr 1408). Respondent never intended to take a legal fee from his best friend and did not receive any payment for any legal work he performed (Tr 1323-24, 1445, 1490).

Charge IV: Respondent failed to file timely and accurate disclosure reports of his income from extra-judicial activities with the Ethics Commission for the Unified Court System, the Internal Revenue Service, the New York State Department of Taxation and Finance and the Clerk of the Broome County Family Court as required.

From January 2015 through the date of the Formal Written Complaint, Respondent failed to properly report legal fees and rental income he received after taking the bench on his state and federal income tax returns and his Ethics Commission Financial Disclosure Form. Respondent also failed to file a report disclosing that income with the Clerk of the Broome County Family Court.

A. Respondent received at least \$27,387 in 2015 for legal work he had performed in *Estate of Deborah Brigham*, *Estate of Roger Funk* and on behalf of clients Jeff Jump and Alysa Durkee, which he failed to disclose when he filed his 2015 Annual Statement of Financial Disclosure with the Ethics Commission for the Unified Court System in May 2016.

Respondent was paid a total of \$16,203.60 as his legal fee for his handling of the *Estate of Deborah Brigham* by three separate checks dated November 24, 2015 (FWC ¶64; Ans ¶64; Tr 841, 843-44; Ex 6Q). According to Respondent, the estate was “pretty well done” before he took the Family Court bench, but he conceded he was still listed with the Broome County Surrogate’s Court as the estate attorney in October 2015 (Tr 842-43).

By checks dated December 1, 2015, Respondent received payment of \$11,184 as his legal fee for work he had performed as the estate attorney in *Estate of Roger Funk*, which was also still pending when Respondent assumed judicial office (FWC ¶65; Ans ¶65; Tr 833-34, 839-40; Ex 2W). Respondent also received legal fees from clients Jeff

Jump and Alysa Durkee, for a total amount of \$27,387.60 in legal fees received by Respondent in 2015 (Ex 10C, p 1).

Respondent filed his Annual Statement of Financial Disclosure (FDS) with the Ethics Commission for the Unified Court System for calendar year 2015 on May 13, 2016 at 5:05 PM (Ex 8B, p 1). Respondent failed to disclose any of the more than \$27,000 in income he had received in 2015 from legal work (Ex 8B, p 4, ¶13).

B. Respondent did not amend his 2015 Statement of Financial Disclosure to include income from the practice of law until November 2017, after he was notified by the Commission about his failure to do so.

On November 16, 2017, twelve days before his scheduled appearance before the Commission for testimony, Respondent amended his 2015 Annual Statement of Financial Disclosure to include “Income” from “former private law practice” in the Category Amount of \$20,000 to under \$60,000 (Ex 8D, p 4, ¶13; Tr 810, 828-29).

C. Respondent failed to report thousands of dollars of income he received from the practice of law and from rents on his Federal and State Income Tax Returns for 2015 and 2016.

Respondent failed to report tens of thousands of dollars of outside income on his 2015 and 2016 state and federal income tax returns.

1. Respondent received a total of \$6,000 per year in 2015, 2016 and 2017 from the rental of the apartment at 2█ North Street, Endicott.

In addition to the more than \$27,000 Respondent received in 2015 for legal work in the *Funk* and *Brigham* estates, Respondent also received a check for \$500 each month (\$6,000 per year) from tenant Louis Micha, for the rental of the apartment upstairs from the law office at 2█ North Street (Tr 523; Ex 7C). Respondent’s wife is the owner of

the building (Tr 828). Mr. Micha, who had been Respondent's legal client, moved into the apartment in November 2013, after his divorce (Tr 522-23). There was no lease and the rent did not include utilities (Tr 524). Dave Iannone, the "super," showed Mr. Micha the apartment and was the person he would call if there were any issues with the apartment (Tr 523-24, 832).

Mr. Micha always paid his rent by check payable to Respondent at the end of the month before the month it was due, and gave each check to Donna Filip, the legal secretary in the law office downstairs (Tr 524-25; Ex 7C). Ms. Filip would give Mr. Micha a receipt and make a copy of the check and receipt (Tr 527; Ex 7C).

Respondent told Mr. Micha to leave the rent checks with the law office (Tr 828). Respondent cashed all the checks (Tr 528).

2. Respondent received \$1,400 in rent in 2015 and \$9,600 in rent in 2016 from tenants David English and Michelle Caforio, for property at 3█ Oakdale Road, Johnson City.

Respondent and his mother have an LLC which owns property at 394 Main Street and 3█ Oakdale Road in Johnson City (Tr 830-32). Respondent had intended to turn the building at 394 Main Street into his law office but it is unoccupied (Tr 831; Ex 10C, pp 1-2). 3█ Oakdale Road is a one-family residential property rented by David English and Michelle Caforio (Tr 831). Respondent received rental payments from Ms. Caforio and Mr. English totaling \$1,400 in 2015 and \$9,600 in 2016 (Ex 10C, pp 1, 3).

3. Respondent failed to report any of the income he received from the practice of law or his rental properties on his 2015 and 2016 Federal and State Income Tax return, notwithstanding that Respondent claimed expenses for the rental property at 3█ Oakdale Road in both years.

Respondent and his wife filed joint federal and New York state income tax returns for 2015 and 2016 (Ex 9A, 9D, 9F, 9I). On his federal return, Respondent's judicial salary was reported on Form 1040, line 1 and his wife's income from partnerships was reported on line 17 and Schedule E, Part II (Ex 9A, 9F). Respondent did not report any additional income in either year, *i.e.*, none of the income from the practice of law was reported on Form 1040, line 21 (Exs 9A, 9F).

On his New York state income tax returns for 2015 and 2016, Respondent similarly reported his judicial salary and his wife's partnership income but did not report his additional income from the practice of law (Exs 9D, 9I).

For 2015, Respondent claimed expenses totaling \$11,236 for 394 Main Street and 3█ Oakdale Road on his federal return, but he did not report any amount of income or rents received for these properties (Ex 9A, Schedule E). Respondent failed to list the rental property at 2█ North Street (Ex 9A, Schedule E). Respondent's New York state income tax return carried over these same omissions (Ex 9D, line 11).

For 2016, Respondent took expenses totaling \$5,978 for 394 Main Street and \$1,107 for 3█ Oakdale Road but did not list any income for Oakdale Road (Ex 9F, Schedule E). Respondent failed to list the rental property at 2█ North Street (Ex 9F,

Schedule E). Respondent's New York state income tax return carried over these same omissions (Ex 9I, line 11).⁹

- D. Respondent did not amend his 2015 and 2016 tax returns to include the income he had previously omitted until in or about August 2017, after he was questioned by the Inspector General for the Unified Court System about the checks he had received for work he had performed in *Estate of Deborah Brigham*, and after he became aware that the Commission had boxes containing his financial records.**

On July 11, 2017, Respondent met with his administrative judge, his supervising judge and the district administrator, who told him a complaint had been made and asked him to take some time off (Tr 813). Later that day, he learned he was locked out of the Family Court building (Tr 813-14).

During the meeting, Respondent was also told that he must meet with the Inspector General's office and on July 14, 2017, he was interviewed by someone from that office (Tr 814, 1370-71). During the Inspector General's investigation, Respondent was asked about income he received for his work on the *Estate of Deborah Brigham* (Tr 1468-69).

⁹ Commission counsel notes that although Respondent reported the value of the rental properties as assets on his Ethics Commission financial disclosure forms for years 2015 and 2016 (Exs 8B, ¶17, 8C, ¶17), he did not report his rental income from those properties on either his original (Exs 8B ¶13, 8C ¶13) or amended (Ex 8D, ¶13) financial disclosure forms. Respondent asserted that overall, his rental properties operated at a loss when the rents were reduced by expenses (Tr 829-30). However, the instruction on paragraph 13 of the disclosure form states that "Income from ... real estate rents shall be reported with the source identified by the building address ... **with the aggregate net income before taxes for each building**" (emphasis added) (Exs 8A-8D). As indicated in Respondent's amended income tax returns, 2█ North Street had a net income in excess of \$1,000 for both 2015 and 2106 (Exs 9C, Schedule E, 9G, Schedule E).

Sometime prior to August 2, 2017, Respondent learned that the Commission had taken possession of boxes containing his tax records and other financial documents, including the checks representing legal fees in the *Estate of Funk* (Tr 1360-61, 1390-91).

Respondent subsequently filed amended federal and state tax returns for 2015 and 2016 on August 2, 2017 (Ex 10A).

The 2015 amended returns resulted in an increased tax liability of \$9,590 and \$1,925 to the IRS and New York State, respectively, (Exs 9B, 9E). For 2016, Respondent's federal tax amount remained the same after the amendment due to an increase in claimed expenses for the rental properties (Ex 9F, Schedule E). Respondent's 2016 New York state tax bill increased by \$725 (Exs 9G, Schedule E, 9J).

E. Since becoming a full-time judge in January 2015, until January 31, 2019, Respondent failed to file a report of outside income with the clerk of his court, notwithstanding that the requirement was brought to his attention by the Office of Court Administration in April 2016 and by the Commission in November 2017 and May 2018.

Section 100.4(H)(2) of the Rules requires a judge to “report the date, place and nature of any activity for which the judge received compensation in excess of \$150, and the name of the payor and the amount of compensation so received” and to file the report “in the office of the clerk of the court on which the judge serves.” Notwithstanding that he received legal fees and/or rental income in 2015, 2016 and 2017, Respondent failed to file a report of outside income until January 31, 2019 (Tr 1387; Resp Ex PP).

On April 23, 2016, District Executive Gregory A. Gates emailed all the Sixth Judicial District judges and their secretaries a memo from Deputy Chief Administrative

Judge Michael V. Coccoma, reminding them of the requirement in §100.4(H)(2) of the Rules that full-time judges must file an annual report of extra-judicial income with the chief clerk of the court on which the judge serves (Ex 18). The email was addressed to all the 6th Judicial District judges and court attorneys (Tr 1471). Respondent did not dispute that it was sent to him (Tr 1472).

Chief Clerk Debbi Singer was aware that each of the four Broome County Family Court judges was required to file an annual report of extra-judicial income with her as clerk of the court (Tr 375). Respondent did not file such a report with Ms. Singer from the time he assumed the bench in January 2015 until Ms. Singer's retirement in June 2018 (Tr. 375-76).

On November 28, 2017, when Respondent appeared for testimony before the Commission during the investigation, he was asked about his failure to file any reports with the clerk of the court; Respondent said he was not aware of the requirement (Tr 853-54). By letter dated May 30, 2018, Respondent also responded to a written inquiry from the Commission, dated May 7, 2018, concerning his failure to file any annual disclosure reports with the clerk (Exs 10B, 10C). Respondent wrote that he had not filed with the clerk because he was unaware of the requirement and believed that his Ethics Commission filing fulfilled all his obligations with respect to financial disclosure; he acknowledged he did not comply with the Rule (Ex 10C, pp 5-6).

Respondent did not file a report with the chief clerk of the Family Court until January 31, 2019, when he produced the report as an exhibit at the final day of the hearing before the Referee on the Formal Written Complaint (Resp Ex PP).

F. Respondent's Testimony at the Hearing.

Respondent acknowledged that he received and cashed the checks for his legal fees for work on the *Funk* and *Brigham* estates and that he knew how to report income from the practice of law on his Ethics Commission financial disclosure statement (FDS), having done so in 2015 for the prior calendar year of 2014 (Tr 1464). Respondent claimed that he thought he had received the funds in 2016, not 2015 (Tr 1411-12), notwithstanding that he also failed to report the income on his 2016 FDS form, which he filed on May 10, 2017 (Ex 8C).

Respondent acknowledged that he did not report the rental income he received on his FDS, but claimed he failed to do so because all the properties ran a deficit as compared to the income; the deductions "always exceeded incomes" (Tr 1383, 1467).

Respondent claimed he was working with his accountant to amend his 2015 and 2016 income tax returns in April, May and June 2017, notwithstanding that they were not filed until August 2017 (Tr 1411-12, 1413, 1468). Respondent knew that the Commission was in possession of his tax records and other financial records, including the checks for his legal fees in *Funk*, which had been in boxes taken from his chambers in July 2017 (Tr 1360-61, 1390-91). Respondent had also been questioned by the Inspector General in July about his receipt of the *Brigham* checks (Tr 1468-69).

Respondent claimed he amended his FDS forms "when I could get into the Ethics form" and not as a result of the Commission's investigation into his failure to disclose income on the forms (Tr 1469).

As for his failure to file the annual disclosure forms with the clerk of the court, Respondent claimed he never saw the email from the district executive Gregory Gates in April 2016 (Ex 18; Tr 1470). He acknowledged that he failed to file any such disclosure until January 2019, although he had been asked by the Commission about his failure to do so back in November 2017 (Tr 1469).

ARGUMENT

POINT I

THE EVIDENCE ESTABLISHES THAT RESPONDENT SHOWED HIS COURT ATTORNEY A PHOTOGRAPH PURPORTING TO DEPICT A NUDE SENIOR COURT OFFICE ASSISTANT, AND THE COMMISSION SHOULD REJECT THE REFEREE'S FINDING THAT IT DID NOT.

The evidence establishes that Respondent showed court attorney Mark Kachadourian a photograph that Respondent said depicted the nude torso of court employee D [REDACTED] L [REDACTED]. Even if the Commission defers to the Referee's assessment regarding Mr. Kachadourian's overall credibility,¹⁰ it should nevertheless find that Kachadourian's testimony regarding the photograph, which was bolstered by Ms. L [REDACTED]'s own testimony, was credible. Indeed, the Referee explicitly accepted Ms.

¹⁰ Commission counsel strongly disagrees with the Referee's credibility determinations with respect to Mr. Kachadourian and Ms. Gallagher. Nevertheless, recognizing the deference ordinarily accorded to such determinations by the Commission, *see e.g. Matter of Michels*, 2012 Ann Rep 130, 137 (Comm'n on Jud Conduct, November 17, 2011), and acknowledging the lack of other witnesses who can directly corroborate their testimony as to most of these allegations, counsel does not challenge the Referee's findings with respect to the other specifications in Charges I and II of the Formal Written Complaint that the Referee did not sustain.

However, because Mr. Kachadourian's testimony regarding the nude photograph of Ms. L [REDACTED]'s torso was corroborated by Ms. L [REDACTED] herself and because a missing witness charge with respect to David Iannone was clearly appropriate, Commission counsel requests that the Commission disaffirm the Referee's failure to find that Respondent showed Kachadourian the photograph.

L [REDACTED]'s corroborating testimony that David Iannone, Respondent's friend and employee, possessed a photograph on his phone like the one described by Mr. Kachadourian as having been shown to him by Respondent on Respondent's phone. Taken together, Mr. Kachadourian's direct testimony and the corroborating testimony of Ms. L [REDACTED] met the Commission's burden of proving this allegation by a preponderance of the evidence.

In addition, the Referee incorrectly applied the missing witness rule and erred by refusing to draw an unfavorable inference against Respondent for not calling David Iannone. Hearing testimony established that Iannone is Respondent's friend and was his employee. As the Referee found, Iannone possessed the photograph on his cell phone and showed it L [REDACTED] (Rep 18). And the Referee acknowledged L [REDACTED]'s hearsay testimony that Iannone told her that he – and not Respondent – showed the photograph to Mr. Kachadourian (Rep 19). On these facts, Respondent's failure to call a friend and employee who had actual knowledge of relevant events and who would be expected to give testimony that supported Respondent's defense clearly warranted application of the missing witness rule. The Commission should draw its own unfavorable inference that Iannone could not truthfully support Respondent's version of events.

The testimony of Mr. Kachadourian and Ms. L [REDACTED], combined with the unfavorable inference, is more than sufficient to prove that it was "more probable than not" that Respondent had received the photograph from Mr. Iannone and displayed it to Mr. Kachadourian on his cell phone.

A. Mr. Kachadourian’s testimony was corroborated by Ms. L [REDACTED], a disinterested witness whom the Referee apparently found credible.

Unlike other allegations that the Referee did not sustain, the allegation concerning Respondent’s display of a photograph depicting Ms. L [REDACTED]’s nude torso does not rely entirely on the credibility of Mr. Kachadourian or Ms. Gallagher.¹¹ Mr. Kachadourian’s testimony that Respondent showed him a cell phone photograph of the nude torso of a woman, whom Respondent identified as Ms. L [REDACTED] (Tr 38-39), was strongly corroborated by the testimony of Ms. L [REDACTED] herself, a witness whom the Referee apparently found credible (Rep 18).

Based on the testimony of Ms. L [REDACTED], the Referee explicitly found that the photograph described by Mr. Kachadourian existed (Rep 18). Indeed, the Referee found that Ms. L [REDACTED] “admitted that she had seen [a photograph depicting a nude female torso] and believed that she was the one depicted” and that her “testimony established that the photograph was on Mr. Iannone’s cell phone” (Rep 18). The Referee also found that “Ms. L [REDACTED] and [David] Iannone dated for some period of time and she acknowledged that the relationship was intimate and included consensual videography” (Rep 18 n22). This direct evidence – found credible by the Referee – corroborates Mr. Kachadourian’s testimony about the existence of such a photograph. And given the extremely limited number of ways that Mr. Kachadourian could have seen the

¹¹ Ms. Gallagher’s credibility is not at issue at all in this allegation.

photograph,¹² Ms. L [REDACTED]'s testimony also strongly supports Mr. Kachadourian's assertion that Respondent showed it to him.

Uncontradicted hearing evidence established that Respondent and Mr. Iannone were friends who communicated by cell phone. Ms. L [REDACTED] testified that when Respondent introduced her to Mr. Iannone, Respondent used his cell phone to call him (Tr 264-65). Additionally, Respondent acknowledged that Mr. Iannone had his cell phone number (Tr 1480). Ms. L [REDACTED] also testified that Respondent and Mr. Iannone were friends and that she was aware that the two men talked about her (Tr 266, 269, 273). Significantly, Ms. L [REDACTED] testified that, after Judge Fitzgerald told her about the possible existence of a photograph of her nude torso in relation to allegations of sexual misconduct against Respondent, she repeatedly asked Mr. Iannone if such a photograph existed "because [she knew] David Iannone and [Respondent] were friends" (Tr 268-69). It is within this context that Mr. Iannone ultimately took out his cell phone and showed Ms. L [REDACTED] a photograph of the nude torso of a woman wearing an elephant pendant necklace, which she recognized as being identical to one that she owned (Tr 271).¹³

¹² If Respondent did not show the photograph to Mr. Kachadourian, the only other possible explanation for the fact that Kachadourian saw it is that Mr. Iannone showed it to him. Respondent made no such claim and did not call Mr. Iannone to testify to that effect. As discussed below, Respondent's failure to call his friend and employee to testify about the photograph warrants an unfavorable inference that he could not truthfully support Respondent's denial that Iannone gave him the photo (Tr 1394-95).

¹³ Commission counsel agrees with the Referee that what Mr. Iannone *said* to Ms. L [REDACTED] about the photograph was inadmissible for the truth of the matter (Rep 19). In fact, it is Commission counsel's position that Mr. Iannone's statement to Ms. L [REDACTED] regarding the circumstances in which he claimed to have shared the photograph with Mr. Kachadourian and Respondent was *not* the truth. To the extent that the Referee relied on this hearsay testimony to conclude there was an "inconsistency in accounts" (Rep 19), it was error.

It is common knowledge that photographs can easily and instantly be shared between cell phones – by text message, email and other applications (such as WhatsApp and AirDrop) – with the click of a button. Mr. Iannone could have easily shared the photograph with Respondent by sending it to his cell phone in a text message or email. Thus, evidence that Mr. Iannone had the photograph, and that Respondent and Iannone were friends who communicated by cell phone, demonstrates that Respondent had the means and opportunity to be in possession of the same illicit photograph that the Referee found Mr. Iannone possessed on his cell phone and showed to Ms. L [REDACTED].

Under the preponderance of the evidence standard, Commission counsel must prove that an alleged fact is more probable than not to have occurred. *See Matter of Nathaniel II*, 18 AD3d 1038, 1038-39 (3d Dept 2005). As the Court of Appeals has made clear: “the Commission may meet its burden of proof with either circumstantial or direct evidence.” *Matter of Mogil*, 88 NY2d 749, 753 (1996). Here, there is both.

Ms. L [REDACTED]’s testimony is direct evidence that the photograph described by Mr. Kachadourian existed and that Mr. Iannone possessed it on his cell phone. Mr. Kachadourian’s testimony is direct evidence that Respondent also had the photograph on his cell phone and that he showed it to him.¹⁴ In addition, Ms. L [REDACTED] and Respondent’s testimony about the friendship between Mr. Iannone and Respondent and their practice of communicating with each other by cell phone was strong circumstantial

¹⁴ As thoroughly discussed above, the Referee wrongly disregarded this direct evidence because Ms. L [REDACTED]’s testimony corroborating the existence of the photograph demonstrated that Mr. Kachadourian’s testimony was credible.

evidence from which the Referee should have concluded that Mr. Iannone sent the photograph to Respondent.

Notably, Respondent offered no proof in the record to explain how his court attorney happened to see an extremely private, nude photograph of a fellow court employee, who also happened to be in an intimate relationship with Respondent's friend. There is no evidence in the record that Mr. Kachadourian had any ties to Mr. Iannone other than knowing him through Respondent. Thus, Commission counsel proved that is more likely than not that it was Respondent who showed the photograph to Mr. Kachadourian.

B. The Referee misapplied the missing witness rule and erred in refusing to draw an unfavorable inference against Respondent for his failure to call Mr. Iannone to support his denial of the allegation.

The Referee misapplied the missing witness rule and erred as a matter of law when he refused to draw an unfavorable inference against Respondent for his failure to call his friend and employee, David Iannone.

The missing witness rule “allows a [factfinder] to draw an unfavorable inference based on a party’s failure to call a witness who would normally be expected to support that party’s version of events.” *People v Savinon*, 100 NY2d 192, 196 (2003). It “derives from the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the

inference that its tenor is unfavorable to the party's cause." *People v Gonzalez* 68 NY2d 424, 427 (1986) (internal quotation marks and citation omitted).¹⁵

An unfavorable inference from a party's failure to call a witness is warranted where it is shown:

[1] that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case;

[2] that the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called him; and

[3] that the witness is available to such party.

People v Gonzalez, 68 NY2d at 427.

The nature of the unfavorable inference to be drawn depends upon whether the case is a civil or criminal action. In civil actions, the Pattern Jury Instructions provide that, from a party's failure to call a friendly witness to testify on an issue, a factfinder "may . . . conclude that the testimony of [the witness] would not support [that party's] position on the question . . . and would not contradict the evidence offered by [the opposing party] on this question and you may draw the strongest inference against [that party] on that question, that opposing evidence permits." 1A NY PJI3d 1:75 (2019 ed.).

See *People v Paylor*, 70 NY2d 146, 149 (1987); *Noce v Kaufman*, 2 NY2d 347, 353

¹⁵ Notwithstanding that Commission counsel has the burden of proving Respondent's misconduct, Commission counsel may seek an unfavorable inference against Respondent for his failure to call a witness who would naturally be expected to support his defense. "Once the accused testifies, or offers some other evidence, the 'failure to call an available witness who is under defendant's control and has information material to the case may be brought to the jurors' attention for their consideration.'" Prince, Richardson §3-140, at 93 (11th ed.), quoting *People v Rodriguez*, 38 NY2d 95, 98 (1975). Here, Commission counsel properly requested the missing witness inference only after Respondent had already presented numerous witnesses and indicated his intention to testify in his defense.

(1957). In criminal cases, “the fact finder may infer from defendant’s failure to call a witness, that if the witness had been called he would not have supported the defense testimony on the issue of which he possessed knowledge.” *People v Paylor*, 70 NY2d at 149.

Commission counsel properly advised Respondent and the Referee, on the record, that Mr. Iannone was an uncalled witness who was knowledgeable about a material issue in the case (the source, sharing and/or display of the L [REDACTED] photograph), that he would be expected to testify favorably to Respondent due to their friendship, that he was available to Respondent and that Respondent had failed to call him (Tr 1289-93). *See Gonzalez*, 68 NY2d at 427. Commission counsel timely informed the Referee and Respondent that it would request that an unfavorable inference be drawn against Respondent if he failed to call Mr. Iannone on the hearing’s adjourned date, which was scheduled for approximately one month later (Tr 1289-93). *See id.* at 427-28; Prince, Richardson §3-140, at 89 (11th ed.)

The burden then shifted to Respondent to defeat the request by accounting for the witness’s absence or demonstrating that the inference was inappropriate by showing that Mr. Iannone was not knowledgeable about a material issue, his testimony would have been cumulative, he was not “available” to be called by Respondent, or he was not under Respondent’s “control” such that he would not be expected to testify in [Respondent’s] favor.” *Gonzalez*, 68 NY2d at 428; *People v Smith*, 2019 NY Slip Op 04447 (2019). Respondent failed to meet his burden. His sole argument that the inference was inappropriate was because Mr. Iannone was “equally available” to be called by

Commission counsel (Tr 1290). But, as set forth below, this argument was irrelevant and insufficient to defeat the request for an inference.

Respondent had a full month before the adjourned date scheduled for Respondent's hearing testimony to either call Mr. Iannone, explain his absence or make some other demonstration that the inference was inappropriate. Respondent did none of the above. Accordingly, and under the circumstances, the Referee should have drawn an unfavorable inference against Respondent as to the L [REDACTED] photograph allegation. Instead, he misapplied the law and abused his discretion in refusing to draw an adverse inference.

1. Mr. Iannone was knowledgeable about a material issue and his testimony would have been noncumulative.

To begin with, the Referee apparently correctly found that Mr. Iannone's testimony would have been material and noncumulative, writing that it was "surprising" that Mr. Iannone was not called to testify (Rep 10). Ms. L [REDACTED] provided *unrebutted* testimony that Mr. Iannone showed her a photograph like the one described by Mr. Kachadourian (Tr 270-71, 281-82). As the Referee properly noted, "If Mr. Iannone had been called as a witness, he surely would have been asked about this picture and whether he was the source who allegedly provided it to Respondent" (Rep 10 n18). Indeed, if Respondent possessed a nude photograph of Ms. L [REDACTED], he likely received it from his friend and Ms. L [REDACTED]'s then-paramour: Mr. Iannone. Alternatively, Mr. Iannone could have been asked if he had shown the photograph to Mr. Kachadourian.

Because Mr. Iannone clearly could have provided material and noncumulative testimony, the missing witness issue in this case turns on the availability and control elements of the rule, which the Referee incorrectly applied.

2. Mr. Iannone was under the “control” of Respondent, in that he had such relationship with him that Mr. Iannone would naturally be expected to testify favorably to him.

Without any explanation, the Referee incorrectly concluded that Mr. Iannone was not under the “control” of Respondent, perhaps misunderstanding the legal definition of control. The Court of Appeals has made clear that the “control” element relates to the nature of the relationship between the missing witness and the party against whom the inference is sought. *See Gonzalez*, 68 NY2d at 429; *Savinon*, 100 NY2d at 200-01. A witness is said to be under the “control” of a party if, by virtue of the nature of their relationship, the witness would naturally be expected to testify favorably toward the party against whom the inference is sought and adversely to the party seeking the inference. *See Gonzalez*, 68 NY2d at 429. “Control . . . might more accurately be referred to as the ‘favorability’ component of the rule.” *Savinon*, 100 NY2d at 200-01.

The 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. *See Savinon*, 100 NY2d at 194-95 (uncalled witness had been “defendant’s friend and employee for several months”).

Here, the record established that Respondent and Mr. Iannone were friends and would speak with each other on the telephone (Tr 32, 266, 268-69, 816, 818). Respondent acknowledged that he had even called Mr. Iannone from chambers (Tr 818).

Although during cross examination Respondent attempted to downplay Mr. Iannone as a mere “acquaintance,” the two men had a close enough friendship that Respondent invited Mr. Iannone to his mother’s house for a New Year’s Eve party (Tr 278). Moreover, Respondent also employed Mr. Iannone to manage his properties and Mr. Iannone assisted him during his campaign for Family Court (Tr 523-24, 818, 832, 1477). These facts establish that Mr. Iannone, by virtue of his friendship with and employment by Respondent, is under the “control” of Respondent such that he would naturally be expected to testify favorably to him and adversely to the Commission’s case. *See Gonzalez, supra* at 431.

In his analysis, the Referee inexplicably ignored the nature of the relationship between Respondent and Mr. Iannone. Instead, he seemed to find Iannone was not under the “control” of Respondent because it was “far from certain” and there was a lack of “assurance” that he would give testimony favorable to Respondent. That is not the standard; there is no requirement of certainty or assurance about what the witness will testify. Indeed, the “party seeking the charge need not establish what the witness might have to say.” Prince, Richardson §3-140 at 90, citing *People v Kitching*, 78 NY2d 532, 538 (1991). Rather, the “control” element is simply about the natural expectations of favorable testimony from the witness in light of the nature of his relationship to the party who failed to call him.

Nevertheless, there was hearsay testimony at the hearing strongly suggesting that Mr. Iannone would have testified favorably to Respondent. Indeed, Ms. L [REDACTED] testified that, when Mr. Iannone showed her the photograph, he told her that it was he –

Mr. Iannone and not Respondent – who showed it to Mr. Kachadourian and Respondent at a restaurant (Tr 270). Although this testimony was correctly not considered by the Referee for the purposes of the truth of the statement (Rep 19), it was evidence that, if true and presented in an admissible form, would seemingly entirely exonerate Respondent as to this charge. The Commission must wonder, then, why Respondent failed to call such a valuable witness. The implication is inescapable: Respondent did not call him because he knew that what Mr. Iannone told Ms. L [REDACTED] about showing the photograph to Mr. Kachadourian and Respondent at a restaurant was not true and that Mr. Iannone would be unable to provide him with any honest or helpful testimony.¹⁶

“The [missing witness] rule is best understood by recognizing that the inquiry must be undertaken from the standpoint of the honest litigant. Thus, when a party truthfully presents a version of events, a factfinder would expect that party’s friend or ally (if knowledgeable) to confirm it. If a witness that valuable does not appear to support the party’s side – and if there is no good reason for the witness’s absence – it is only natural to suppose (or as the law has it, infer) that the witness cannot honestly help the party.” *Savinon*, 100 NY2d at 196-197 (emphasis added).

If Respondent had truthfully denied showing this photograph to Mr. Kachadourian, the Referee – and now the Commission – should have expected him to call his friend and employee, Mr. Iannone, to confirm one of two scenarios: (1) there was

¹⁶ In this regard, it bears repeating that the Referee also refused to admit records showing Mr. Iannone’s criminal history, including his conviction for Forgery (Ex 1A for identification; Tr 894). And surely, had Iannone been called by Respondent, Commission Counsel would have confronted him with that criminal history and taken issue with his credibility.

no such photograph, or (2) the photograph existed but that he did not share it with Respondent and/or that it was he, and not Respondent, who showed it to Mr. Kachadourian. Only one reasonable inference can be made from Respondent's failure to call him: he did not do so because he knew that what Mr. Iannone had told Ms. L [REDACTED] was not true and that he could not "honestly" help Respondent.

3. Mr. Iannone was available to be called by Respondent; because Mr. Iannone was under the "control" of Respondent, he was unavailable to Commission counsel.

The Referee also incorrectly concluded that the missing witness charge was not appropriate because Mr. Iannone was "within the subpoena power of either party" and "equally available" to the Commission (Rep 10). "It is to be emphasized that the 'availability' of a witness is a separate consideration from that of 'control.' 'Availability' simply refers to the party's ability to produce such witness." *Gonzalez*, 68 NY2d at 428.

Here, Mr. Iannone was available to Respondent: Respondent had his phone number, he was on his witness list and he could have been subpoenaed by him just like his counsel did with numerous other witnesses (Tr 1290, 1479). At no point did his counsel claim that they could not locate and produce him.

Respondent's sole argument against applicability of the missing witness rule was that Commission could have also subpoenaed him and that he was equally available to the Commission (Tr 1290). But Respondent's "assertion that both parties had the physical ability to call [Mr. Iannone] is [not] sufficient to defeat the charge because, as [the Court of Appeals has] explained, when the witness is under the control of one party, such witness is in a pragmatic sense unavailable to the opposing party." *Gonzalez, supra*

at 431; *see also* *People v Hall*, 18 NY3d 122, 131 (2011); *People v Keen*, 94 NY2d 533, 540 (2000). Because Mr. Iannone was under the control of Respondent, he was, pragmatically speaking, unavailable to Commission counsel. *See Gonzalez, supra* at 431.

In *People v Hall*, the Court of Appeals held that it was error for the trial court judge to rule that a missing witness instruction was inappropriate because uncalled witnesses were available to and could have been called by either party. *See Hall, supra* at 129-32. As the Court explained: “A missing witness instruction permits [a factfinder] to draw the common-sense inference that a failure to call a seemingly friendly witness suggests some weakness in a party’s case. That inference is not rebutted when the opposing party chooses not to call the same witness – a witness who, by definition, the opposing party would expect to be hostile.” *Id.* at 131.

Here, because Mr. Iannone was friendly with Respondent and available to him, “[i]t is irrelevant that [Mr. Iannone was] also available to [Commission counsel], in the sense that [Commission counsel was] allowed to interview [him], and [Commission counsel] could have called [him] if it chose.” *Id.*¹⁷ The Referee committed legal error in holding that Iannone was “‘equally available’ to both the Commission and Respondent” (Rep 10).

Given the Referee’s failure to find that Commission counsel did not prove this allegation by a preponderance of the evidence, his failure to take an unfavorable

¹⁷ Commission counsel chose not to call Mr. Iannone because, due to his friendship with Respondent, we expected him to be hostile to us and to testify untruthfully in Respondent’s favor. Moreover, we would be ethically constrained from calling a witness who we had reason to believe would testify untruthfully.

inference against Respondent was not harmless error. Had the Referee given Mr. Kachadourian's testimony the credibility it deserved in light of Ms. L [REDACTED]'s corroborating testimony, properly applied the missing witness rule and drawn an unfavorable inference against Respondent, there can be no doubt that Commission counsel clearly established Respondent's misconduct as to this allegation by a preponderance of the evidence.

The Commission should draw the "strongest inference" from Respondent's failure to call Mr. Iannone and conclude that Respondent showed Kachadourian the L [REDACTED] photograph.

POINT II

THE COMMISSION SHOULD CONFIRM THE REFEREE'S FINDINGS THAT RESPONDENT COMMITTED MISCONDUCT BY MAKING SEXUALLY INAPPROPRIATE AND UNWELCOME COMMENTS TO CHIEF CLERK DEBBI SINGER AND BY FAILING TO BE PATIENT, DIGNIFIED AND COURTEOUS TO COURT ASSISTANT REBECCA VROMAN.

Judges are required to be patient, dignified and courteous to court staff. Rule 100.3(B)(3). "Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect." *Matter of Kuehnel*, 49 NY2d 465, 469 (1980); *see also Matter of Dye*, 1999 Ann Rep 93, 94 (Comm'n on Jud Conduct, February 6, 1998).

The Court of Appeals and the Commission have repeatedly sanctioned judges who subjected court staff to offensive, undignified and sexually harassing conduct. *See Matter of Shaw*, 96 NY2d 7, 9-10 (2001) (judge, *inter alia*, made inappropriate sexual remarks to his secretary); *Matter of Collazo*, 91 NY2d 251, 253 (1998) (judge, *inter alia*,

passed “ribald note” and made “indelicate suggestion” about appearance of female intern); *Matter of Magill*, 2005 Ann Rep 177, 179-80 (Commn on Jud Conduct, October 6, 2004) (judge, *inter alia*, made injudicious comments about a pornographic movie); *Matter of Dye*, *supra* at 94 (judge made inappropriate sexual remarks to his secretary); *Matter of LoRusso*, 1994 Ann Rep 73, 77 (Commn on Jud Conduct, June 8, 1993) (judge engaged in course of sexual harassment including “crude and suggestive comments”).

A. Respondent made highly inappropriate comments to Ms. Singer.

As the Referee found (Rep 23, 39), it was inappropriate for Respondent to tell Ms. Singer that if he had known she could cook, he would have “gone for the widow” (Tr 367) and, on another occasion, say to her, “You look really hot in that outfit” (Tr 370). Although the Referee omitted it from his Report, it was also inappropriate for Respondent to tell Ms. Singer, “It’s nice to know I still have that effect on you,” after she apologized for having a hot flash (Tr 368, 400-03). Given the Referee’s explicit finding that he found Ms. Singer credible (Rep 23-24), it is submitted that the Referee’s failure to make this finding was an oversight and that the Commission should find that Respondent made this statement and that it was also misconduct.

Respondent should have known that his sexualized remarks and behavior were grossly inappropriate, especially in a professional setting, and created a hostile and uncomfortable work environment for Ms. Singer.

However, the Referee was incorrect when he wrote, “When asked whether he made these comments to Ms. Singer, Respondent testified that he had no recollection” and “Respondent did not deny making the comments outright as he did when responding

to other allegations in the Complaint” (Rep 23). The Formal Written Complaint alleges in paragraphs 23 and 24 that on various occasions, Respondent told Ms. Singer that if he’d known she could cook, he would have “gone for the widow” (FWC ¶23) and that he said “he was ‘glad he had that effect on her’ when she said something about having a hot flash, and that she looked ‘really hot’ in the outfit she was wearing” (FWC ¶24). When asked about those specific allegations on direct examination, he emphatically – and untruthfully – testified that those incidents “did not” occur (Tr 1399).

B. Respondent displayed an impatient and discourteous demeanor toward Ms. Vroman.

The Commission should confirm the Referee’s finding that Respondent’s treatment of Ms. Vroman after a day of hearing emergency petitions violated Respondent’s requirement to be patient, dignified and courteous to court staff, as required by Section 100.3(B)(3) of the Rules (Rep 20-22, 39). While the Referee found only that there was an “incident” between Ms. Vroman and Respondent in court which was “unprofessional” on the part of Respondent (Rep 21-22), the Referee made no specific findings as to what actually occurred, notwithstanding that he also appeared to credit Ms. Vroman’s testimony that Respondent “yelled at [her] and told [her she] was going too slow [while] being very rude[,] disrespectful[,] condescending[,] demeaning and just very belligerent to [her]” (Tr 327; Rep 20-22). The Commission should find that Respondent loudly berated Ms. Vroman for being too slow, on an occasion when he had failed to notify her or anyone else in court that he intended to leave early.

POINT III

THE COMMISSION SHOULD CONFIRM THE REFEREE’S FINDING THAT RESPONDENT COMMITTED MISCONDUCT BY ASKING HIS COURT SECRETARY TO TYPE A LETTER REGARDING THE *ESTATE OF ROGER L. FUNK*, AN ESTATE HE HANDLED AS A PRIVATE ATTORNEY.

The Commission should confirm the Referee’s finding that Respondent engaged in misconduct when he asked Ms. Gallagher to write a letter to the executor of a pending estate so that Respondent could receive payment for his legal work on the estate (Rep 40).

The Rules Governing Judicial Conduct require a judge to avoid impropriety and act at all times in a manner that upholds the integrity of the judiciary. *See* Rule 100.2(A). The public expects that government officials and employees will use “resources paid for by the taxpayers only for the purposes for which those resources were intended.” *Matter of Brigantti-Hughes*, 2014 Ann Rep 78, 87 (Comm’n on Jud Conduct, December 17, 2013). Respondent violated these ethical precepts when, on November 6, 2015, in his judicial chambers, he asked Ms. Gallagher to write a letter to Mr. Hayes, the *Funk* estate executor, so that he could receive payment for his legal services in the amount of \$11,184.60. Respondent himself testified that it would be improper to direct his chambers staff to type correspondence to help him secure compensation for a private non-judicial matter (Tr 1459), yet that is exactly what he did.

Commission precedent is very clear – it is misconduct for a judge to ask, or cause, court staff to perform non-work related personal tasks. *See Matter of Brigantti-Hughes*, 2014 Ann Rep at 79-80; *Matter of Ruhlmann*, 2010 Ann Rep 213, 219 (Comm’n on Jud

Conduct, February 9, 2009). Even small requests, performed without protest, can constitute misconduct. *See Matter of Ruhlmann*, at 220. Standing alone, Respondent's direction to his court secretary to write a letter so that Respondent could be paid a legal fee was improper. The fact that Respondent had Ms. Gallagher feign that the letter came from his former law office secretary, Ms. Filip, at Ms. Filip's home address, was dishonest and smacks of concealment on Respondent's part.

In that regard, the Commission should also find that Respondent lacked candor when he testified that Ms. Gallagher "volunteered" to draft the letter and that she unilaterally undertook to compose the letter as if Ms. Filip was the author and sender (Tr 1400, 1454-58; Ex 2V). During the hearing, there was a factual dispute that required the Referee to resolve whether Respondent directed Ms. Gallagher to draft the letter – as she testified – or whether she "volunteered" to do so – as Respondent testified. Despite the Referee's explicit acknowledgement of this discrepancy, the Referee conspicuously failed to resolve it (Rep 24-25). The Commission should do what the Referee failed to: resolve the issue by finding that Respondent directed Ms. Gallagher to draft the letter, including by telling her to draft it as if it was from his former private practice secretary, and conclude that his account that she "volunteered" lacked candor.

POINT IV

THE COMMISSION SHOULD CONFIRM THE REFEREE’S FINDING THAT RESPONDENT ASKED THE CHIEF CLERK OF THE TIOGA COUNTY SURROGATE’S COURT IF THE COURT WOULD ALLOW THE *ESTATE OF ANTOINETTE SARACENO* TO BE CLOSED BY MOTION BUT DISAFFIRM HIS CONCLUSION THAT IT WAS NOT MISCONDUCT.

The Referee correctly found that, in reference to the *Estate of Saraceno*, Respondent called the Tioga County Surrogate’s Court while he was a full-time Family Court Judge and asked Chief Clerk Deborah Stone “whether the Court would accept a motion instead of an accounting to close the Estate” (Rep 31). However, he erred in concluding that such action was not misconduct on the basis that it was not the actual practice of law (Rep 40).¹⁸

Charge III of the Formal Written Complaint alleged that, in connection with the *Saraceno* estate, Respondent “engaged in the practice of law and/or conveyed the impression that he ... engaged in the practice of law as a full-time judge” (FWC ¶34) (emphasis added). By concluding that Respondent did not commit misconduct because his request did not amount to the *actual* practice of law, the Referee wrongfully ignored that Respondent’s actions, at the very least, improperly conveyed the impression that he was practicing law.

A full-time judge shall not engage in the “practice of law.” Rule 100.4(G). The practice of law is much broader than personally appearing in court before a judge concerning a legal action. *See In re Perez*, 327 B.R. 94, 97 (Bankr. EDNY 2005), *citing*

¹⁸ Commission counsel concedes that the remainder of the allegations in Charge III of the Formal Written Complaint were not proven by a preponderance of the evidence.

People v Alfani, 227 NY 334 (1919). Practicing law also includes “the rendering of legal advice,” and “holding oneself out to be a lawyer.” *El Gemayel v Seaman*, 72 NY2d 701 (1988); *see also* Jud Law §478. The practice of law “embraces the preparation of pleadings and other papers” and “the management of such actions and proceedings on behalf of clients.” *In re Perez*, at 97, citing *Alfani*. The practice of law further includes “all advice to clients and all action taken for them in matters connected with law.” *Erbacci, Cerone and Moriarty, Ltd. v U.S.*, 923 F Supp 482, 485 (SDNY 1996), citing *Matter of Schwerzmann*, 408 NYS 2d 187, 188 (Ct. on the Judiciary 1978). Furthermore, “[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Rules 100.2 (emphasis added).

In the *Estate of Saraceno*, Respondent engaged in the practice of law. On October 12, 2016, Respondent called the Tioga County Surrogate’s Court and requested that Judge Gerald Keene close *Saraceno* “by motion” (Ex 5A, p 3; Tr 425). Respondent’s request was on behalf of a (former) client concerning a pending legal proceeding. At the time of his call, Respondent had not submitted a substitution of attorney and remained the attorney of record on the estate, even though he had started his Family Court term on January 2, 2015 (Ex 4A, p 3). Four years prior, Respondent was paid “good money” by the estate executor, in the amount of \$6,960, and yet the estate remained open (Tr 474; Ex 5UU).

Respondent knew or should have known when he took the Family Court bench that the matter was not concluded, as the last thing he did in the estate was to file a request for an extension of time to file releases (Ex 5LL). After Mrs. Saraceno called

Respondent regarding the letters and phone calls she had received from the court, and further informed him that her husband was sick and in the nursing home, Respondent called the court and requested that the estate be closed without a formal accounting (Tr 425-26). Mrs. Saraceno contacted the Surrogate's Court and spoke with the court clerks about the estate (Tr 475), but as a lay person she would not have been able to request that the Surrogate close the estate "by motion." Only an attorney could make such a specific request. And contrary to Respondent's assertion (Tr 1402, 1447), it was not well-known by the Tioga County Surrogate's Court staff that he was a full-time judge and could no longer practice law (Tr 424).

Even assuming, *arguendo*, that the Referee is correct that Respondent's request that the *Saraceno* estate be closed by motion while a full-time judge did not meet the literal definition of the "practice of law," it clearly conveyed that impression. As the Court of Appeals has stated, an appearance of impropriety is no less to be condemned than impropriety itself. *See e.g. Matter of Ayres*, 30 NY3d 59, 63 (2017); *Matter of Lonschein*, 50 NY2d 569, 572 (1980); *Spector v State Comm on Jud Conduct*, 47 NY2d 462 (1979).

Indeed, Respondent was on specific notice to avoid not just impropriety but also the *appearance* of impropriety. In previously censuring Respondent while he was a town justice, the Commission found, in part, that his conduct in six cases "conveyed an erroneous impression that he was presiding over a client's matters, thereby creating an appearance of impropriety that undermines public confidence in the impartiality of the

judiciary.” *Matter of Miller, II*, 2003 Ann Rep 140, 142 (Comm’n on Jud Conduct, December 30, 2002) (emphasis added).

Significantly, the majority of Respondent’s misconduct in the prior Censure involved the impermissible practice of law. Just as the Commission found in the prior case, Respondent has shown “insensitivity and inattention to his ethical responsibilities” and engaged in “an impermissible intermingling of his roles as lawyer and judge.” *Id.*

Accordingly, the Commission should confirm the Referee’s finding that, as a full-time judge, Respondent asked the Surrogate’s Court if the *Saraceno* estate could be closed by motion but conclude that such action was misconduct.

POINT V

RESPONDENT COMMITTED SERIOUS MISCONDUCT BY INTENTIONALLY FAILING TO REPORT LARGE SUMS OF EXTRA-JUDICIAL INCOME TO THE FEDERAL AND NEW YORK STATE GOVERNMENTS, UNIFIED COURT SYSTEM AND THE BROOME COUNTY FAMILY COURT.

By intentionally failing to properly disclose tens of thousands of dollars in income from the practice of law and from rents as required by law, Respondent violated his ethical responsibilities and cast doubt on the integrity of the judiciary.

- A. Respondent’s failure to disclose over \$27,000 in income from the practice of law on his 2015 Financial Disclosure to the Ethics Commission for the Unified Court System violated his ethical obligations under the Rules of the Chief Judge and the Rules Governing Judicial Conduct.**

State paid judges are required to file an annual financial disclosure report with the Ethics Commission of the Unified Court System with respect to the preceding calendar

year. *See* 22 NYCRR §40.2(a); Rule 100.4(I). Paragraph 13 of the disclosure statement required of Respondent as follows:

List below the nature and amount of any income In EXCESS of \$1,000 from EACH SOURCE for the reporting Individual and such Individual's spouse for the taxable year last occurring prior to the date of filing. Nature of income includes, but is not limited to, all income EARNED BY YOU AND YOUR SPOUSE (other than that received by you from the employment listed under Item 2 above) from **compensated employment whether public or private**, directorships and other fiduciary positions, contractual arrangements, teaching income, partnerships, honorariums, lecture fees, consultant fees, bank and bond interest, dividends, income derived from a trust, real estate rents, and recognized gains from the sale or exchange of real or other property. **Income from a business or profession and real estate rents** shall be reported with the source identified by the building address in case of real estate rents and otherwise by the name of the entity and not by the name of the individual customers, clients or tenants, with the aggregate net income before taxes for each building address or entity. The receipt or maintenance received in connection with a matrimonial action, alimony and child support payments shall not be listed.

(Ex 8B) (Capitalized emphasis in original; bold emphasis supplied).¹⁹

Respondent's omissions were intentional.²⁰ He clearly knew how and where on the form to report income from his practice of law, since he had done so for calendar year 2014 (Ex 8A, addendum to Q13). He conceded that when he filed his 2015 FDS, he was aware that he had received almost \$30,000 in legal fees just months before (Tr 1464). Yet Respondent failed to list any of the over \$27,000 he had received from the estates of Roger Funk and Deborah Brigham when he filed his 2015 FDS in May 2016 (Ex 8B, Q13).

¹⁹ In addition to the instructions provided with respect to each question of the FDS (Exs 8A-8D), the Ethics Commission of the Unified Court System publishes a detailed set of filing instructions, which are available online at: <https://www.nycourts.gov/IP/ethics/FilinginstructionsPart40.pdf>

²⁰ The Referee neglected to make any finding as to whether Respondent's omissions were intentional or merely negligent. For the reasons listed herein, the Commission should explicitly find that they were intentional.

Respondent's claim that he did not report income from his former law practice on his 2015 FDS because he believed that he received that income in 2016 (Tr 1411-12) suffers from a fatal infirmity – Respondent also failed to report that same income on his 2016 FDS (Ex 8C, Q13). Moreover, Respondent has never amended his FDS to include the many thousands of dollars he received in rents. Respondent did not even attempt to explain why, having failed to report this income on his 2015 FDS because he allegedly believed he received it in 2016, he then failed to report it his 2016 FDS. His failure to do so was misconduct. *See Matter of Dier*, 1996 Ann Rep 79 (Commn on Jud Conduct, July 14, 1995); *Matter of Francis and Joseph Alessandro*, 13 NY3d 238 (2009). Indeed, the Commission has found that even filing accurate but untimely disclosure forms is improper and can subject a judge to public discipline. *See Matter of Russell*, 2001 Ann Rep 121 (Commn on Jud Conduct, October 31, 2000); *Matter of Elliot*, 2003 Ann Rep 107 (Commn on Jud Conduct, November 18, 2002); *Matter of McAndrews*, 2014 Ann Rep 157 (Commn on Jud Conduct, June 18, 2013).

B. Respondent’s intentional failure to disclose thousands of dollars in income from the practice of law and from rents on his state and federal income tax returns violated the law and his ethical obligations under the Rules.

Every judge is required to “respect and comply with the law” and to conduct all of his extra-judicial activities so that they do not detract from the dignity of judicial office. Rules 100.2(A) and 100.4(A)(2). Respondent’s failure to report his income from the practice of law, and from rents for two rental properties on his state and federal income tax returns, violated these precepts.

In an intentional effort to shield income from taxation, Respondent failed to list over \$27,000 in income from the prior practice of law on his 2015 Federal and State Income Tax Returns when he filed initially in 2016. Respondent acknowledged that he had not forgotten about the receipt of the checks from the *Funk* and *Brigham* estates just months earlier (Tr 1464). Instead, he claimed he thought he received that income in 2016 (Tr 1464). However, he also failed to report the income when he filed his 2016 federal and state income tax returns (Exs 9F, 9I).²¹

Moreover, Respondent failed to report to federal and state tax authorities any income from his rental properties at 2█ North Street and 3█ Oakdale Road in two successive years (Exs 9A, 9F, Schedules E). Respondent acknowledged that he was active in the management of the rental properties (Tr 832). Respondent's accountant testified that she had no way to know about Respondent's outside income unless Respondent's told her (Tr 1264, 1267).

With respect to 2█ North Street, the monthly rent checks were made payable to Respondent (Ex 7C) and cashed by him (Tr 528). Respondent's amended federal tax returns reveal that he received \$6,000 in rent for each of those years (Exs 9C, (H, Schedules E). It is simply inconceivable that Respondent “forgot” to advise his accountant that he received monthly checks over a period of two years totaling \$12,000 in rental income from the apartment over the law office.

²¹ It was not misconduct for Respondent to receive payment for legal work performed prior to assuming the full-time judicial position. See Advisory Opinion 11-21 (March 9-10, 2011); Advisory Opinion 05-130(A) (December 8, 2005); Advisory Opinion 00-03 (January 27, 2000); Advisory Opinion 95-12 (March 9, 1995). He committed misconduct, however, when he failed to report that income on his FDS and tax returns.

It is significant that with respect to the Oakdale property, Respondent's original 2015 and 2016 federal tax returns claimed deductions but no income (Exs 9A, 9F Schedules E). The fact that Respondent took those deductions, and posted a loss, makes it clear that he did not forget about the Oakdale Road property when he filed his return. It is equally obvious that he did not simply overlook the fact that he had received rental income, which must be listed for each property first, before deductions may be subtracted (*see* Ex 9A, Schedule E). Rather, Respondent's failure to report income for a rental property he claimed was operating at a taxable loss was a deliberate attempt to shield that income from taxation.

C. Respondent's failure for over four years to file any report of extra-judicial income with the clerk of the Family Court, even after he was notified of his obligation to do so, was misconduct.

As a full-time judge, Respondent was required to report the date, place and nature of any activity for which he received compensation in excess of \$150, and the name of the payor and the amount of the compensation so received; such report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves. *See* Rule 100.4(H)(2). Respondent persistently failed to file any report of extra-judicial income with the clerk of the Family Court as required, even after he was notified by the Commission of the requirement.

Even if, as he claimed, he was unaware of the April 2016 email from the district executive to all the judges in the district, enclosing a reminder of the filing requirement from the deputy chief administrative judge, the Commission notified Respondent of the requirement in 2017, and again in 2018 (Tr 853-54; Ex 10B). Still, Respondent failed to

file any report with the clerk of the court until January 31, 2019, well after service of the Formal Written Complaint and several days after the hearing before the Referee had begun (Resp Ex PP). Respondent's failure to file was both intentional and misconduct. *See Matter of Moynihan*, 1993 Ann Rep 85, 98 (Comm'n on Jud Conduct, April 3, 1992), *determination accepted* 80 NY2d 322 (1992) (judge, *inter alia*, failed to file reports of income from extrajudicial activities).

D. The Referee is wrong about the timing of when Respondent filed amended filings with respect to when he learned the Inspector General for the Unified Court System and Commission were investigating his failures to report income.

The Referee incorrectly found that the record contained no evidence regarding when Respondent was placed on notice that the Inspector General was investigating Respondent's failure to report income (Rep 36). In fact, the record shows that Respondent learned of the Inspector General's investigation into these issues on July 14, 2017, when he was interviewed by someone from that office and asked about his receipt of checks he had received for his work on the *Estate of Deborah Brigham* (Tr 814, 1370-71, 1468-69). Thereafter, on August 2, 2017, Respondent filed his amended returns for 2015 and 2016 (Ex 10A; Rep 35). The timeline is clear and in the record: Respondent declared that extra-judicial income one year and two years late, and only when confronted with evidence of it.

The Referee also wrongly found that Respondent filed his amended FDS before he was placed on notice by the Commission that the Commission was investigating his omissions (Rep 36). Respondent admitted that he knew, in July 2017, that the

Commission was in possession of his tax records and other financial records, including the *Funk* checks, which had been in boxes taken from his chambers (Tr 1360-61, 1390-91). On November 16, 2017, twelve days before his scheduled appearance before the Commission for testimony, Respondent amended his 2015 Annual Statement of Financial Disclosure to include “Income” from “former private law practice” in the Category Amount of \$20,000 to under \$60,000 (Ex 8D, p 4, ¶13; Tr 810, 828-29).

Moreover, Respondent has *never* disclosed his rental income on the FDS forms, and he failed for years to file any report with the clerk of the court, despite many reminders. Indeed, Respondent did not file a report with the chief clerk of the Family Court until January 31, 2019, when he produced the report as an exhibit at the final day of the hearing before the Referee on the Formal Written Complaint (Resp Ex PP). Clearly, Respondent failed to report this income well after he learned of investigations by the Inspector General and after the Commission’s hearing was already underway.

POINT VI

RESPONDENT SHOULD BE REMOVED FROM OFFICE.

Standing alone, Respondent’s unauthorized display to his court attorney of a photograph purporting to depict a nude female senior court office assistant is vile and despicable conduct requiring his removal. But this misconduct does not stand alone. Even if the Commission does not sustain this allegation, the multiple other acts of misconduct that were affirmatively found by the Referee, combined with Respondent’s disciplinary record, depict a judge who is insensitive to his ethical obligations and who

routinely places his own personal and monetary gain over his special obligations and as a judge, warranting his removal.

- A. Standing alone, Respondent's unauthorized display of a photograph purportedly depicting a female member of the Family Court staff to his court attorney requires his removal.**

It was highly inappropriate for Respondent to show his court attorney a photograph that Respondent said depicted a female member of the Family Court staff. Such conduct is humiliating, embarrassing and demeaning to Ms. L [REDACTED] and utterly unbecoming a judge, especially a Family Court judge who routinely presides over highly sensitive and personal matters that may include allegations of sexual abuse and domestic violence. If the Commission finds that Respondent committed this egregious misconduct, it simply cannot allow him to remain on the bench.

- B. Even if the Commission does not sustain the L [REDACTED] photograph allegation, the misconduct found by the Referee warrants his removal.**

Even if the Commission does not sustain the L [REDACTED] photograph allegation, the multiple acts of misconduct that the Referee found Respondent did commit show that he is insensitive to the special ethical obligations of judges and routinely places his own personal and monetary gain over his role as a judge, often with the use of deception.

1. The Referee found that Respondent made sexually inappropriate comments to the Chief Clerk of his court and demeaned a Supervising Court Assistant.

The Referee found that, on more than one occasion, Respondent subjected the Chief Clerk of the Broome County Family Court to inappropriate and unwanted sexual comments (Rep 23-24, 39). In 1985, the Commission said:

The cajoling of women about their appearance or their temperament has come to signify differential treatment on the basis of sex. A sensitized and enlightened society has come to realize that such treatment is irrational and unjust and has abandoned the teasing once tolerated and now considered demeaning and offensive. [Such] [c]omments . . . are no longer considered complimentary or amusing, especially in a professional setting.

Matter of Doolittle, 1986 Ann Rep 87, 88 (Comm'n on Jud Conduct, June 13, 1985).

Over thirty years later, society is more sensitized than ever to the fact that remarks of a personal and sexual nature are highly inappropriate, especially amid the current “Me Too” movement. Accordingly, it is appalling that Respondent failed to understand that it was improper to repeatedly subject the chief clerk to – in her words – such “shock[ing] and disgust[ing]” comments (Tr 367, 370).

“A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function.” *Matter of Kuehnel*, 49 NY2d at 469; *see also Matter of Dye*, 1999 Ann Rep at 94.

Respondent’s behavior toward Chief Clerk Singer is aggravated by his failure to acknowledge and take responsibility for it. *See Matter of Ayres*, 30 NY3d at 64. During his testimony, Respondent emphatically denied that he made these statements to Ms. Singer (Tr 1399). Respondent never apologized to Ms. Singer, testifying only that he “would have apologized” if Ms. Singer had told him his comments made her “uncomfortable” (Tr 1428) (emphasis added). By the time Respondent testified at the

hearing, however, he had listened to Ms. Singer’s compelling testimony that she was “shocked and disgusted” (Tr 367, 370) by his conduct. Yet despite knowing how deeply his words had offended her, he did not apologize.

Respondent also demonstrated his injudicious demeanor by degrading a Supervising Court Assistant, Ms. Vroman for being “too slow” on an occasion when Respondent wanted to leave court early (Rep 20-22, 39).

2. The Referee found that Respondent omitted over \$30,000 of extra-judicial income from state and federal tax returns and financial disclosure forms for the court system.

The Referee found that Respondent committed misconduct by omitting tens of thousands of dollars of extra-judicial income from his FDS filings, state and federal tax returns and disclosure forms with the clerk of the Broome County Family Court (Rep 34-39, 40-41). This misconduct was seriously exacerbated by the inescapable conclusion that Respondent’s omissions were intentional, so as to conceal significant amounts of income from taxation.

The Court of Appeals has repeatedly stressed that “deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth” and that judges “are held to higher standards of conduct than the public at large.” *Matter of Francis and Joseph Alessandro*, 13 NY3d at 248 (quotation marks and citations omitted). Under this “high standard of conduct,” Respondent was “required to provide truthful and complete information in his financial disclosure statement[s]” and tax forms. *Id.*

Furthermore, the Court has suggested that where omissions of required information from financial disclosure statements are intentional, as opposed to merely

negligent, it may constitute “truly egregious” conduct warranting removal from office. *Id.* at 248-49. Here, as thoroughly discussed in Point V, pp 76-82, *supra*, the evidence demonstrated that Respondent’s recurring omissions were not a result of mere carelessness; they were part of a deliberate and ongoing pattern of deception to conceal income from taxation and, by itself, warrants his removal. *See id.*

Respondent’s belated amendment to his FDS filing, made only after he was notified by the Commission of his failure to include income from the practice of law, does not mitigate the impropriety and appearance of impropriety in his initial failure to properly disclose this income in the first instance. *See Matter of Dier*, 1996 Ann Rep at 80-81 (sustaining Charge III for failure to report rental property income, notwithstanding that Respondent subsequently filed an amended FDS). Moreover, Respondent’s amendments were materially incomplete, as he has *never* amended his FDS forms to disclose omitted rental income.

Respondent’s misconduct in failing to disclose income to the IRS and state taxation authorities was particularly egregious and was not cured by the subsequent filing of amended returns. Contrary to the Referee’s finding (Rep 36), it is apparent that Respondent knew by the time he amended his returns that the Commission was in possession of his tax records and other financial records, including the checks for his legal fees in *Funk*, which had been in boxes taken from his chambers in July 2017 (Tr 1360-61, 1390-91). Prior to filing his amended returns, Respondent was also questioned by the Inspector General about income he received for his work on the *Estate of Deborah Brigham* (Tr 1468-69).

In analogous circumstances, the Commission found it was misconduct for a judge to fail to report income on his tax return, notwithstanding that an “amended return was filed by respondent prior to the issuance of the Formal Written Complaint issued by the Commission, but following the initiation of an investigation by the Commission.” *Matter of Ramich*, 2003 Ann Rep 154, 155 (Comm’n on Jud Conduct, December 27, 2002).

As the Commission held in *Ramich*, Respondent’s:

misconduct was exacerbated by his failure to report the fee he received to the chief clerk of the court, as required by the ethical rules, or on his 1998 income tax returns. Such lapses are not excused by negligence or inattention and, even if inadvertent, create the appearance that respondent was intentionally concealing his extrajudicial activity.

Id. at 159.

Respondent further seriously aggravated his misconduct by providing shifting explanations and excuses for his failures to disclose income, which lack the ring of truth. Respondent initially testified that he believed he had disclosed his income from the practice of law on his 2015 FDS form as part of his answer listing his bank account holdings (Tr 840, 844-45). Yet he had reported income from the practice of law in the appropriate section of his 2014 form, so he clearly knew how to report it properly (Ex 8A, addendum to Question 13). At the hearing before the Referee, he changed his excuse, now claiming that he thought he had received the income not in 2015, but in 2016 (Tr 1411-12). However, he also failed to report that income on his 2016 FDS form (Ex 8C). Respondent’s explanation that he believed he had received the over \$27,000 in income from the practice of law in 2016 was further belied by his failure to report that income on his 2016 income tax returns (Exs 9F, 9I).

Respondent's explanation for failing to disclose thousands of dollars in rental income on his FDS forms and tax returns – that the properties ran a deficit overall – strains credulity. The FDS form specifically instructs filers to include net rent from each source before taxes (*see* Ex 8B, instructions for Question 13) and the IRS Schedule E requires the listing of rents received for each property *before* the listing of expenses which may then be subtracted from the rent (*see* Ex 9C, Schedule E). Thus, under any interpretation of instructions, the income from 2█ North Street should have been disclosed on Respondent's 2015 FDS and income tax returns because Respondent did not pay the expenses of 2█ North Street and that property did not run a “deficit.”²² Yet Respondent initially did not even include 2█ North Street as one of the properties on his tax returns.

Respondent also repeatedly professed ignorance as to the requirement to file an annual report with the clerk of the court – notwithstanding that he was reminded of this obligation by court administrators in an email dated April 2016 and by the Commission in November 2017 and May 2018. In any event, ignorance and lack of competence do not excuse violations of ethical standards. *See Matter of VonderHeide*, 72 NY2d 658 (1988).

Judges are obliged to be candid in Commission proceedings. *See Matter of Doyle*, 2008 Ann Rep 111 (Comm'n on Jud Conduct, February 26, 2007). Respondent's obvious lack of candor in explaining his omissions elevates the required sanction.

²² Respondent's amended federal income tax returns show that 2█ North Street had a net profit of \$1,174 in 2015 (Ex 9C, Schedule E) and \$2,185 in 2016 (Ex 9G, Schedule E).

3. Respondent's request of the Tioga County Surrogate's Court to close an estate he had worked on as an attorney by motion and his request of his court secretary to type letter to a former client to receive payment for past legal services demonstrated an impermissible intermingling of his judicial role and his former role as a practicing attorney.

Respondent “demonstrated a serious confusion between his judicial role and his former role as a practicing attorney,” *Matter of Ramich*, 2003 Ann Rep, *supra*, at 159, by asking if the Tioga County Surrogate's Court would close an estate he had worked on as a practicing attorney by motion (Rep 31)²³ and by “request[ing]” that his court secretary type a letter to a former client to receive payment for past legal services (Rep 24-25, 40).

Respondent's request of the Tioga County Surrogate's Court was particularly egregious given that the Commission, in publicly Censuring him, had already put him on specific notice to avoid “impermissibl[y] intermingling . . . his roles as a lawyer and judge.” *Matter of Miller, II*, 2003 Ann Rep at 142.

The fact that Respondent instructed Ms. Gallagher to draft the letter as if it was originating from his former private practice secretary further demonstrated, like his intentional omissions from his tax returns and financial disclosure forms, his propensity to employ deception for personal monetary gain. Respondent's explanation that Ms. Gallagher “volunteered” to draft this letter lacked candor, another significant aggravating factor.

²³ As discussed in Point IV, *supra*, the Referee correctly found that this occurred but wrongly concluded that it was not misconduct.

C. Respondent's disciplinary record further supports removal.

In determining sanction, the Commission may consider both the severity of a judge's misconduct and his disciplinary record. *See Matter of Cerbone*, 2 NY3d 479, 485 (2004).

This is Respondent's third matter before the Commission. In 2002, the Commission publicly censured Respondent for numerous acts of misconduct, primarily related to an inappropriate intermingling of his roles as a lawyer and judge, including:

- (1) Presiding over two cases in which a party or a member of the party's immediate family was a client of Respondent's law firm;
- (2) Presiding over six cases in which Respondent engaged in conduct that conveyed an erroneous impression that he was presiding over a client's matters;
- (3) Representing, in three cases, defendants notwithstanding that the charges originated in Respondent's court;
- (4) Acting, in one case, as an attorney in a proceeding in his own court; and
- (5) Issuing notices to a small claims defendant which stated that a warrant would be issued for the defendant's arrest if he did not appear in court to pay a judgment.

Matter of Miller, II, 2003 Ann Rep at 141-42.

Moreover, in November 2015, the Commission cautioned Respondent, after he allowed his campaign for his present Family Court judgeship to distribute and display advertising that falsely implied he was then an incumbent Family Court judge (*see* appended letter of dismissal dated November 16, 2015). That act, like many of the acts

of misconduct currently at issue, involved a level of deception intended for Respondent's personal benefit.

As the Commission wrote in 2002: “[R]espondent’s conduct showed insensitivity and inattention to his ethical responsibilities.” *Miller, supra*, at 142. It is apparent that Respondent did not learn from his prior interactions with the Commission; he continued a pattern of self-serving, injudicious and lewd behavior. Respondent’s misconduct, as demonstrated by the record, together with his history of past misconduct shows that he is unable to understand and abide by the special ethical obligations of judges. If he is not removed, the Commission can expect “more of the same.” *Matter of Bauer*, 3 NY3d 158, 165 (2004); *Matter of Ayres*, 30 NY3d at 66.

CONCLUSION

Counsel to the Commission respectfully requests the Commission should confirm in part and disaffirm in part the Referee’s findings of fact and conclusions of law as set forth above, and render a determination that Respondent has engaged in judicial misconduct and should be removed from office.

Dated: September 20, 2019
Albany, New York

Respectfully submitted,

ROBERT H. TEMBECKJIAN
Administrator and Counsel to the
Commission on Judicial Conduct

By: 

S. Peter Pedrotty, Esq.
Senior Attorney
Corning Tower, Suite 2301
Empire State Plaza
Albany, New York 12223
(518) 453-4600

Of Counsel:
Cathleen S. Cenci, Esq.
Edward Lindner, Esq.



NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

HON. THOMAS A. KLONICK, CHAIR
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61 BROADWAY
NEW YORK, NEW YORK 10006
646-386-4800 646-458-0037
TELEPHONE FACSIMILE
www.cjc.ny.gov

ROBERT H. TEMBECKJIAN
ADMINISTRATOR & COUNSEL

MEMBERS

JEAN M. SAVANYU, CLERK

November 16, 2015

CONFIDENTIAL

Honorable Richard H. Miller, II
Family Court Judge
c/o Paul DerOhannesian II, Esq.
DerOhannesian & DerOhannesian
677 Broadway, Suite 202
Albany, New York 12207-2985

LETTER OF DISMISSAL AND CAUTION

Dear Judge Miller:

The Commission on Judicial Conduct has completed its investigation of a complaint alleging that in 2014, as a town justice and candidate for Family Court judge, you allowed your campaign to distribute and display advertising that implied that you were an incumbent Family Court judge. After considering your response to the allegations, the Commission has determined not to institute formal charges.

In accordance with Section 7000.3(c) of the Commission's Operating Procedures and Rules, the Commission has dismissed the complaint with this letter of dismissal and caution.

You are cautioned to adhere to Section 100.1 of the Rules Governing Judicial Conduct ("Rules"), which requires a judge to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved; Section 100.2(A) of the Rules, which requires a judge to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and

impartiality of the judiciary; Section 100.5(A)(4)(c) of the Rules, which prohibits a judge or judicial candidate from authorizing his or her campaign committee to do what the judge or candidate is prohibited from doing; and Section 100.5(A)(4)(d)(iii) of the Rules, which prohibits a judge or judicial candidate from knowingly making false statements or misrepresenting his or her identity, qualifications, current position or other fact concerning the candidate or an opponent.

Your considerable use of the campaign logo “Rick Miller Family Court Judge” – on campaign materials including billboards, the Internet, television ads, letterhead and palm cards – was inconsistent with the above standards since it could reasonably be interpreted as implying that you were the incumbent Family Court judge. On those materials, the omission of the words “for” or “elect” created ambiguity as to whether you currently held that office and permitted an inference that you did so, an inference that might be an advantage in your campaign. Even if such phrasing is commonly used in campaign materials of non-judicial candidates, judicial candidates in New York are required to adhere to an ethical code that imposes unique and more stringent limitations on political activity. As the U.S. Supreme Court recently affirmed in *Williams-Yulee v. Florida Bar*, 135 S Ct 1656, 1667 (2015), states “may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians.” Moreover, even if other judicial candidates have used similar phrasing in their advertising, the fact that other judges engaged in similar misconduct does not excuse the impropriety. *See Matter of Sardino*, 58 NY2d 286, 291 (1983).

In accordance with the Commission’s policy, you may either accept this letter of dismissal and caution or request a formal disciplinary hearing. If you choose to accept this letter of dismissal and caution, no further action will be taken. If you request a hearing, the Commission may authorize a Formal Written Complaint against you pursuant to Judiciary Law Section 44(4) and designate a referee to hear and report findings of fact and conclusions of law. If a hearing is held, the Commission may then decide to dismiss the complaint, issue a letter of caution to you, or file a determination pursuant to Judiciary Law Section 44(7) that you be publicly admonished, publicly censured, or removed from office.

The letter of dismissal and caution is a confidential disposition of the current complaint but may be used in a future disciplinary proceeding pursuant to Section 7000.4 of the Commission’s Operating Procedures and Rules (22 NYCRR §7000.4).

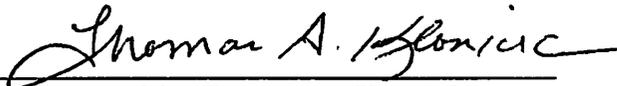
Please have your attorney send to the Commission, no later than 10 days

after his receipt of this letter, your signed acknowledgment that you received this letter of dismissal and caution. If we do not hear from you requesting a formal hearing within 10 days, the letter shall be final.

A copy of the Commission's rules is enclosed for your information.

Very truly yours,

COMMISSION ON JUDICIAL CONDUCT

By: 
Honorable Thomas A. Klonick
Chair

Enclosure

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: File No. 2015/A-0013