

To be Argued by:
PAUL DEROHANNESIAN II
(*Time Requested: 15 Minutes*)

JCR 2020-00003

Court of Appeals
of the
State of New York

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.

HON. RICHARD H. MILLER, II,

Petitioner,

– against –

STATE OF NEW YORK COMMISSION ON JUDICIAL CONDUCT,

Respondent.

BRIEF FOR PETITIONER

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I. SUMMARY OF ARGUMENT

Commission Counsel professed not to dispute the principle of deference accorded to a Referee's credibility determinations. Yet, in assessing Judge Miller's conduct and the appropriate sanction, the Commission's majority ignored, rejected and altered the Referee's findings and conclusions. Indeed, the findings that they did make – especially concerning Judge Miller's comments to Ms. Vroman and Ms. Singer – appear to be influenced by the “sensational allegations” of two incredible witnesses.

The Referee's detailed – and damning – extensive factual findings against the two accusers (Judge Miller's Court Attorney, Mark Kachadourian, and Court Secretary, Rachelle Gallagher) go virtually unchallenged and unmentioned by the Commission. The Referee describes their testimony as “def[ying] reason,” “absurd[],” “crazy,” “mak[ing] no sense,” “troubling,” and “consciously trying to make [Judge Miller] sound ‘connected’ to bad people.” The Referee notes that Mr. Kachadourian and Ms. Gallagher – witnesses with a federal lawsuit against Judge Miller and the Unified Court System – offered “rehearsed and coordinated testimony.” Multiple reputation witnesses support the Referee's conclusions: they aver that the Court Secretary is “untruthful,” a “[m]anipulator, troublemaker, liar, evil” and “not credible, she's not truthful.” The evasive Court Attorney refused to answer questions at times. When it came to his main job duty, he conceded to only

writing a “couple” of decisions for Judge Miller during his tenure and could not identify one by name. (Judge Miller testified that Mr. Kachadourian only drafted two decisions.)

This record is replete with the testimony and exhibits indicating that much of the investigation and charges against Judge Miller emanated from these two deceitful and discredited witnesses whose testimony was “rehearsed and coordinated” and designed to damage Judge Miller and enrich themselves to support their pending federal lawsuit.

Fortunately, not all members of the Commission turned a blind eye to the source and impact of the unsubstantiated allegations against Judge Miller. Appellate Justice Robert Miller and Vice-Chair Paul Harding recognized that the allegations of two serial liars contaminated, corrupted and compromised the proceeding against Judge Miller:

In the presentation before the Commission, counsel for the Commission did not seek to overturn the referee’s credibility findings regarding the Court Attorney and Court Secretary, or the finding that their allegations were not established. I believe that the serious allegations these individuals made which were not proved cast a pall over the entire proceeding against [Judge Miller]. Accordingly, in my view, it is critical to focus solely on those acts of misconduct that were established by the evidence. The appropriate sanction for the proven misconduct is censure. [emphasis added]

Against this “pall” the Commission selectively culls facts to justify removal while ignoring other uncontested facts favoring mitigation and the censure that Judge Miller concedes should be imposed.

For example, it is uncontested that Judge Miller, together with his accountant, began the process of amending his income tax returns and FDF (which resulted in a one-line amendment to one FDF) within weeks of filing his 2016 return, and long before any inquiry into his financial documents and filings. The Referee specifically acknowledges Judge Miller’s timing as a mitigating factor, but the Commission demonstrated willful blindness to this and his other findings.

To justify its conclusion of removal, the Commission found in Judge Miller’s 23-year career an 18-year-old censure involving unrelated conduct and a 2015 Letter of Dismissal and Caution regarding a campaign lawn sign. The Commission ignored the unrebutted character testimony of Judge Miller’s reputation and history for truthfulness, his judicial temperament and courteous behavior toward court personnel and litigants over 23 years. This testimony about Judge Miller spanned his decades on the bench and a gamut of individuals: past and present court clerks, an attorney and an Office of Court Administration security supervisor in Family Court who observed Judge Miller daily.

Judge Miller was also candid and forthright in admitting he is not perfect. He does not contest that his secretary prepared a four-sentence letter, which was not

sent, with respect to a legal matter he handled just prior to assuming the bench. Nor does he contest that he used an unprofessional tone during a particularly busy and stressful emergency Family Court petition session. And Judge Miller recognized that he made two inappropriate comments to a female clerk, described by the Referee as not “graphic in nature.” Judge Miller acknowledged that his statements were perceived as offensive to the clerk. He apologized for making such comments. He avers that he will refrain from any such comments in the future. Judge Miller’s comments are aberrational and atypical given the undisputed testimony by character witnesses, and even some of Commission Counsel’s witnesses, that Judge Miller is a respectful, honest, trustworthy and productive judge.

The facts demand, precedent requires and justice mandates that this Court uphold the Referee’s findings, as he was in the best position to assess the circumstances and context of these comments and the credibility of Judge Miller (findings which the dissenting Justice Miller and Vice-Chair Harding credited) that the incident with Ms. Vroman was “not professional” and that Judge Miller’s two statements to Ms. Singer, while “inappropriate,” were uttered without the “intent to harm anyone . . . [and] may well have been intended to be humorous.”

The Commission’s majority also turned a blind eye by refusing to adhere to the very precedents cited in its own determination and other long-established standards. Reviewing the determinations and decisions cited by the Commission

reveals that virtually without exception, the appropriate sanction has been less than removal. Thus, in dissent, Appellate Division Justice Robert Miller, joined by Vice-Chair Harding implores that “[g]iven the nature of [Judge Miller’s] misconduct, the sanction of removal is contrary to the findings of the referee and contrary to long-established precedent of the Commission.”

II. QUESTIONS PRESENTED

1. Did the Commission err in finding that Judge Miller’s prior contacts with the Commission rendered his current misconduct that much more egregious?

2. Did the Commission err in ignoring, rejecting or altering the Referee’s findings, and in doing so, depart from the longstanding precedent affording the Referee’s credibility determinations great deference?

3. Did the Commission err in departing from precedent, including those cited in the determination, in imposing the sanction of removal?

4. Did the Commission err in finding that removal was necessary?

Petitioner respectfully submits that the answer to each of these questions is “yes.”

III. STATEMENT OF FACTS

On July 9, 2018, the State of New York Commission on Judicial Conduct (“the Commission”) issued a Formal Written Complaint accusing Petitioner Hon.

Richard H. Miller II, (“Petitioner” or “Judge Miller”) of four categories of charges. R35-55.¹ Following a hearing, Referee Robert Barrer (“Referee”) issued a Report and Proposed Findings of Fact and Conclusions of Law (“Report”) on June 20, 2019. R2778-2818. At the outset, the Referee found that “the two key complaining witnesses, Mark Kachadourian and Rachelle Gallagher”² (R2785), were not credible (R2788-91). In explaining his finding, the Referee described the witnesses and their testimony as “def[ying] reason,” (R2788), “absurd[.]” (R2788), “crazy” (R2789), “mak[ing] no sense” (R2789), “troubling” (R2791), and “consciously trying to make [Judge Miller] sound ‘connected’ to bad people” (R2790). The Referee later noted that Mr. Kachadourian and Ms. Gallagher – witnesses who filed a federal civil lawsuit against Petitioner and the Unified Court System (R204, R772-73) – offered “rehearsed and coordinated testimony” (R2796).³ The Referee therefore rejected any allegation against Judge Miller based solely on the testimony of either Mr. Kachadourian or Ms. Gallagher.

¹ References to the Record are designated as “R.”

² Mr. Kachadourian was Judge Miller’s court attorney and Ms. Gallagher was Judge Miller’s court secretary. R155-56.

³ Multiple reputation witnesses support the Referee’s conclusions: they aver that Ms. Gallagher is “untruthful” (R1221, R1228), a “[m]anipulator, troublemaker, liar, evil” (R1324), and “not credible, she’s not truthful” (R1459). Mr. Kachadourian at times refused to answer questions (R208), and argued that certain questions were irrelevant, offensive and constituted privileged communications with his wife (R229-230, R335, R373). At one point, Mr. Kachadourian stated “You know what? I think at this point, I may request an adjournment to have my counsel present.” R231. His request was denied. R232. During his tenure as Judge Miller’s law clerk, Mr. Kachadourian drafted “two” (R1604-05) or possibly a “couple” decisions and could not identify any by name (R283-84, R350, R372-73). Judge Miller inquired into terminating both Mr. Kachadourian and Ms. Gallagher for their work performance. R278-79, R1619-20, R1633-34.

As to the four charges against Petitioner, the Referee found that the third charge – that Judge Miller engaged in the practice of law while a full-time Judge – were totally unproven. R2817. The Referee further found that the vast majority of the allegations in Charges I, II and IV were similarly unproven. Indeed, of the many allegations raised against Judge Miller, only the following were proven as violating the Rules Governing Judicial Conduct (“the Rules”). First concerning Charge 1, Petitioner’s unprofessional interaction with Court Assistant Rebecca Vroman and his inappropriate comments to former Chief Court Clerk Debbie Singer. R2816. As to Charge II, Ms. Gallagher typed a letter for Judge Miller regarding the *Estate of Roger L. Funk*. R2817. Finally, concerning Charge IV, Petitioner’s failure to file annual reports with the Clerk of the Family Court, his failure to include extra-judicial income on his Unified Court System Ethics Commission Financial Disclosure Forms (“FDF”), and his failure to include extra-judicial income on his Federal and New York State Tax Returns. R2817-18.

In Judge Miller’s submission to the Commission prior to oral argument, he advised that he “d[id] not seek to disturb his findings of fact and/or the charges [the Referee] sustained.” R2821. Instead, Petitioner “urge[d] the Commission to follow its precedent and impose no greater than a Censure.” R2821. Counsel for the Commission (“Commission Counsel”) “recogniz[ed] the deference ordinarily accorded to” a Referee’s credibility findings, and therefore, with one exception,

“d[id] 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.”⁴
R2903.

On February 14, 2020, following oral argument, the Commission issued a Determination (“2020 Determination”) removing Judge Miller. R1-27. With one notable exception, the Commission effectively adopted the Referee’s findings as to which allegations were proven.⁵ In other words, the Commission agreed with the Referee’s finding that Judge Miller violated the Rules with respect to the three categories of allegations identified above (unprofessional and inappropriate interactions with Ms. Singer and Ms. Vroman, the letter drafted by Ms. Gallagher and Judge Miller’s failure to timely and accurately file tax returns and financial disclosures). R3-12. However, as will be discussed throughout this fact section, the Commission ignored, altered or rejected several of the Referee’s factual findings underlying the proven allegations.

⁴ The one exception concerned a sensational allegation testified to by Ms. Gallagher and Mr. Kachadourian. R2903. Commission Counsel argued that the Commission should disaffirm the Referee’s unproven finding in light of a missing witness charge that Commission Counsel maintains was erroneously rejected by the Referee. R2903. The Commission did not disaffirm the Referee’s finding as to that allegation or reverse the Referee’s finding with respect to the missing witness charge.

⁵ The notable exception concerns an allegation that Judge Miller made an inappropriate comment to Ms. Singer. Although the Referee did not make a specific finding as to this allegation, the Commission’s 2020 Determination is drafted as if the Referee found the allegation proven. The facts surrounding this allegation and Judge Miller’s argument as to why the Commission erred in relying on this allegation, are addressed below. See infra Part III.A.3, IV.B.1.

Two members of the Commission, Justice Robert J. Miller,⁶ a Justice of the Appellate Division, Second Department, and Mr. Paul B. Harding, Esq., Vice Chair of the Commission, concurred with the majority's misconduct findings but argued the appropriate sanction was censure as opposed to removal. R24. The dissenting opinion, drafted by Justice Robert Miller, found that "[g]iven the nature of [Judge Miller's] misconduct, the sanction of removal is contrary to the findings of the referee and contrary to long-established precedent of the Commission." R24. In finding that censure was the appropriate sanction, Justice Robert Miller also highlighted the prejudicial impact that the unproven yet "very serious allegations" of Ms. Gallagher and Mr. Kachadourian, and their motive to lie, had on the proceedings against Judge Miller. R24-25. The pertinent portion of Justice Robert Miller's decision is below:

The primary focus of the charges against [Judge Miller], and the hearing before the referee, relate to very serious allegations made by [Judge Miller's] Court Attorney [Mr. Kachadourian] and Court Secretary [Ms. Gallagher]. In support of those allegations, the Commission called the Court Attorney, the Court Secretary, and two additional witnesses. [Petitioner] testified on his own behalf and called witnesses to testify about the allegations made against him. After conducting a six-day hearing, the referee issued a report in which he found that both the Court Attorney and the Court Secretary lacked credibility. He also concluded that they each had a motive for lying about these matters due to a pending

⁶ Justice Robert J. Miller and Petitioner are not related. Petitioner will refer to the dissenting judge as "Justice Robert Miller" to avoid any confusion.

lawsuit they had brought against the Unified Court System. The referee further found that their troubling allegations against [Judge Miller] were not proved. In the presentation before the Commission, counsel for the Commission did not seek to overturn the referee's credibility findings regarding the Court Attorney and Court Secretary, or the finding that their allegations were not established. *I believe that the serious allegations these individuals made which were not proved cast a pall over the entire proceeding against [Judge Miller]. Accordingly, in my view, it is critical to focus solely on those acts of misconduct that were established by the evidence. The appropriate sanction for the proven misconduct is censure.*

R24-25 (footnote omitted, emphasis added).

The facts relating to the Referee's proven charges and the instances in which the 2020 Determination ignored, rejected or altered the Referee's findings, are detailed below.

A. Charge I: Judge Miller's Unprofessional Conduct With Ms. Vroman And Inappropriate Comments To Ms. Singer

The Referee found that the Complaint's more salacious allegations in Charge I were not proven as they were based on the uncorroborated and unreliable testimony from Mr. Kachadourian and Ms. Gallagher, witnesses the Referee found entirely incredible. R2793-2800. Indeed, of the many allegations referenced in Charge 1, the Referee found only the following three were proven: 1) on February 6, 2017, Judge

Miller was unprofessional when he admonished Ms. Vroman⁷ (R2797-99); 2) in May 2017, following a dish-to-pass luncheon Judge Miller commented to Ms. Singer,⁸ whose husband is deceased, that “[i]f [he] knew [she] could also cook, [he] would have gone for the widow” (R2800-01); and 3) in June 2017, Judge Miller commented to Ms. Singer that she “look[ed] really hot in that outfit” (R2800-01). Acknowledging that Charge I contained far more salacious unproven allegations, the Referee noted that he

d[id] not find that the fact that Respondent made unprofessional comments to Ms. Vroman and Ms. Singer to be probative of the more sensational allegations against Respondent in this Charge This is so because the comments were made directly to Ms. Vroman and Ms. Singer and not behind their backs. Nor were the comments graphic in nature. In short, the proof of the Vroman and Singer comments fails to support, either directly or indirectly, proof of the other comments in this Charge.

R2801. What the Referee did not find is as important as what he did find. He did not find that any comment was malicious or sexist. Nor did he find any “pattern” of comments.

The facts surrounding the various statements are discussed below.

⁷ Ms. Vroman was Judge Miller’s court assistant. R478.

⁸ Prior to her retirement, Ms. Singer was the Chief Clerk of Broome County Family Court. R3, R511.

1. Judge Miller's Unprofessional Interaction With Ms. Vroman

Judge Miller described February 6, 2017, as an “extremely busy day.” R1657.

According to Judge Miller,

we came to find out that Ms. Gallagher didn't tell Ms. Vroman that I had physical therapy, that she said it was my responsibility to let her know that. I was the emergency intake judge that week. We had 14 regular cases scheduled. In the afternoon, we had seven cases. We had an additional nine emergencies that came in. Mark Kachadourian was nowhere to be found. I didn't hear any information from Ms. Gallagher. It was getting late in the day. I think after 4:00 we actually got the last two petitions. We had to be out of that courtroom by 4:30 and there was a court officer in the courtroom with us, too. I did not, loud and angrily, admonish Ms. Vroman. What I did is asked her if she could move along because we had to get them done before 4:30, meaning some of the typing and input could be done afterwards as opposed to being done immediately right when we were in the courtroom.

R1657-58.

Ms. Vroman agreed that it was a busy, pressure-filled day with a significant number of emergency petitions. She testified that they had a “full caseload” and that around 2:30 that afternoon, she

started receiving emails with emergency petitions in them for the judge to review. . . . At first, [Judge Miller] was just taking them, it was no problem, but after—We ended up getting six of them between quarter to 3:00 and a little bit after 4:00. So, there was six emergency petitions that came in, like all at once, and the more I handed to him, the more upset he got.

R481-82. Ms. Vroman also confirmed Judge Miller’s testimony that neither Mr. Kachadourian nor Ms. Gallagher were present to assist Judge Miller. R484. During a break between cases, Ms. Vroman testified that Judge Miller “yelled at [her] and told [her she] was going too slow and that [she] needed to move faster and he just was being very rude and disrespectful and condescending and demeaning and just very belligerent to [her].” R483. No one beyond Ms. Vroman and Judge Miller was present for this exchange. R484. Ms. Vroman agreed that what transpired on February 6, 2017, did not impede her and Judge Miller’s ability for the two of them to “get the job done.” R508. While Broome County Family Court proceedings are recorded (R417, R503, R1435), there is no audio or video recording of any exchange between Ms. Vroman and Judge Miller. The Commission did not present any testimony from a court security officer concerning the exchange between Judge Miller and Ms. Vroman.⁹

Although Judge Miller testified at the hearing that he did not “loud[ly] and angrily admonish[] Ms. Vroman,” he acknowledged “ask[ing] her if she could move along.” R1657-58. Petitioner explained that “[w]hen [he is] frustrated, [he] ask[s] that [they] push to get things done” and was “sorry that Ms. Vroman [wa]s still upset by it.” R1687. Going forward, Judge Miller promises to “be mindful of [his] tone

⁹ According to Ms. Vroman, it is “standard operating procedure” for security personnel to be present in Family Court. R502-03.

and fully explain” if he had a “commitment which would require a timely finish to the court date.” R1687-88.

The Commission’s 2020 Determination repeatedly states that Judge Miller “berated and demeaned” Ms. Vroman. R13, R19, R22. However, while these words (“berate” and “demean”) appear in the Referee’s Report, they are included only as recitation of testimony (R2797-98, R483, R527-28), not as a finding of fact. Stated differently, the Referee did not find that Judge Miller “berated and demeaned” Ms. Vroman. Instead, the Referee found “that the interaction with Ms. Vroman was not professional,” but “[t]here [wa]s nothing in the record to indicate that [Petitioner] used obscenity or other inappropriate words.” R2798-99. Nor could the Referee “conclude that [Judge Miller’s] demeanor was ‘loud and angry.’” R2798-99.

2. The Proven Inappropriate Comments To Ms. Singer

Turning next to the allegations concerning Ms. Singer, the Referee found that two statements had been established. R2800-01. The first occurred in May 2017. R522. Ms. Singer, a widow for approximately twenty years (R252), testified that “[a]fter [a dish to pass] luncheon, the judge stopped in [her] office to say he really liked the dish that [Ms. Singer] made and he said, ‘If I knew you could also cook, I would have gone for the widow’” (R522-23). No one was present for this interaction. R523. Ms. Singer described Judge Miller’s demeanor as “[l]aughing, happy.” R523. The second statement occurred in June 2017. R526. Ms. Singer testified that she

“was standing in the middle of [her] office doing something, [her] door was open, . . . Judge Miller walked by, . . . he stepped in and said to [her], ‘You look really hot in that outfit. You should always wear that outfit.’” R526. Ms. Singer did not testify that anyone was present for this comment. Prior to these two comments, Ms. Singer testified that she and Judge Miller had a good working relationship. R516.

Unlike the incident with Ms. Vroman, Judge Miller has no “specific memory of the comments” to Ms. Singer. R1688. Nevertheless, he acknowledged that he will at times “kid around” with his coworkers to “put [them] at ease.” R1688. However, “[t]his experience has taught [him] that [he] must choose carefully not only the words [he] use[s] but how [he] deal[s] with others [He] know[s] now that all [his] choices and words or how [he] treat[s] people must be respectful for them and for [his] position, so [he] cannot and will not say anything in jest.” R1688. At the oral argument before the Commission, Judge Miller again accepted responsibility for his actions and “reiterate[d] [his] apologies to Ms. Vroman and Ms. Singer.” R3029. Going forward, he “will be mindful of their feelings” and “assure[d]” the Commission “that it will never happen again.” R3029.

The Referee “accept[ed] and credit[ed] [Judge Miller’s] testimony that he had no intent to harm anyone with comments that may well have been intended to be humorous,” but nevertheless found that “the comments made to Ms. Singer were inappropriate.” R2801. Justice Robert Miller, in his dissenting opinion, found that

“[t]he record supports the referee’s conclusion that respondent’s inappropriate statements to the Chief Clerk constituted an extremely poor attempt at humor. Although such remarks must not be condoned or tolerated, Commission precedent demonstrates that censure or admonition have been held to be appropriate punishments for significantly worse conduct.” R25-26 (citations omitted). The majority decision, however, rejected the Referee’s finding¹⁰ and concluded that the statements to Ms. Singer were “sexist,” “shocking” and constituted a “pattern of sexual comments to a court employee.” R13, R19.

3. The Unproven Comment Allegedly Concerning Ms. Singer

In addition to the two statements to Ms. Singer identified above, the Commission also relied on a third statement allegedly attributed to Judge Miller and never found to be proven by the Referee. R5. (This statement is the notable exception referenced above. See supra Part III.A.3.) According to the 2020 Determination,

Ms. Singer testified that, as she usually did when someone was in her office and she had a hot flash, she apologized to [Judge Miller] and explained that she was having a hot flash. After Ms. Singer mentioned the hot flash to [Judge Miller], he replied “It’s nice to know I still have that effect on you.”

¹⁰ The 2020 Determination “f[ou]nd it implausible that respondent . . . would think telling his chief clerk that she was ‘really hot’ and ‘should always wear that outfit’ was humorous.” R22.

R5. However, Ms. Singer *did not* testify that Judge Miller made the statement and the Referee *did not* find that this statement had been made or proven by a preponderance of evidence.¹¹ Instead, Ms. Singer testified that Ms. Gallagher told her that Judge Miller made the statement. R524-26. The relevant portion of Ms. Singer's direct testimony is below:

Q. Let me direct your attention then to in or about June 2017. Do you recall an interaction with the judge in which he-- or, in which you were having a hot flash?

A. Yes.

Q. Can you tell us about that incident?

A. Unfortunately, I have frequent hot flashes. The judge was in my office speaking to me and I had a hot flash and I always kept an expandable fan there for that purpose. I began fanning myself and I said, "I apologize, I'm having a hot flash," continued our conversation, and he went back to his chambers and—

Q. . . . Did he say anything at the time when you said you were having a hot flash?

A. Well, he told-- This was reported by Rachelle, that he said he was-

...

Q. Did he say anything to you when you said you were-- Excuse me, you were having a hot flash?

A. No. He reported it to Rachelle.

¹¹ The statement is not referenced in the Referee's Report.

R524-25. Judge Miller’s hearsay objection and his request to strike were effectively overruled with the Referee finding that because Ms. Singer was not present for Judge Miller’s alleged statement, Ms. Singer “*has no idea what was said. And so, it’s irrelevant.*” R526 (emphasis added). Despite Ms. Singer’s testifying that it was Ms. Gallagher who told her of Judge Miller’s alleged “hot flash” statement, Commission Counsel inexplicably chose not to question Ms. Gallagher about the incident. (Ms. Gallagher testified after Ms. Singer and never testified that Judge Miller made any such comment.) Although Ms. Singer suggested on redirect that she was present for the alleged statement, she testified as such only after prompting from Commission Counsel and a review of her notes. R558-59. Ms. Singer’s initial testimony was very clear that she was not present for the statement and her knowledge of any such comment was only because it was relayed to her the very same day by Ms. Gallagher. R524-25.

Ms. Singer was certain that the statement was allegedly made the week of June 5, 2017, based on a review of her “notes.”¹² R556-57. However, Ms. Gallagher – the source of the statement – was away on her “annual leave” that week and not in the building on the date Ms. Singer alleged the incident occurred. R905-07.

¹² Ms. Singer’s notes were not introduced into evidence but were marked for identification as Respondent’s U. R543.

4. The Unrebutted Testimony Concerning Judge Miller's Reputation For Judicial Temperament, Sexual Propriety And Honesty

Many witnesses, including witnesses testifying on behalf of the Commission, attested to Judge Miller's reputation for judicial temperament, sexual propriety and honesty. For example, Ms. Diane Marusich, testified from the perspective of a woman working with individuals working side-by-side with Judge Miller from his early days as a judge and hearing directly from court clerks and employees and actively involved in community affairs. R1452-53. She averred that there was "no complaint" as to Judge Miller's performance as a judge and that Judge Miller's reputation was that he was "very fair in often times [sic] contentious family court environment." R1452-53. Even witnesses called by the Commission agreed with this assessment: D.L.,¹³ a Family Court Clerk testified that in working on Judge Miller's team, she observed him interact with court personnel, including clerks such as Ms. Vroman, attorneys, litigants and found Judge Miller to treat court personnel "fairly" and "nicely." R443-45. Ms. Marusich's opinion of Judge Miller's temperament in the family court environment and D. L.'s observations are echoed by an Office of Court Administration security officer, Sgt. Ronald R. Kreb. Among those working in the courtroom daily overseeing security, Sgt. Kreb testified to Judge Miller's reputation for judicial temperament in the "emotional" world of family court: "I can

¹³ D.L. was the subject of one of the very salacious yet unproven allegations by Mr. Kachadourian and Ms. Gallagher. D.L.'s name has been redacted to protect her privacy.

speak for my officers and me included, you know, never seen anything that was— anything less than professional. He was always a—pleasant to work [sic] in there. As a matter of fact, coming out of the courtrooms, litigants would even say, you know, that, you know, he is very welcoming, he was very professional, pleasant. Never heard of anything adverse.” R1437.

Ms. Kate Fitzgerald, an attorney in Binghamton, New York, with nearly 40 years’ litigation experience in Family Court and a director of the Broome County Bar Association, testified that she first knew Judge Miller as a fellow attorney with a similar practice and later appeared before him when he became a judge. R1185-88. However, Ms. Fitzgerald and Judge Miller did not socialize. R1180. When asked to discuss Judge Miller’s reputation in the community for his judicial temperament, Ms. Fitzgerald responded that Judge “Miller has exactly the kind of judicial temperament you want to find in a judge. Fair, calm, reasonable, courteous to people in his courtroom, which is always welcome. Not too familiar, just what, personally, I like to see and I believe colleagues like to see.” R1188-89.

Ms. Fitzgerald also testified to Judge Miller’s reputation in the community for sexual propriety – a topic which she recently heard discussed in the legal community. Ms. Fitzgerald attested that her discussions with others concerning Judge Miller’s reputation for sexual propriety only “occurred since these accusations were made. . . . [She] did not have those kinds of discussions before that because there was no

issue” and “[p]eople don’t go around and say someone is sexually appropriate.” R1189-91. Ms. Fitzgerald testified that Judge Miller “has a good reputation for sexual [p]ropriety.” R1192. Ms. Fitzgerald agreed that “sexual propriety, would . . . include how [Judge Miller] treats women . . . as a judge . . . [a]nd as a lawyer.” R1192.

As to Judge Miller’s reputation for honesty, Ms. Marusich, testified that Judge Miller’s reputation was one of “honesty,” “professionalism,” “approachable,” “patient,” and “a man to be trusted.” R1450. Sandra Conklin testified Judge Miller’s reputation is that, “He’s a good family man. He’s trustworthy.”¹⁴ R1210. Lisa Wojdat, who knows Judge Miller from working as a court clerk as well as through the community, averred that Judge Miller’s reputation was that he was “honorable, fair, respectable” and that she never heard a negative word “that he was less than honest and trustworthy.” R1317. Police Officer Jolene Payne, a former employee of Judge Miller, testified that people in the community, including law enforcement professionals such as New York State Troopers, clients and attorneys have an opinion of Judge Miller as “a good man. He’s—I have never heard anybody say anything negative about him. He’s—He’s honest, he’s trustworthy, nice—nice man.” R1009-14. Even after Ms. Gallagher’s and Mr. Kachadourian’s allegations

¹⁴ Ms. Conklin knew Judge Miller from her employment at Johnson City Village Court. R1206-07.

became public with the filing of their federal lawsuit weeks before the hearing, Office Payne testified that his reputation in the community did not change. R1016-17.

B. Charge II: Ms. Gallagher’s Four-Sentence Typed Letter Regarding The *Estate of Roger L. Funk*

As with the first charge, the vast majority of the allegations contained in the second charge were based entirely on accusations by Ms. Gallagher and Mr. Kachadourian. As such, the Referee rejected all but the sole allegation wherein the underlying facts were largely conceded by Judge Miller. R2801. The 2020 Determination similarly found the following allegation as the only proven allegation in Charge II. R6-7.

In November 2015, Judge Miller received unsigned checks in the *Estate of Roger L. Funk* for work he performed prior to becoming a full-time judge. R779, R1660, R1784-85. Judge Miller explained that he reviewed the unsigned checks at the end of the day. R1718, R3037. He then stated in front of Ms. Gallagher, his court secretary, that the checks were not signed. R3037. According to Judge Miller, “Ms. Gallagher volunteered to do a letter” returning the checks. R1660, R1715-16. (Ms. Gallagher asserts that Judge Miller “asked” her to draft the letter. R779.) Ms. Gallagher drafted the four-sentence letter as if it was written by Petitioner’s former secretary, Ms. Donna Filip. R779-80, R1784. Judge Miller did not send the letter

and instead returned the letter to his former law office. R1660-61. Judge Miller acknowledged that he should not have discussed the matter in front of his court secretary (R3037) which set the stage for her volunteering to draft the letter.

C. Charge IV: Judge Miller’s Financial Disclosures And Tax Returns

The Referee found, and the Commission agreed, that Petitioner violated the Rules with respect to his financial reporting in the following three categories: first, that Judge Miller failed to file the required financial disclosure form with the Broome County Family Court Clerk in accordance with Section 100.4(H) of the Rules; second, that Judge Miller did not include all his income on his 2015 and 2016 federal and New York State income tax returns; and finally, that Judge Miller failed to include extra-judicial income on his 2015 FDF.¹⁵ R2817-18, R7-12.

As to the first category – the financial disclosure forms filed with the Broome County Family Court Clerk – Judge Miller concedes he was unaware of and did not timely comply with Section 100.4(H)(2) of the Rules. R1672, R1677, R2812. Section 100.4(H)(2) requires that as a full-time judge he “annually” file “a report with 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

¹⁵ The Referee does not identify the year that Judge Miller failed to include all his income on his FDF. As discussed in this section, Judge Miller’s 2015 tax return and FDF were amended after discovering income that should have been included in 2015. R2189. However, no additional income was included on Judge Miller’s 2016 amended tax return and the 2016 FDF was therefore not amended. R2284.

compensation so received” with the “clerk of the court on which the judge serves.” 22 NYCRR §100.4(H)(2). Judge Miller filed the required forms on January 31, 2019. R1672, R2543-47. He testified that he erroneously believed filing his yearly FDF fulfilled all his financial disclosure obligations. R1690. He apologized for his oversight, has since refamiliarized himself with the Rules, and stated that, going forward, he would discuss his financial reporting obligations with his attorneys to ensure he does not repeat his mistakes. R1690. The Commission never alleged that the Reports that Judge Miller filed with the Family Court Clerk were incorrect or failed to include all of his reportable income.

Turning to Petitioner’s tax returns, Robin Dean, Judge Miller’s accountant (“Accountant Dean”), testified that she had been employed by CPA Sal Peretore for 29 years, first as a bookkeeper and later as an accountant. R1476. Accountant Dean would prepare Judge Miller’s tax returns and Mr. Peretore would sign off on them. R1477. She worked on Judge Miller’s tax returns for “[p]robably about 8 to 10 of” the twenty years Judge Miller was a client of Mr. Peretore’s, and “half of those years [Accountant Dean] fully [] prepare[d] his returns.” R1478.

Judge Miller had several issues that made it challenging for him to collect all the documentation necessary for the filing of his tax returns. R1481-82. According to Accountant Dean, each year she and Judge Miller would “sit down initially” to discuss the returns, but there were “always extra items that [he would] still have to

get, . . . pertaining to rental properties, extra expenses that [we]re just missed, and so [there were] a lot of things that later on, we still need[ed] to collect further information.” R1481-82. Accountant Dean explained that Judge Miller’s “surgeries” also hindered him collecting the necessary financial information. R1512-13. The collection of documents was an ongoing problem for Judge Miller, which Accountant Dean described as “common” (R1482), presumably among her many clients. Accountant Dean’s advice to Judge Miller and his wife – they filed jointly until 2017 (R1478-79, R1483) – was to do their best to collect information before the April 15th filing deadline. R1482-83. The Millers had the option to 1) file by April 15 and then amend if necessary; or, 2) not file by April 15 and seek an extension. R1482-83.

Accountant Dean explained, however, that Judge Miller’s wife, a physician who has a medical practice,¹⁶ was “reluctant to do an extension.” R1483. As a business owner, Dr. Miller is required to submit her first estimated taxes by April 15, which Judge Miller understood. R1483, R1620. It was “easier” for Dr. Miller to collect the necessary financial information from her business than it was for Judge Miller to “add up manually the rentals.” R1483. (As a result, the Millers subsequently opted to file separately commencing with the 2017 tax returns. R1484-

¹⁶ Dr. Miller is a pulmonologist. R1310.

85. This allowed Dr. Miller to “separate her income [so] she can do her estimated taxes on time and she can get her information on time.” R1485.)

Accountant Dean also explained that, while filing jointly, the Millers’ priority was to “get all of the income in and pay the taxes that are due on time,” by April 15. R1483-84. Accordingly, Accountant Dean testified that Judge and Dr. Miller opted to file their income tax return on time with the understanding that they could “amend it later.” R1483-84. Judge Miller testified that “[A]ccountant [Dean] was well aware [that Judge Miller did not] have all [his] information and that [he] would be filing an amended return after [he] filed [his] 2016 return, so that would have been April of ‘17.” R1620-21. The 2016 return was filed in April 2017. R1484.

Almost immediately after filing the 2016 returns, Judge Miller contacted Accountant Dean after discovering unreported income.¹⁷ R1485-86, R1492, R1643. Accountant Dean averred that she responded: “Don’t worry about it. We can amend it and you just would pay the taxes owed on the income.” R1486. After that initial conversation with Accountant Dean, in approximately May or June 2017, Judge Miller began compiling the necessary financial documents required by Accountant Dean to amend his tax returns. R1673. Judge Miller kept the financial documents, along with other important personal papers, in two boxes “tucked underneath [his

¹⁷ Judge Miller testified that this conversation occurred in April 2017. R1673. Accountant Dean believed that this conversation occurred a bit later, “like a month and a half” after filing on April 15, 2017. R1486-87.

chamber's] desk." R1620-23. On July 3, 2017, Judge Miller discovered that the boxes were missing. R1673. He was later informed by administrator Greg Gates that "they were with Judicial Conduct."¹⁸ R1650-51. Judge Miller explained to Mr. Gates that he required the boxes for his financial filings. R1650. Accountant Dean recalled that Judge Miller's financial records "were taken from him" and "unavailable." R1490. Judge Miller attempted to reconstruct the missing files by obtaining records from his bank. R1651. The boxes were returned to Judge Miller shortly before he filed his 2015 and 2016 amended returns on August 2, 2017. R10, R1650, R1669-70, R2337.

Judge Miller's amended 2015 tax return included an additional \$27,388 as "other income." R1492, R2217. This "other income" was from work performed by Judge Miller as a private attorney before becoming a Family Court judge in 2015. R1492. Although Judge Miller reported additional income from rental properties in his amended 2016 tax return, the rental properties' expenses exceeded the income. Compare R2260, R2301. As a result, this additional income from the rental properties did not result in an increase in Judge Miller's 2016 taxable income. R2255, R2260, R2290, R2301. Judge Miller did not receive any private practice income in 2016.¹⁹

¹⁸ Mr. Gates is a retired Judicial District Executive. R222, R2355, R2368.

¹⁹ The Referee suggests that Judge Miller received additional unreported income from "legal fees" in both 2015 and 2016. R2815. However, no additional income from Judge Miller's

The \$27,388 in income from Judge Miller's prior legal practice resulted in an additional \$9,590 in income taxes for 2015. R2217. (The Millers had already paid \$111,160 in income taxes for 2015. R2217.) Neither the Commission nor the IRS has ever alleged that Judge Miller's 2015 or 2016 amended returns were incorrect, failed to include all his reportable income, or that Judge Miller failed to timely pay the 2015 additional taxes.

Judge Miller's FDFs were based on his tax returns.²⁰ R1643-44. Judge Miller amended his 2015 tax returns to include the previously unreported income and was therefore required to amend his 2015 FDF to reflect that same income. R1643-44. (The 2016 FDF was not amended since no additional taxable income was reported on his 2016 amended tax return.) Unlike amending his tax returns, Judge Miller required permission to amend his FDFs. R1669. Thus, although Judge Miller's amended tax returns were filed in August 2017, the 2015 amended FDF was not filed until November 2017. R1669. As with the Millers' 2015 and 2016 amended tax returns, the Commission does not allege that the 2015 amended FDF was inaccurate, incomplete, or otherwise failed to properly identify all Judge Miller's income.

When did Judge Miller become aware of the investigation into his financial affairs? Judge Miller was first informed by Supervising Judge Molly Fitzgerald of

prior law practice was reported on the 2016 amended return, only the 2015 amended return. Compare R2284, R2290.

²⁰ The FDFs are to be filed in May each year. R1641.

an Inspector General investigation on July 11, 2017, but he was not provided with the specifics of the complaint against him. R1630-31. On July 14, 2017, Judge Miller met with the Inspector General and learned of the “issues raised [against him] of harassment of [a] sexual nature.” R1631. Judge Miller’s testimony that the complaint was “of harassment of [a] sexual nature” (R1631) is consistent with the Commission’s Administrator’s Complaint, dated July 11, 2017²¹ (R28). The July 11, 2017 Administrator’s Complaint does not reference any allegations that Judge Miller failed to accurately or timely file financial disclosures or tax returns. R28.

A second Administrator’s Complaint, dated August 11, 2017, alleged that Judge Miller failed to include certain income on his 2015 FDF. R29. Although the Complaint is dated August 11, 2017, there is no testimony or evidence as to when Judge Miller was provided a copy of the complaint. However, presumably it was not served on Judge Miller until sometime after August 11, 2017, nine days after the Millers filed their amended 2015 tax return.

The following is a timeline of the events surrounding the filing of Judge Miller’s 2015 and 2016 tax returns, amended tax returns, FDFs and amended FDF:

²¹ The July 11, 2017 Administrator’s Complaint includes many of the sexual allegations that the Referee found were unproven. R28.

Date	Event
April 18, 2016	The Millers file their joint 2015 income tax returns. R1484, R2337.
May 13, 2016	Judge Miller files his 2015 FDF. R2174
April 12, 2017	The Millers file their joint 2016 income tax returns on the advice of their accountant. R1484, R2337.
April 15, 2017 to June 1, 2017 (approx.) ²²	<ul style="list-style-type: none"> • Judge Miller contacts Accountant Dean after discovering unreported income and begins collecting the documents necessary to amend his returns. R1485-87, R1492, R1673. • Judge Miller stores the financial documents in two boxes in his chambers. R1620-23. • Accountant Dean explains that the monies should be reported on the 2015 return. R1492.
May 10, 2017	Judge Miller files his 2016 FDF. R2180.
July 3, 2017	Judge Miller discovers his boxes of documents necessary to amend his returns are missing from his chambers (apparently taken by the Commission). R1650-51, R1673.

²² Judge Miller testified that he contacted Accountant Dean concerning the discrepancies in his prior returns in April 2017. R1673. Accountant Dean believed that this conversation occurred a bit later, “like a month and a half” after filing on April 15, 2017. R1486-87.

Date	Event
July 11, 2017	<ul style="list-style-type: none"> • Judge Fitzgerald informs Judge Miller that he is to meet with the Inspector General on July 14, 2017. • Judge Fitzgerald does not provide Judge Miller with any specifics of the complaint. R1630-31.
July 14, 2017	Judge Miller meets with the Inspector General and learns of the “issues raised [against him] of harassment of [a] sexual nature.” R1631.
End of July 2017 (approx.) ²³	The boxes containing Judge Miller’s personal and financial documents were returned to him. R1650.
August 2, 2017	Accountant Dean files the Millers’ amended income tax returns for 2015 and 2016. R10, R1669, R1728, R2337.
August 11, 2017 ²⁴	Administrator’s Complaint: asserts that Judge Miller failed to include certain income on his 2015 FDF. R29.
November 16, 2017	Judge Miller amends his 2015 FDF after receiving permission to do so. R1669, R2186-91.

²³ Judge Miller testified that the boxes were returned shortly before he filed his amended returns. R1650.

²⁴ It is unknown when Judge Miller received the Administrator’s Complaint, but presumably not before the signed date of August 11, 2017. R29.

The Referee found that Judge Miller did not timely and accurately report his income on the financial disclosure forms filed with the Family Court Clerk, his tax returns, and his 2015 FDF.²⁵ R2817-18. However, the Referee found that Judge Miller amended his tax returns and 2015 FDF to accurately reflect the additional income “before he was placed on formal notice by the Commission that the Commission was looking into these issues” (R2813), which “is a matter of mitigation to be argued directly to the Commission” (R2816). The Commission ignored the Referee’s finding and did not consider the formal notice or timing as a mitigating factor in finding that removal was the appropriate sanction.

IV. ARGUMENT

Judge Miller made clear in his submission to the Commission prior to oral argument that he was not challenging the Referee’s findings. R2821. Judge Miller maintains that position now. Accordingly, Judge Miller respectfully submits that the Commission erred in ignoring, rejecting and altering the Referee’s findings which were based on his assessment of proof and credibility of witnesses. Judge Miller further maintains that the very same determinations and decisions cited by the Commission demonstrate that the facts surrounding the instant matter are not so

²⁵ Again, as previously noted, Judge Miller did not amend his 2016 FDF as there was no additional income to report. The Referee’s references to FDFs (plural) is understandable given that Judge Miller amended his tax returns for both 2015 and 2016, even though there was no additional taxable income or tax due for 2016.

“egregious” as to warrant removal. Finally, although this argument will be discussed first, Judge Miller submits that the Commission erred in finding that his prior history with the Commission rendered his current misconduct so egregious as to justify removal.

A. The Commission Erred In Its Utilization Of Judge Miller’s Prior History With The Commission

The 2020 Determination relied on Judge Miller’s two prior contacts with the Commission in finding that removal was the appropriate sanction. R18-19. Specifically, the Commission found that “[g]iven [Judge Miller’s] prior experience with the Commission, [he] should have been particularly attentive to his ethical responsibilities. Instead, the evidence here demonstrated that [Judge Miller] again disregarded his ethical obligations and engaged in three separate types of misconduct.” R19. The Commission then described the “three separate types of misconduct,” namely the inappropriate comments to Ms. Vroman and Ms. Singer, the errors in Judge Miller’s financial reporting, and “when he acted to further his personal interests by having his court secretary write a personal letter as if it were from his former law firm secretary.” R19-20. Of these three allegations of wrongdoing, the Commission found that “the most serious was [Judge Miller’s] *pattern of sexual comments* to a court employee including telling her that she looked ‘really hot’ and ‘should always wear that outfit.’” R19 (emphasis added). As will be

discussed, Judge Miller disputes the Commission’s recitation, characterization and findings as to the allegations raised against him – particularly that he engaged in a “pattern of sexual comments.” But first, Judge Miller respectfully submits that the allegations at issue with his two prior contacts with the Commission are far too attenuated from the facts and allegations present here.

Judge Miller has had two prior contacts with the Commission. He was first censured in 2002 for his conduct between 1997 and 2000. Matter of Miller, Determination of the Commission on Judicial Conduct, December 30, 2002 (2003 Annual Report 140) (“2002 Determination”). At the time, Judge Miller was a part-time justice of Union Town Court, Broome County, where he had been a justice since 1996.²⁶ Id. Judge Miller was also a private attorney with his own practice. Id. The improper conduct at issue in the 2002 Determination involved Judge Miller presiding over cases with connections to his private practice, representing clients with charges originating in Union Town Court, acting as an attorney in his own court, and allowing the court clerk to affix his stamp on a small claims matter that was erroneously captioned as a criminal case and warning that a warrant would be issued for the defendant’s arrest if he did not pay the small claims judgment against him. Id. Notably, the allegations that Judge Miller engaged in private practice or

²⁶ Judge Miller became a town justice with Johnson City Village Court in January 2002. Matter of Miller, 2003 Annual Report, at 140. The conduct described in the 2002 Determination concerned only his actions while a justice with Union Town Court. Id.

political activities while a Family Court Judge from 2015 through 2017 were dismissed by the Referee (R2817), and Commission Counsel did not ask that they be reinstated.

As to the second contact with the Commission, Judge Miller was issued a Letter of Dismissal and Caution in November 2015 for omitting one word in his campaign materials during his election for Family Court Judge. R2942-44. Specifically, the Commission found that the phrase

“Rick Miller Family Court Judge” . . . could reasonably be interpreted as implying that [Petitioner was] the incumbent Family Court judge. On those [campaign] materials, the omission of the words ‘for’ or ‘elect’ created ambiguity as to whether [Judge Miller] currently held that office and permitted an inference that [he] did so, an inference that might be an advantage in [his] campaign.

R2943.

The Commission’s 2020 Determination suggests that the allegations against Judge Miller are that much more flagrant because of their similarity to his prior sanctioned conduct. R12. However, the foregoing clearly illustrates that his actions leading to the 2002 Determination and the November 2015 Letter of Dismissal and Caution are far too attenuated from the conduct in the instant allegations. Most importantly – since the Commission found his “pattern of sexual comments” to be the “most serious” allegation (R19) – there is no mention of improper sexual comments in either the 2002 Determination or the November 2015 Letter of

Dismissal and Caution. Nor is there any allegation of financial reporting errors or using his judicial staff on a private matter.

Furthermore, a Letter of Dismissal and Caution “is issued to the Judge in lieu of a formal written complaint” and it contains “written confidential comments, suggestions and recommendations.” 22 NYCRR §7000.1(l). It is privately issued as a warning such that the Commission will later consider it if the Judge again behaves in similar conduct, and thereby failed to heed the warning. 22 NYCRR §7000.4. Judge Miller’s failure to include one of two words in a campaign poster is not in any way similar to the conduct alleged and found here.

What is reflected in the eighteen years since the 2002 Determination was issued is that Judge Miller took the Commission’s censure very seriously, corrected his conduct and did not repeat such conduct – a fact demonstrated by character testimony over those many years. Accordingly, the Commission erred insofar as it found that the current allegations are that much more egregious because they relate to previously sanctioned conduct.

B. The Commission Erred In Ignoring, Rejecting And Altering The Referee’s Findings

The Referee’s credibility findings are entitled to great weight and deference. As this Court ruled,

[i]t is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely

unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record. The Hearing Officer before whom the witnesses appeared, on the other hand, was able to perceive the inflections, the pauses, the glances and gestures -- all the nuances of speech and manner that combine to form an impression of either candor or deception.

Berenhaus v. Ward, 70 N.Y.2d 436, 443 (1987). This principle is no less cogent simply because this Court articulated this principle in the context of a police officer disciplinary hearing. See In re Von Wiegen, 146 A.D.2d 901, 903 (3d Dep't 1989) ("This court has consistently recognized that due deference should be given to a fact finder's determination on the issue of credibility [citations omitted]. Such deference is not the result of any abdication of our fact-finding or review powers; it is predicated on the commonsense notion that a Trial Judge who observes a witness and hears his testimony is in a special position to evaluate and integrate that evidence with other facts before him There is no reason for applying a different rule in cases involving attorney discipline."); Matter of Dwyer, 285 A.D.2d 133, 134 (4th Dep't 2001) ("When the resolution of issues in a disciplinary proceeding depends upon the credibility of witnesses, a Referee's findings are entitled to great weight."). Commission Counsel also "recogniz[ed] the deference ordinarily accorded to" a Referee's credibility findings. R2903.

As stated in his submission to the Commission prior to oral argument, Judge Miller "d[id] not seek to disturb [the Referee's] findings of fact and/or the charges

he sustained.” R2821. Petitioner maintains that position now. The highly respected Referee was actively engaged with the witnesses and counsel during the hearing and drafted a thoughtful and thorough Report. With the exception of the “hot flash” allegation, the 2020 Determination accepted the Referee’s findings as to which of the allegations were sustained. However, the Commission ignored, rejected or altered several of the Referee’s credibility determinations, mitigation and factual findings concerning those proven allegations – all to Judge Miller’s detriment. Petitioner respectfully submits that the Referee, as the hearing officer, was in the best position to make findings of fact and assess witness credibility. Accordingly, his findings should be upheld.

1. The Commission Erred In Relying Upon The Unproven “Hot Flash” Statement

As discussed above, the Commission’s 2020 Determination is drafted as if Ms. Singer was present for the alleged “hot flash” comment. However, her direct testimony is clear that it was Ms. Gallagher who informed Ms. Singer of the statement – a witness who is not credible and was not in the building that day or week. R524-35, R556-57, R905-07. Ms. Singer was certain that her discussion with Ms. Gallagher about the statement occurred the week of June 5, 2017, based on a review of her notes. R556-57. Accordingly, Ms. Singer could not have had any interaction with Ms. Gallagher about the statement (or anything else) since Ms.

Gallagher was away on her “annual leave” that week and not in the building. R905-07. It is therefore unsurprising that Commission Counsel chose not to ask Ms. Gallagher about the statement. That did not, however, stop Commission Counsel from attempting to resurrect the alleged statement before the Commission.

Furthermore, the Referee did not find that the statement was proven. There are two likely explanations for the Referee’s silence as to this allegation: first, that he overlooked the allegation; or second, that he was abiding by his explicit finding during the hearing that Ms. Singer “*has no idea what was said. And so, it’s irrelevant.*” R526 (emphasis added). The latter is clearly the equivalent of the Referee finding the allegation unproven.

As to the former – that the Referee overlooked the allegation – other findings in the Report make it clear that had the Referee rendered a finding, he would have found it unproven. The Referee offered a thoughtful and extensive explanation as to why Ms. Gallagher lacked all credibility. R2790-91. The only allegation from Ms. Gallagher that was found proven was the letter referenced in Charge II which was largely conceded to by Petitioner. The “hot flash” comment to Ms. Singer is based entirely on Ms. Gallagher’s hearsay assertion and was not independently corroborated by Ms. Gallagher or any other source. The statement is actually refuted by Ms. Gallagher’s absence on the day (and week) that Ms. Singer claims the statement was made.

The Referee also specifically noted that unlike the other more salacious unproven allegations in Charge I, the proven “comments were made directly to Ms. Vroman and Ms. Singer and not behind their backs.” R2801. The “hot flash” comment was a statement allegedly made to Ms. Gallagher *behind Ms. Singer’s back*, which is precisely the type of allegation the Referee rejected.

Given that the truthfulness of the allegation rests entirely on the credibility of Ms. Gallagher, a witness the Referee found wholly incredible (R2790-91), who was not even in the building on the date the statement was allegedly made (R556-57, R905-07), the Commission erred in relying on that unproven statement in rendering its Determination. R5. (Ms. Gallagher testified one day after Ms. Singer, meaning that Commission Counsel had the opportunity to question her about this alleged statement, yet they chose not to do so. R400, R476, R716, R722.) This is perhaps the most egregious example that the Commission was swayed by the “*pall*” of the salacious charges that were dismissed. Simply stated, there is no credible evidence for the Commission to have made this finding. The Commission certainly did not meet its burden of establishing this act of misconduct by a preponderance of evidence. Accordingly, Judge Miller respectfully submits that this Court should revert to the Referee’s Report and conclude that the “hot flash” allegation was unproven.

2. The Commission Erred In Ignoring And Rejecting The Referee's Findings Concerning The Context And Circumstances Surrounding The Interactions With Ms. Vroman And Ms. Singer

As to Ms. Vroman, while the Referee characterized the incident as “not professional,” he specifically found “[t]here [wa]s nothing in the record to indicate that [Judge Miller] used obscenity or other inappropriate words.” R2798-99. Nor could the Referee “conclude that Respondent’s demeanor was ‘loud and angry.’” R2798-99. The Commission, however, altered the Referee’s findings to conclude that Judge Miller “berated and demeaned” Ms. Vroman – words the Referee did not include in his finding. R13, R19, R22.

Turning to Ms. Singer, the Referee “accept[ed] and credit[ed] [Judge Miller’s] testimony that he had no intent to harm anyone with comments that may well have been intended to be humorous” but nevertheless found that “the comments made to Ms. Singer were inappropriate.” R2801. Appellate Justice Robert Miller accepted this finding in his dissenting opinion (R25-26), but the majority rejected it as “implausible” (R22). The 2020 Determination created conclusions never made by the Referee and instead found that the statements to Ms. Singer were “sexist,” “shocking” and constituted a “pattern of sexual comments to a court employee.” R19. The Referee did not refer to the comments as “sexist” or “shocking” and most certainly did not characterize two statements to one woman as a “pattern of sexual comments.” They are more accurately described as aberrational in light of the

substantial unrebutted character testimony describing Judge Miller’s professional behavior.

Although not specifically referenced in his Report, no doubt the Referee was basing his finding “accept[ing] and credit[ing] [Judge Miller’s] testimony,” at least in part, on the numerous unrebutted witnesses identified above, including witnesses for Commission Counsel, who testified to Judge Miller’s judicial temperament, sexual propriety, and honesty. See supra Part III.A.4. Arguably, the Referee also considered Ms. Singer’s testimony that prior to these two comments, she had known Judge Miller for decades and they had a good working relationship.²⁷ R515-16. The Referee was in the best position to evaluate Petitioner’s credibility as well as the credibility of the witnesses testifying to their positive observations and experiences interacting with Judge Miller.

Accordingly, Petitioner respectfully submits that this Court should reject the 2020 Determination’s characterization that Judge Miller “berated and demeaned” Ms. Vroman and uttered “sexist” and “shocking” statements to Ms. Singer constituting a “pattern of sexual comments.” Instead, this Court should uphold the Referee’s findings (findings which the dissenting Justice Robert Miller and Vice-Chair Harding credited), that the incident with Ms. Vroman was “not professional,”

²⁷ Specifically, when describing their working relationship, Ms. Singer stated “[i]t was good. He would come down and discuss things with me and he was quite, you know, open about that, you know, stopping by and saying hello.” R516.

that Judge Miller made only two statements to Ms. Singer, which although “inappropriate,” were uttered without the “intent to harm anyone . . . [and] may well have been intended to be humorous.” R2801.

3. The Commission Erred In Ignoring The Referee’s Finding Concerning The Timing, Circumstances And Context Of His Financial Amendments

Petitioner concedes, and has repeatedly conceded, that he did not timely and accurately file his local report to the Family Court, his tax returns and his 2015 financial disclosure form. Judge Miller does not dispute the Referee’s finding that such a failure violates the Rules.²⁸ However, the context of these filings bespeaks mitigation of the highest order. The Referee noted that Judge Miller amended his tax returns and one FDF to accurately reflect the additional income for one tax year “*before he was placed on formal notice by the Commission that the Commission was looking into these issues*” (R2813), which “*is a matter of mitigation to be argued directly to the Commission*” (R2816) (emphasis added).

The 2020 Determination does not address or even mention the Referee’s critical finding or Judge Miller’s accountant’s testimony. The 2020 Determination ignored key facts surrounding the context of financial disclosures and filing of amended tax returns set forth in the Referee’s Report and testimony. Petitioner

²⁸ As discussed below, Judge Miller does dispute any suggestion that this failure resulted from an intent to deceive either the Commission or the government as to his income. See infra Part IV.C.

respectfully submits that this Court should accept the Referee’s finding that Judge Miller amended his tax returns and FDF to accurately reflect the additional income “before he was placed on formal notice by the Commission that the Commission was looking into these issues” (R2813), which “is a matter of mitigation” (R2816).

C. The Commission Erred In Departing From Precedent In Finding That The Proven Allegations Warrant Removal

As this Court has made clear, “[r]emoval is excessive where the misconduct amounts solely to poor judgment, even extremely poor judgment.” In re Skinner, 91 N.Y.2d 142, 144 (1997) (citations omitted). Removal “should be reserved for truly egregious circumstances.”²⁹ In re Mazzei, 81 N.Y.2d 568, 572 (1993) (citations omitted). No doubt Judge Miller exercised lack of attention to details and record keeping and perhaps poor judgment. However, as demonstrated below, the Commission’s own precedent makes clear that Judge Miller’s admitted poor judgment does not constitute a “truly egregious circumstance” warranting removal.

The Commission relies on Matter of Dye and Matter of Doolittle for the proposition that statements to women concerning their appearance or comments that are otherwise sexual in nature are inappropriate and will not be tolerated under the Rules. R14 (citing Matter of Dye, Determination of the Commission on Judicial Conduct, February 6, 1998 (1999 Annual Report 93); Matter of Doolittle,

²⁹ Black’s Law Dictionary defines “egregious” as “[e]xtremely or remarkably bad; flagrant.” Black’s Law Dictionary (7th ed. 1999).

Determination of the Commission on Judicial Conduct, June 13, 1985 (1986 Annual Report 87)). Judge Miller wholeheartedly agrees with the Commission's Determinations in Dye and Doolittle. Although he has no memory of the statements testified to by Ms. Singer, he has repeatedly apologized during the proceedings for his comments to both Ms. Singer and Ms. Vroman and promised to conduct himself more appropriately in the future. R1687-88, R3029.

Notably, the statements and conduct in both Dye and Doolittle are far more blatant, graphic and derogatory than the statements at issue here, yet, neither judge was removed. The judge in Dye "made *numerous* comments to [his secretary] about the physical appearance and attributes of other women in the courthouse. He boasted of his sexual prowess and sexual experience with other women." Dye, 1999 Annual Report at 94 (emphasis added). Other statements to his secretary included "a) that he enjoyed talking to her because she was physically attractive; b) that she had attractive legs; c) that her clothes inspired his sexual feelings; d) that he had a strong interest in sex and that he wanted to have sex with her; and, e) that others in the courthouse had asked him whether he was having sex with Ms. Moore and that he had replied that he did not 'mix with the hired help.'" Id. In Doolittle, the Commission also characterized the judge's improper statements to female attorneys as "*numerous.*" Doolittle, 1986 Annual Report at 88. Specifically, the Commission found that the judge "made numerous improper comments to female attorneys,

referring to their appearance and physical attributes. . . . In some instances, respondent suggested that female attorneys could get whatever they were asking of the court because of their physical appearance.” Doolittle, 1986 Annual Report at 88. Unlike the respondent in Doolittle, Judge Miller’s statements were uttered privately to either Ms. Singer or Ms. Vroman and not in the presence of others.³⁰

Clearly, the “numerous improper comments” at issue in both Dye and Doolittle are far more egregious both in content and number than the two discrete sustained comments to Ms. Singer over the course of a multi-decade career as a judge and unrefuted character testimony of honesty and judicial temperament, including sexual propriety. Nevertheless, neither the judge in Dye nor Doolittle was removed. Instead, the judge in Dye was censured and the judge in Doolittle was admonished.³¹

As to Charge II, the Commission cites Matter of Ruhlmann and Matter of Brigantii-Hughes for the proposition that “it was inappropriate for [Judge Miller] to allow Ms. Gallagher to prepare [the] letter.” R15 (citing Matter of Ruhlmann,

³⁰ When asked if anyone else was present for the conversation with Judge Miller, Ms. Vroman responded, “No, like I said, it was in between cases.” R484. Ms. Singer testified that no one was present for the “widow” comment. R523. Ms. Singer was not asked whether others were present for the “really hot” comment. However, as Ms. Singer testified that the comment occurred in her office, she does not mention that anyone else was present, and no other witnesses testified to this incident, presumably because she was alone.

³¹ Notwithstanding his censure in 1998, Judge Dye received a second censure five years later after admitting that he made biased and hostile remarks while presiding in two separate matters. Matter of Dye, Determination of the Commission on Judicial Conduct, September 19, 2003 (2004 Annual Report 94). In rendering its determination, the Commission noted that Judge Dye agreed to retire at year’s end. Id. at 98.

Determination of the Commission on Judicial Conduct, February 9, 2009 (2010 Annual Report 213, 214); Matter of Brigantii-Hughes, Determination of the Commission on Judicial Conduct, December 17, 2013 (2014 Annual Report 78)). Judge Miller does not disagree with that proposition. He does, however, maintain that one lapse in judgment involving a four-sentence letter does not warrant removal.³² This assertion is supported by the very same determinations the Commission cites, discussed below.

The judge in Ruhlmann erroneously believed that her confidential secretary's duties "included being the judge's personal assistant . . . [as] part of her employment" and had the court secretary "perform a variety of personal assignments for her and her husband Raymond over an eight-month period." Ruhlmann, 2010 Annual Report 214. The judge in Brigantii-Hughes had court staff pick up her child from school, supervise the child in chambers, drive her to a hair salon, drive her to New Jersey so she could go shopping, and engage in various religious actions while in chambers. Brigantii-Hughes, 2014 Annual Report 78. Neither the judge in Ruhlmann nor the judge in Brigantii-Hughes was removed. Instead, both received censures for *repeatedly* utilizing court staff as their personal assistants.

³² The short four-sentence letter contains grammatical errors such as "I received yours check's numbered 102, 103 and 104," (R1784) making it unlikely that Judge Miller "had [Ms. Gallagher] change it like two more times," as Ms. Gallagher claims (R779).

Turning to the final charge, the Commission asserts in the 2020 Determination that the failure to file financial disclosures or the filing of incomplete or erroneous financial documents violates the Rules. R17-18. While this assertion may be technically correct, it is also most certainly misleading and deceptively incomplete. When considering whether a sanction should be imposed, and if so, what sanction is appropriate, the Commission must consider whether any errors or omissions were *deliberate* or *intentional*. Although the Commission cites Matter of Alessandro, 13 N.Y.3d 238 (2009), to support its assertion that filing correct financial documents serves an important public function, the 2020 Determination fails to include a critical finding and explanation of context provided by the Court of Appeals. Alessandro involved two separate brother judges and one critical distinction. While this Court accepted the removal for one brother, Francis Alessandro’s sanction was reduced from removal to admonition after determining that the respondent’s failure to report certain income constituted “carelessness” as opposed to a “deliberate” or “intentional” omission. Id. at 249. This Court explained that “[c]areless omissions from a financial disclosure statement are not the type of ‘truly egregious’ conduct that warrants removal from judicial office.” Id. (citing Matter of Cunningham, 57 N.Y.2d 270, 275 (1982)). Judge Miller’s actions surrounding the inaccurate or incomplete filings were neither “deliberate” nor “intentional.” Judge Miller was also

intentionally taking steps to correct his returns and FDF before the investigation into his financial affairs was brought to his attention.

Thus, that Judge Miller failed to file certain financial disclosures or filed incomplete financial documents only establishes that he violated the Rules – a finding he does not dispute. However, when determining the appropriate sanction, the more important question is whether Judge Miller acted with an intent to deceive or whether his actions were simply a product of “carelessness.” For the reasons set forth the above, see supra Part III.C, Judge Miller acknowledges that many of his actions were careless (such as erroneously believing that filing the yearly FDF discharged all his filing responsibilities for financial disclosures and a general lack of adequate bookkeeping with respect to his rental properties). Significantly, Judge Miller’s actions were guided by his accountant’s advice (such as filing amended returns as opposed to seeking an extension in light of Dr. Miller’s estimated taxes due April 15). However, what is clear from Judge Miller’s amendments to his returns and 2015 FDF prior to being put on notice of any investigation into or questions about his financial filings, is that Petitioner never acted with the intent to deceive. It is important to remember that the Referee found that Judge Miller amended his tax returns and FDF to accurately reflect the additional income “before he was placed on formal notice by the Commission that the Commission was looking into these

issues” (R2813), which “is a matter of mitigation” (R2816). The Commission simply ignored this crucial finding and element of mitigation.

The 2020 Determination also cites several other Commission determinations and Court of Appeals decisions establishing the importance of timely filing accurate financial documents. R17-18 (citing Matter of Dier, Determination of the Commission on Judicial Conduct, July 14, 1995 (1996 Annual Report 79); Matter of Russell, Determination of the Commission on Judicial Conduct, October 31, 2000 (2001 Annual Report 121); Matter of McAndrews, Determination of the Commission on Judicial Conduct, June 18, 2013 (2014 Annual Report 157); Matter of Ramich, Determination of the Commission on Judicial Conduct, December 27, 2002 (2003 Annual Report 154)). Again, Judge Miller does not dispute this proposition. Instead, Petitioner respectfully submits that a review of the determinations and decisions cited by the Commission reveals that, virtually without exception, the appropriate sanction has been less than removal.³³

³³ One arguable exception occurred in Alessandro, 13 N.Y.3d at 238. As discussed above, the sanction for one of the two brother judges was reduced to an admonition with this Court finding that his reporting errors amounted to “carelessness.” Id. at 249. The other respondent, however, was removed after this Court found that he failed to repay a \$250,000 loan and gave “changeable answers” which “create[d] a strong inference that he was dishonest in his dealings.” Id. at 248-49. In contrast, Judge Miller cooperated fully with the Commission’s investigation and has not been accused of being untruthful or dishonest. On the contrary, the unrebutted character testimony supports Judge Miller’s reputation for truthfulness and honesty. The only other possible exception occurred in Matter of VonderHeide, 72 N.Y.2d 658 (1998). The Commission cites VonderHeide for the proposition that Judge Miller’s ignorance of the Rules is not an excuse (a proposition that Judge Miller does not dispute). R16. Although the Commission references VonderHeide in connection with Judge Miller’s failure to file the local financial disclosure form with the Broome County Family Court Clerk, the judge in VonderHeide was not accused of any misconduct related

For example, the judge in Dier failed to include all income on his FDFs, but unlike Judge Miller, did not file an amended FDF until *after* being questioned by the Commission. Dier, 1996 Annual Report at 80-81. The judge in Dier also violated the Rules in other ways, including “repeatedly issu[ing] dispositive orders without making findings of fact or setting forth his reasoning” and failing to recuse himself after engaging “in a heated verbal confrontation” with a litigant outside of court which resulted in police interaction. Id. Although the judge had previously received a censure and an admonition from the Commission, the judge in Dier was sanctioned with a censure. Id. at 81; see also Matter of Dier, Determination of the Commission on Judicial Conduct, July 10, 1979 (1978-1979 Annual Report 126); Matter of Dier, Determination of the Commission on Judicial Conduct, April 28, 1993 (1994 Annual Report 60).

As for the judge in Russell, he failed to timely file FDFs from 1992 through 1998. Russell, 2001 Annual Report at 121. During that time period, the judge received seven Notices to Cure, three Notices of Delinquency, and three Letters of Dismissal and Caution. Id. (Judge Miller has never received any Notice to Cure,

to his financial filings. More importantly, the judge in VonderHeide was not removed because he was ignorant of the Rules. Instead, the judge was removed for multiple acts of misconduct, including routinely basing judgments on out of court *ex parte* communications with witnesses and berating a teenage boy for carrying an open container “and threaten[ing] harsh treatment if the youth appeared in his court.” Id. at 659. Thus, VonderHeide stands for the uncontroversial proposition that if the judge’s underlying misconduct warrants removal (as it did for the judge in VonderHeide) pleading ignorance will not lessen the sanction.

Notice of Delinquency, or Letter of Dismissal and Caution concerning the filing of his financial disclosures.) Notwithstanding thirteen warnings over a six-year period, the Commission sanctioned the judge in Russell with an admonition.

Turning to McAndrews, the judge did not file his 2010 FDF until receiving both a Notice to Cure and a Notice of Delinquency. McAndrews, 2014 Annual Report 157. The judge agreed that “he ‘ha[d] no valid excuse’ for his late filing.” Id. at 162. The judge also failed to cooperate with the Commission’s investigation by failing to respond to three letters from the Commission posing questions and “failed to respond to two written requests from the Commission, . . . that he confirm his attendance at an appearance for testimony.” Id. at 159-60. (In contrast, Judge Miller has cooperated fully with all inquiries by the Inspector General and the Commission.) The judge in McAndrews was censured. Id. at 163.

Finally, the judge in Ramich failed to report extra-judicial income prior to the initiation of the Commission’s investigation (unlike Judge Miller who contacted his accountant to correct his filings concerning the additional income long before Judge Miller was told of any inquiry and before the Commission began its investigation). Ramich, 2003 Annual Report 155. The judge in Ramich was also charged with several other wrongdoings, including engaging in the practice of law and *ex parte* communications. Id. at 156-59. The Commission censured the judge.

The Commission’s majority did not adhere to the precedents cited in its determination as well as long-established precedent. Judge Miller acknowledges that his financial reporting was “careless,” but maintains that his errors were not borne out of an intent to deceive the Commission, public, government or the court as to his income. Judge Miller took steps to correct his returns and FDF before any inquiry. Nor is Judge Miller seeking special consideration from this Court. Instead, Judge Miller requests that this Court rule in accordance with the decisions and determinations cited above – nearly all of which found that a sanction less than removal was appropriate, particularly where the judge is addressing the issue of financial statements and returns under the direction of an accountant before being notified of any inquiry.

Similarly, Petitioner accepts responsibility for his lapses in judgment concerning Ms. Vroman, Ms. Singer, and the letter prepared by Ms. Gallagher. However, the Commission does not cite any case or determination establishing that removal is the appropriate sanction. Simply stated, the matters cited in the 2020 Determination demonstrate that judges have acted far more egregiously than Judge Miller, yet the Commission imposed lesser sanctions than removal.

As this Court has made clear, “[t]he purpose of judicial disciplinary proceedings is not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents.” In re Watson, 100 N.Y.2d 290, 303

(2003) (citations and quotations omitted). In rejecting the Commission’s sanction of removal and instead imposing a censure, this Court in Watson noted that “petitioner expressed remorse and acknowledged . . . that he exercised extremely poor judgment.” This Court further found that while his “transgressions [we]re serious, [this Court was] unpersuaded that his continued performance in judicial office presently threaten[ed] the proper administration of justice or that he ha[d] irredeemably damaged public confidence in his own impartiality or that of the state judiciary as a whole.” Id.; see also 22 NYCRR §100 (“Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.”).

Consistent with the decisions and determinations cited throughout this Memorandum of Law and in consideration of the substantial un rebutted mitigation evidence as to Judge Miller’s reputation for judicial temperament, and his acknowledgment and remorse for his conduct, we respectfully submit that this Court should find as the dissenting opinion of Justice Robert Miller and Vice Chair Harding did, that “[g]iven the nature of [Judge Miller’s] misconduct, the sanction of removal is contrary to the findings of the referee and contrary to long-established precedent of the Commission.” R24.

V. CONCLUSION

For the reasons stated herein, Judge Miller respectfully submits that this Court should reject the Commission's determination as set forth above, impose a lesser sanction, and grant such other and further relief as this Court deems just and proper.

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CERTIFICATION PURSUANT TO RULE 500.13(C)(1)

I certify that this brief was prepared using Microsoft Word, the font is Times New Roman 14-point type (12-point type for footnotes), the spacing is double (with the exception of headings, footnotes and block quotes), and the total number of words, excluding the cover page, is 13,895.

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