

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

JCR 2020-00003

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**Court of Appeals**  
*of the*  
**State of New York**

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

RICHARD H. MILLER, II,  
a Judge of the Family Court, Broome County.

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HON. RICHARD H. MILLER, II,

*Petitioner,*

– against –

STATE OF NEW YORK COMMISSION ON JUDICIAL CONDUCT,

*Respondent.*

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**REPLY BRIEF FOR PETITIONER**

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## I. SUMMARY OF ARGUMENT

The opening portion of Respondent’s Brief makes clear that Counsel for the Commission (“Commission Counsel” or “Respondent”) has fallen victim to the unproven yet “serious allegations” of Ms. Rachelle Gallagher and Mr. Mark Kachadourian, that have, in the words of Dissenting Justice Robert J. Miller, “cast a pall over the entire proceeding.” R24-25, RB 3-7.<sup>1</sup> Commission Counsel’s choice to reference, and by inference emphasize, every salacious *unproven* claim alleged by Ms. Gallagher and Mr. Kachadourian is an attempt by Respondent to validate the Commission’s removal of Petitioner Hon. Richard H. Miller (“Petitioner” or “Judge Miller”) utilizing the “pall” of innuendo and concocted charges. This sets a dangerous precedent striking at the heart of the integrity of the judicial discipline process.

In arguing for removal, Commission Counsel asks this Court to ignore, reject or alter the credibility determinations of Referee Robert Barrer (“Referee”), made after a six-day hearing, by a preponderance of evidence, in favor of the more pejorative and suggestive portrayals and findings by the Commission, which include the following:

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<sup>1</sup> References to the Record, Respondent’s Brief and Petitioner’s Opening Brief are designated as “R,” “RB” and “POB,” respectively.

- While the Referee characterized Judge Miller’s one-time interaction with Court Assistant Rebecca Vroman as “not professional,” he specifically found that the Record did not support the conclusion that Judge Miller “used obscenity or other inappropriate words” or was “loud and angry.” R2798-99. Conversely, the Commission morphs the finding into one that Judge Miller “berated and demeaned” Ms. Vroman. R13, R19, R22.
- The Commission claims the statements to Chief Court Clerk Debbie Singer were “sexist,” “shocking” and constituted a “pattern of sexual comments to a court employee.” R19. The Referee never made these findings. Instead, the Referee found that “the comments made to Ms. Singer were inappropriate” but “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.” R2801. Although Justice Robert Miller and Vice Chair Paul B. Harding, Esq., agreed with the Referee’s finding in their dissent (R25-26), the majority rejected it as “implausible” (R22).
- The Referee found that Judge Miller amended his tax returns and Unified Court System Ethics Commission Financial Disclosure Form (“FDF”) to accurately reflect his 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 does not address or even mention this finding.

While the Referee clearly based his findings on a preponderance of evidence (R2791), the Commission fails to even assert that their newly minted findings meet that standard. Commission Counsel also ignores the unrebutted character testimony as to Judge Miller’s reputation not only for honesty but also judicial temperament and courteous behavior toward court personnel and litigants over 23 years, which was corroborated by Respondent’s witnesses. Likewise, the February 14, 2020 Determination’s (“2020 Determination”) disregards all the above in an apparent effort to generate a case for removal. Integrity of the judicial conduct review process – and fairness to all stakeholders – requires deference and respect for a Referee’s findings, not an unbridled effort to slant findings and testimony to generate a more serious sanction.

Judge Miller acknowledges violating the Rules Governing Judicial Conduct (“Rules”) in engaging in an unprofessional interaction with Ms. Vroman,<sup>2</sup> in making two inappropriate comments to Ms. Singer, and in failing to timely and accurately

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<sup>2</sup> Ms. Vroman testified this was the “first,” and presumably only, “time [Judge Miller] had ever treated [her] that way.” R483-84.

report his income on his 2015 and 2016 tax returns, his 2015 FDF, and the financial disclosures filed with the clerk of the court. Petitioner is accordingly not asking this Court to find that the charges are unfounded. Rather, Judge Miller is simply requesting that this Court uphold the Referee's factual and credibility findings, reject the 2020 Determination's more indicting expansion of the Referee's findings and censure Petitioner as recommended by the dissent and consistent with the Commission's and this Court's precedent. The bar for removal is high but it will be lowered if Respondent succeeds in removing Judge Miller.

## **II. STATEMENT OF FACTS**

A recitation of the facts is in Petitioner's Opening Brief. POB5-32.

## **III. ARGUMENT**

### **A. The Commission Erred In Its Utilization Of Judge Miller's Prior History With The Commission**

Judge Miller argued in his Opening Brief that the allegations present with his two prior contacts with the Commission (censure in 2002 and Letter of Caution and Dismissal in 2015) were far attenuated from the facts and issues in the instant matter. POB33-36. (The dissent of Justice Miller and Vice-Chair Harding concurs. R27.) Respondent does not dispute or rebut this contention. Nor does Commission Counsel rebut Petitioner's argument that Judge Miller has not been accused of similar conduct in the eighteen years since the censure was issued, as reflected in the

unrebutted character testimony. POB36. Commission Counsel argues a sweeping conception with no limiting principle – that any prior interaction with the Commission which, by definition, involves “ethical obligations,” triggers a sanction of removal. RB49-51.

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

Judge Miller noted in his Opening Brief the well-established principle that the Referee’s credibility findings are entitled to great weight and deference. POB36-38 (citing Berenhaus v. Ward, 70 N.Y.2d 436, 443 (1987); In re Von Wiegen, 146 A.D.2d 901, 903 (3d Dep’t 1989); Matter of Dwyer, 285 A.D.2d 133, 134 (4th Dep’t 2001)). Commission Counsel does not rebut either this assertion or the cases cited in support. Nor could they, as they “recogniz[ed] the deference ordinarily accorded to” a Referee’s credibility determinations. R2903. Nevertheless, it is clear that the Commission and Commission Counsel consistently attack this principle of deference and sweepingly reject any of the Referee’s crucial and critical credibility findings, rendered after a six-day hearing, favoring Judge Miller as that is the only way they can justify removal.

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

Petitioner argued in his Opening Brief that 1) Ms. Singer testified on direct examination that it was Ms. Gallagher who informed her about the “hot flash”

comment; 2) Ms. Gallagher was not in the building on the day, or even the week, the statement was allegedly made; 3) Commission Counsel could have, but chose not to, question Ms. Gallagher about the statement; 4) the Referee found Ms. Gallagher was entirely incredible; 5) based on Ms. Singer's direct testimony, the Referee stated that Ms. Singer "ha[d] no idea what was said" rendering her testimony concerning the alleged comment "irrelevant;" and, 6) the Referee did not find the "hot flash" statement was proven. POB38-40. In response, Commission Counsel does not rebut the foregoing but maintains that Ms. Singer essentially retracted her testimony that it was Ms. Gallagher who informed her of the comment. RB29-31. Respondent further asserts that Judge Miller is accusing Ms. Singer of "deliberately l[ying]" as to the hot flash comment. RB31.

This latter argument is a total mischaracterization of Petitioner's Opening Brief as Judge Miller has never accused Ms. Singer of "deliberately l[ying]." Indeed, quite the opposite. Judge Miller testified that Ms. Singer was "truthful" (R1027) and "honest" (R1736) – characterizations Judge Miller maintains. As previously noted, Judge Miller has no "specific memory" of the two statements the Referee found had been proven but acknowledged "try[ing] to kid around." R1688.

Instead, Judge Miller is accusing Ms. Gallagher, as opposed to Ms. Singer, of being untruthful. The Referee found Ms. Gallagher entirely incredible. R2790. Respondent did not challenge that finding (R2856) and the Commission did not

reject that finding. Accordingly, there is ample support for Judge Miller’s argument that Ms. Gallagher was not truthful when she informed Ms. Singer of the alleged “hot flash” comment.

As to Respondent’s first argument, Commission Counsel asserts that “[a]lthough Singer’s direct examination testimony created the impression that Petitioner made that comment privately to Gallagher (R524-25), Singer clarified the matter both on cross-examination and redirect examination by explaining, in no uncertain terms, that Petitioner made this remark to her face.” RB30. However, Ms. Singer’s direct testimony did not “*create[] the impression* that Petitioner made that comment privately to Gallagher.” RB30 (emphasis added). Ms. Singer was *explicitly clear* during her direct testimony that Judge Miller made the comment to Ms. Gallagher and not to her. R524-26. For example, when asked by Commission Counsel “[d]id [Judge Miller] say anything at the time when you said you were having a hot flash,” Ms. Singer responded with “[w]ell, he told-- This was reported by Rachelle [Gallagher], that he said he was--[objection].” R524. Any doubt concerning whether and to whom Judge Miller allegedly made the comment to was resolved immediately thereafter when Commission Counsel asked “[d]id [Judge Miller] say anything to you when you said you were . . . having a hot flash,” and Ms. Singer responded with “[n]o. He reported it to Rachelle [Gallagher].” R525. Ms. Singer was so clear that she was not present for the statement that the Referee found

that Ms. Singer “*ha[d] no idea what was said. And so, it’s irrelevant.*” R526 (emphasis added). Yet to create a case for removal, the Commission and Commission Counsel ignore, reject and alter the Referee’s findings.

Respondent claims that “on cross-examination, after Petitioner’s attorney brought up the ‘hot flash’ apology, Singer asserted flatly, ‘He made that comment to me.’” RB30 (citing R555). However, the question posed to Ms. Singer was not, as Commission Counsel suggests, whether the comment was made to Ms. Singer or to Ms. Gallagher. Instead, the question was “did you expect Judge Miller to react or respond to that comment,” to which Ms. Singer replied “[h]e made that comment to me.” R555. Ms. Singer’s response was not an attempt to refute her earlier statements that the comment was relayed to her by Ms. Gallagher. Ms. Singer was simply testifying that she believes Judge Miller “react[ed] or repond[ed] to” her apology for having a hot flash.<sup>3</sup> R555.

It was not until re-direct with prompting by Commission Counsel – and after having reviewed her notes concerning the alleged statement – that Ms. Singer testified the comment was made directly to her. R558-559. The relevant portion of her testimony is below:

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<sup>3</sup> Respondent asserts that Ms. Singer’s “made that comment to me” statement contradicts “Petitioner’s claim that Singer changed her testimony on redirect ‘only after prompting from Commission Counsel.’” RB30. However, Respondent failed to provide this Court with the context for Ms. Singer’s statement, specifically, the preceding question.

Q. Just to clarify and follow up to some of [Petitioner’s counsel’s] questions about this comment that the judge—about this incident in or around June 5<sup>th</sup> in which you said that you had a hot flash, did the judge respond to you personally? *After having now looked at your notes?*

A. After-- Sorry. *Having referred to my notes*, he replied, “It’s nice to know I still have that effect on you.”

Q. And he replied that to you?

A. Yes.

R558-59 (emphasis added). Accordingly, on direct examination Ms. Singer unequivocally testified (as opposed to “*creat[ing] an impression*”) that the “hot flash” comment was relayed to her by Ms. Gallagher and not by Judge Miller. Her testimony changes only after she has reviewed a document – even though she did not indicate her recollection needed refreshing.

Strikingly, Respondent does not rebut, discuss or even mention the fact that Ms. Gallagher was not present on the day Ms. Singer states the statement was allegedly made. R905-07. This is particularly important given that, even on re-direct, Ms. Singer is unequivocal that after their conversation, Judge Miller “went back to chambers and shared it with at least Rachelle Gallagher.” R559. Even the impossibility of Ms. Gallagher’s presence in the building on the day or week the comment was allegedly uttered does not stop the Commission from ignoring the facts to create a justification for removal. R905-07.

Respectfully, the alleged “hot flash” statement was never established by a preponderance of evidence.

**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**

The Referee characterized the incident with Ms. Vroman as “not professional,” and 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. Conversely, Respondent asserts that “[t]he Commission found that Petitioner ‘berated and demeaned’ Court Assistant Rebecca Vroman by ‘screaming and yelling at her’ in his courtroom.” RB32 (citing R4, R13, R19, R22). However, the Commission did not find (and Ms. Vroman did not testify) that Judge Miller was “screaming and yelling at” Ms. Vroman. That phrase occurs only once in the 2020 Determination and merely as a recitation of Ms. Singer’s hearsay characterization of the incident after it was relayed to her by Ms. Vroman. R4. More importantly, the Referee’s findings directly contradict the 2020 Determination’s and Commission Counsel’s argument that Judge Miller “berated and demeaned” Ms. Vroman.<sup>4</sup>

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<sup>4</sup> Ms. Vroman testified this was the “first,” and presumably only, “time [Judge Miller] had ever treated [her] that way.” R483-84. Ms. Vroman also agreed that between February 6 (the day of the incident) and when she left Family Court, she and Judge Miller were “doing cases alone”

Apparently acknowledging this contradiction, Commission Counsel asserts that “the fact that the Referee did not resolve conflicting testimony between Vroman and Petitioner regarding whether Petitioner had yelled, and was thus ‘unable to conclude that [Petitioner’s] demeanor was ‘loud and angry,’ does not compel a factual finding in Petitioner’s favor.” RB32. In other words, Commission Counsel argues that the Referee “was [] ‘unable to conclude that [Petitioner’s] demeanor was ‘loud and angry,’” because he chose to “not resolve conflicting testimony between Vroman and Petitioner.” RB32.

However, Commission Counsel parses, misstates and ignores the Referee’s entire finding:

*[b]ased upon the totality of the evidence received, I find that there was in fact an “incident” that occurred between Respondent and Ms. Vroman in open court on February 6, 2017. The testimony of Respondent and Ms. Singer (who recounted Ms. Vroman’s contemporaneous report of the incident) reveals that the interaction with Ms. Vroman was not professional. On this Record, I was unable to conclude that [Judge Miller’s] demeanor was “loud and angry.”*

R2798-99 (emphasis added, footnote omitted). Thus, the Referee based his not “loud and angry” finding “upon the totality of the evidence received” and “[o]n this Record.” R2798-99. It was not based, as Commission Counsel asserts, on his choice to “not resolve conflicting testimony between Vroman and Petitioner.” RB32.

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and they “continued to get the job done,” even in the absence of his secretary and law clerk, from July 3 to 11, 2017. R507-08, R1618-19, R1687.

Indeed, the Referee’s statement that the finding was based “upon the totality of the evidence received” and “[o]n this Record,” is an implicit, if not explicit, statement that the Referee resolved any relevant conflicting testimony before rendering his findings.

Judge Miller acknowledges, as Respondent argues, that “[n]either the Commission nor this Court is bound to accept the Referee’s findings.” RB 32 (citing Matter of Marshall, 8 N.Y.3d 741, 743 (2007)). However, this Court should – as Judge Miller argued in his Opening Brief – afford the Referee’s credibility findings great weight and deference as they are “largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record.” POB36-38 (quoting Berenhaus, 70 N.Y.2d at 443). Respectfully, this Court should neither endorse nor condone the 2020 Determination’s and Commission Counsel’s sweeping disregard of multiple significant credibility determinations to rewrite the Referee’s findings, made by a preponderance of evidence. R2791. To do so would establish a dangerous precedent in judicial discipline proceedings.

Finally, Respondent argues that “[t]he Commission had several good reasons to accept Vroman’s testimony” including that Ms. Vroman filed a complaint about the incident, “Petitioner’s demonstrated lack of candor throughout the proceedings,” and that Judge Miller was not “forthright about Vroman’s allegations.” RB32-34. However, the standard for rejecting the Referee’s credibility determinations is not

whether there are “*good reasons* to accept Vroman’s testimony.” RB32 (emphasis added). Rather, the question is whether the Respondent’s arguments are so compelling as to overcome the great weight and deference afforded a Referee’s credibility findings. See Collins v. Codd, 38 N.Y.2d 269, 270 (1976) (“The testimony posed a clear-cut issue as to the veracity of the witnesses; and where substantial evidence exists, as it clearly does here, to support the administrator’s determination, that determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions.”). For the following reasons, Judge Miller respectfully submits that Respondent has not met this heavy burden.

Turning first to the complaint, Respondent asserts that Ms. “Vroman promptly filed a report of Petitioner’s outburst, which indicated that he had ‘berated her in the courtroom, screaming and yelling.’” RB32-33. Although they suggest this language – that Judge Miller allegedly “berated her in the courtroom, screaming and yelling” – is included in complaint, Commission Counsel chose not to introduce the complaint into evidence (R2798), and it is therefore not in the Record.

Respondent next claims that Ms. Vroman’s testimony should be credited because Judge Miller has “demonstrated [a] lack of candor throughout the proceedings.” RB33. In support, Commission Counsel utterly fails to cite to conflicting testimony between Judge Miller and another witness. Nor does

Respondent cite to a finding by either the Referee or the Commission that Judge Miller lacked candor. Instead, Commission Counsel uses the 2020 Determination’s comments by the Commission referencing questions and responses about Judge Miller’s financial filings, and asserting that Judge Miller’s responses were noted to be “varying,” “shifting,” “implausible,” “nonsensical” and “baseless.” RB33. Notably, the Commission’s comments were not rendered in connection with Ms. Vroman (or Ms. Singer).

Accusing a judge of “lack of candor” is a serious charge. While Judge Miller strenuously objects to this assertion – Petitioner uses the word “assertion” and not “finding” because neither the Referee nor the Commission found that Judge Miller lacked candor – the accusation is also belied by Respondent’s own submissions. Although they now claim that Judge Miller “demonstrated [a] lack of candor *throughout the proceedings*,” RB33 (emphasis added), Commission Counsel argued lack of candor only once, and it was to the Commission for a very specific issue. Following the Referee’s Report and Proposed Findings of Fact and Conclusions of Law (“Report”), Respondent argued to the Commission that Judge Miller lacked candor as to Charge II concerning whether Ms. Gallagher “volunteered” to draft the letter, as Petitioner asserts, or whether she was directed to, as Ms. Gallagher claims. R2921, 2938. Neither the Commission nor the Referee found that Judge Miller lacked candor as to this, or any other, area of conflicting testimony. Had Judge Miller

truly “demonstrated [a] lack of candor *throughout the proceedings*,” RB33 (emphasis added), Commission Counsel surely would have argued lack of candor to the Referee, amended the pleadings to the proof, and raised more than this one specific conflict to the Commission.

Commission Counsel is now attempting to bootstrap a lack of candor argument to Ms. Vroman’s allegations based solely on comments the Commission rendered in connection with Judge Miller’s financial reporting. In so doing, Respondent is asking this Court to ignore the following facts: 1) Commission Counsel did not argue lack of candor to the Referee; 2) Respondent did not argue lack of candor with respect to Ms. Vroman to the Commission; and, perhaps most importantly, 3) neither the Referee nor the Commission found that Judge Miller lacked candor. Accordingly, Commission Counsel’s argument should be rejected. In re Kiley, 74 N.Y.2d 364, 371 (1989) (“the use of a Judge’s ‘lack of candor’ as an aggravating circumstance should be approached cautiously to minimize the risk that the investigative process itself will be used to generate more serious sanctions”).

Finally, Respondent claims that Judge Miller has not been “forthright about Vroman’s allegations” because “after Ms. Vroman complained about his behavior, [Petitioner’s] response was not to apologize, but to file a complaint against Ms. Vroman.” RB33-34. Commission Counsel’s argument rests on a fatal assumption – that Judge Miller’s letter outlining concerns in Family Court operations against Ms.

Vroman was in response to her complaint against him. However, Judge Miller’s letter related to multiple concerns with her work. Upon reviewing Judge Miller’s letter, even though Ms. Singer did not observe Ms. Vroman in the courtroom or interview Judge Miller (R551-53), Ms. Singer concluded that there were “two or three” concerns where she believed that Ms. Vroman “could improve her work product and [they] discussed how [Ms. Vroman] would do that.”<sup>5</sup> R529. Judge Miller similarly testified that “[a]djustments were made as to at least a number of the concerns that [he] voiced in [his] letter to Ms. Singer.” R1687.

Turning to Ms. Singer, Petitioner argued in his opening brief that, likely considering the many witnesses who testified to Judge Miller’s judicial temperament, sexual propriety, and honesty, 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.” POB42, R2801. Appellate Justice Robert Miller accepted this finding in his dissenting opinion. R25-26.

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<sup>5</sup> Commission Counsel asserts that Judge Miller’s complaint against Ms. Vroman “was ultimately determined to be meritless and retaliatory.” RB39 (citing R14, R20). By citing the 2020 Determination, as opposed to testimony from the hearing, Respondent strongly suggests that it was the Commission who made this “ultimate[] determin[ation].” However, the Commission did not find that Judge Miller’s complaint was “meritless and retaliatory.” Rather, the 2020 Determination merely recites Ms. Singer’s testimony that *Ms. Singer believed in her opinion* the complaint was “retaliatory.” R4-5, R20. Notably, as discussed above, Ms. Singer did not testify that Judge Miller’s complaint against Ms. Vroman was “meritless” and she confirmed several of Judge Miller’s concerns. R529.

Petitioner further argued that 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.’” POB41. Notably, the 2020 Determination does not assert that these findings were based on a preponderance of evidence. In response, Commission Counsel does not rebut the foregoing. Nor do they contradict Judge Miller’s assertion that the Referee’s findings are credibility determinations to be awarded great weight and deference.

Instead, Respondent argues that the 2020 Determination correctly rejected the Referee’s findings because, essentially, Commission Counsel minimizes Judge Miller’s statements of contrition.<sup>6</sup> In so doing, Respondent is asking this Court to once again relitigate a credibility determination by the Referee – a finding rendered after a six-day hearing observing Judge Miller testify as well as a long line of witnesses who testified to his reputations for judicial temperament, sexual propriety,

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<sup>6</sup> Commission Counsel also argues that “[i]t is telling that Petitioner insists in his brief to this Court that he has ‘repeatedly apologized’ to Singer and Vroman (PB 45) when his own citations to the record make plain that he did no such thing.” RB39. However, Judge Miller has never claimed that he apologized directly to Ms. Vroman or Ms. Singer. The fact that Judge Miller uttered public apologies, as opposed to apologies directly to Ms. Vroman and Ms. Singer, would have been clear if Respondent had chosen to quote the entirety of Petitioner’s sentence, instead of just two words. Specifically, Judge Miller asserted the following in his Opening Brief: “Although he has no memory of the statements testified to by Ms. Singer, [Judge Miller] 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.” POB45 (emphasis added). This is another example of Commission Counsel culling words from a broader statement and deliberately mischaracterizing its context to create an argument justifying removal.

and honesty over decades as a judge. Isolated and occasional comments, in light of that character testimony and long judicial career, are neither frequent nor widespread and do not amount to a pattern of improper activity impacting the judicial system. Petitioner respectfully submits that this Court should, as the dissent by Justice Robert Miller (joined by Vice-Chair Harding) did, uphold the Referee's credibility finding "accept[ing] and credit[ing] [Judge Miller's] testimony that he had no intent to harm anyone with comments that 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**

Undisputed by the Respondent from Judge Miller's Opening Brief is a chart of relevant dates in connection with filing his tax returns, amended tax returns, FDFs, and amended 2015 FDF, facts established by a preponderance of the evidence. POB30-31. One particularly important date is that shortly after filing his 2016 tax returns – meaning, as early as April 15, 2017, and as late as June 1, 2017 – Judge Miller contacted Accountant Robin Dean ("Accountant Dean") after discovering unreported income and began collecting the documents necessary to amend his tax returns *and before any inquiry*. R1485-87, R1492, R1620-23, R1673. Judge Miller filed his amended returns for 2015 and 2016 on August 2, 2017, prior to the Administrator's Complaint asserting that Judge Miller failed to include income on his 2015 FDF. R29, R1669, R1728, R2337. (As noted in Petitioner's Opening Brief,

the Record does not establish when the Administrator's Complaint was served on Judge Miller, but, presumably, after the August 11, 2017, date it was signed. POB31, n.24.) Ultimately, the Referee rendered the material finding that Judge Miller amended his tax returns and one 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).

Commission Counsel fails to refute or directly address the dates set forth in Petitioner's chart or the Referee's key finding. Rather, Commission Counsel deliberately mischaracterizes the Referee's finding as Petitioner's argument. RB45. According to Respondent, Judge Miller "claims that he amended all of his tax returns and his 2015 FDF 'before he was placed on formal notice by the Commission that the Commission was looking into those issues.'" RB45 (emphasis in original). In so doing, Respondent seeks to dilute and denigrate the Referee's finding by labeling it merely an argument by Judge Miller.

Respondent further speculates that Judge Miller "had every reason to believe that the Commission was investigating" his failure to report income as of July 3, 2017, when Judge Miller discovered that the Commission had removed his boxes of personal and financial papers from his Chambers. RB19, RB46. Commission Counsel is seeking to resurrect a previously rejected argument. The Referee

specifically noted that “Counsel for the Commission urges that notice should be inferred as early as July of 2017 when [Judge Miller] learned that the Commission had taken boxes from his Chambers that included tax materials. . . . I do not find that this circumstance translates into knowledge that a tax investigation was ongoing.” R2813. The seizure of Petitioner’s personal records from chambers frustrated and delayed Judge Miller’s effort to amend his returns and financial filings as he sought to reconstruct the missing documents. R1651. Commission Counsel apparently believes that their blocking and delaying of a judge’s attempt to correct and amend his tax returns and FDF by seizing his or her personal financial records creates a case for removal.

More importantly, even assuming *arguendo* that Judge Miller should have known that his tax returns were under investigation in early July 2017 – Judge Miller, with his accountant, voluntarily began the process of amending his 2015 and 2016 tax returns shortly after filing his 2016 return, reflecting a good faith intent to correct his filings and belying any “intent to deceive.” R1485-87, R1492, R1673. Notably, it was not just Judge Miller who testified to this fact, as Commission Counsel suggests. RB19. Rather, Accountant Dean corroborated Judge Miller and testified that “not too much longer . . . so like a month and a half,” after filing the 2016 returns on April 12, 2017, Judge Miller contacted her after discovering monies that should have been reported on his tax returns. R1485-86, R2337. Thus, there is substantial

and credible evidence that not only did Judge Miller amend 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), but Judge Miller also began the process of amending his returns and FDF weeks or even months *before* Commission Counsel asserts Judge Miller had reason to suspect that the Commission was investigating his financial documents. Although this argument was raised in Petitioner’s Opening Brief (POB3, POB53), Commission Counsel chose not to rebut or address it.

Commission Counsel also argues that Judge Miller erred in not including “thousands of dollars in reportable income” from his rental properties on his amended 2015 FDF and in failing to amend his 2016 FDF to reflect the rental property income. RB35-36. This misleading, if not deceptive, statement ignores that there was never any taxable income for the rental properties. With the exception of one footnote in their submission to the Referee (R2899), Respondent has never accused Judge Miller of filing an inaccurate 2015 amended FDF or that he erred in failing to file an amended 2016 FDF. Judge Miller filed his amended 2015 and 2016 tax returns on August 2, 2017. R1669, R1728, R2337. He then filed his amended 2015 FDF on November 16, 2017, which is based on his tax returns, after receiving permission to do so. R1643, R1669, R2186-91. The Formal Written Complaint (“FWC”) is dated July 9, 2018. R35. Commission Counsel therefore had many

months to include this alleged wrongdoing in the FWC. (There was also nothing precluding Commission Counsel from amending the FWC to include an additional charge.) That Respondent chose not to do so demonstrates the speciousness of their eleventh-hour argument to justify removal.

Furthermore, the Record amply establishes that Judge Miller did not violate the Rules by not including income from his rental properties. Petitioner's 2015 and 2016 tax returns make clear that Judge Miller suffered a loss from his rental properties in both years, i.e. no income to tax in both years. R2228, R2301. As Accountant Dean explained, in such a situation the rental income has no impact on taxes owed. R1518. Accordingly, Judge Miller did not include income from his rental properties on his FDFs as there was no reportable income. Moreover, Judge Miller did not unilaterally decide to omit the rental income on his FDFs. Rather, Judge Miller discussed the issue of rental losses with his accountant and an "administrator" in the Office of Court Administration ("OCA") Office of Ethics.

Accountant Dean explained to Judge Miller that the FDFs were based on "information off the tax returns. Each of [Judge Miller's] returns, with the rents included, and all the expenses, [] run[s] at a deficit. So, [Accountant Dean] said if it runs at a deficit, you don't put it in there because it's not income that you have coming in. It's running at a deficit." R1643. The Referee inquired of Accountant Dean if Judge Miller asked her assistance on his financial filings with the court

system and she said yes, and noted the “confusing” nature of some questions. R1520. Accountant Dean made clear that when she gave Judge Miller advice on financial filing, he followed her advice. R1514.

As for the OCA Office of Ethics, Judge Miller explained that the administrator “had to go in and open up [his] accounts” so that he could amend his 2015 FDF to include the additional income from his prior law practice. R1644. They also discussed his rental losses while they were on the phone. R1644. The administrator confirmed Accountant Dean’s assertion to “take [the information for the FDFs] off the tax returns if you’re showing income coming in then you’re [to] report it” on the FDFs. R1644. Judge Miller was asked “without telling us what . . . [the administrator] said to you, what did you do with respect to your forms after speaking to the administrator.” R1644. He responded that he “added the line of prior law office income.” R1644. A reasonable inference from his testimony is that he relied on the OCA administrator’s advice when he excluded the rental losses.

In their quest to rewrite the Referee’s findings, Commission Counsel also accuses Judge Miller of “g[iving] answers that the Commission found were ‘shifting,’ ‘implausible,’ ‘nonsensical,’ and ‘baseless’” in connection with his financial reporting. RB2. Based on these comments disparaging Judge Miller’s character, Commission Counsel argues, for the first time, that while Judge Miller was “under investigation [he] committed recurring intentional misconduct and dealt

dishonestly with the Commission,” which Respondent asserts creates a case for removal. RB48.

A review of the 2020 Determination reveals that the Commission based these comments on Judge Miller’s hearing testimony. See R17, R20-21. Accordingly, the Commission rendered a credibility finding based on “a lifeless record,” which is precisely what this Court cautions against. Berenhaus, 70 N.Y.2d at 443 (finding “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.”). Notably, the Referee did not render any similar credibility findings against Judge Miller – not one. Indeed, the Referee’s finding that Judge Miller amended his tax returns and one 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), is a clear credibility finding based on Judge Miller’s testimony as corroborated by Accountant Dean. This finding is consistent with the Referee’s earlier credibility finding in Charge I “accept[ing] and credit[ing] [Judge Miller’s] testimony that he had no intent to harm anyone with comments that may well have been intended to be humorous.” R2801.

Moreover, neither the 2020 Determination nor Commission Counsel addresses, let alone rebuts, the long line of witnesses who testified to Judge Miller’s

judicial temperament and honesty. POB19-22. Judge Miller also responded to every letter by Commission Counsel and answered every question they posed during various interviews. Petitioner therefore respectfully submits that the Record does not support the conclusion that Judge Miller “gave answers that the Commission found were ‘shifting,’ ‘implausible,’ ‘nonsensical,’ and ‘baseless’” in connection with his financial reporting. RB2.

Finally, Respondent asserts that “there is ample evidence that Petitioner’s omissions from his tax returns, and his faulty or missing financial disclosures, constituted deliberate attempts to deceive the state and federal government for his own financial gain.” RB42. In support, the Commission cites five categories of errors, several of which concern his rental properties.<sup>7</sup> RB43. However, as explained above and in Petitioner’s Opening Brief (POB27), Judge Miller’s rental expenses exceeded his rental income in both 2015 (R2192, R2198, R2223, R2228) and 2016 (R2255, R2260, R2290, R2301). Accordingly, there was no taxable income from Judge Miller’s rental properties in either 2015 or 2016, and he reasonably relied on advice from Accountant Dean and an OCA Ethics Office administrator. Respondent’s argument that Judge Miller was “attempt[ing] to deceive the . . .

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<sup>7</sup> The categories are as follows: 1) income from legal fees not included in the 2015 tax return; 2) income from rental properties not included in the 2015 tax return; 3) income from rental properties not included in the 2016 tax return; 4) income from legal fees and rental properties not included in the 2015 or 2016 FDFs; and, 5) failure to file the local financial disclosures with the Clerk of the Court. RB43.

government for his own financial gain” by not including rental property income – when the aggregate net income was negative – is simply false but consistent with their effort to create a case for removal.<sup>8</sup> This is especially true given that Judge Miller relied on the advice of his accountant who took the “information off the tax returns” and an administrator in the OCA Office of Ethics. R1643-44.

As to the income from his legal practice in 2015 (the only taxable income at issue), Judge Miller’s good faith and candor is reflected by the fact that he recognized there were issues with his returns and sought to amend his taxes with his accountant to include the additional income long before Commission Counsel argues Judge Miller should have been aware of the investigation.<sup>9</sup> Finally, as to the local financial disclosures, Judge Miller concedes he was unaware of and did not timely

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<sup>8</sup> Respondent argues that, per “[t]he instructions for the FDF,” Judge Miller was to list the “aggregate net income before taxes for each building.” RB35, n.9 (emphasis in original). However, this language is lifted from Question 13, which should be read in conjunction with the “comprehensive instructions.” Commission Counsel chose not to introduce the FDF instructions into evidence. R1674-76. The instructions, which the Referee described as being “very comprehensive,” relating to the “proper complet[ion]” of the forms and “probably a matter of public record,” can be found at the website identified in the Commission’s post-hearing Brief to the Referee. R2718 (citing <https://www.nycourts.gov/IP/ethics/FilinginstructionsPart40.pdf>), R2926 (citing same). The instructions state that aggregate net income is determined based on the deductibility rules “for federal income tax purposes” (available at the aforementioned website). Furthermore, while Judge Miller did not identify the income from the one property that generated income on his FDF – as his properties as a whole operated at a loss – he did reference all three properties on his 2015 FDF (R2178-79), his amended 2015 FDF (R2190-91) and his 2016 FDF (R2184-85) in response to Question 17, further negating Respondent’s argument that he acted with an intent to deceive.

<sup>9</sup> Respondent posited that Judge Miller “had every reason to believe that the Commission was investigating” his failure to report income as of July 3, 2017, when Judge Miller discovered that the Commission had removed his boxes of personal and financial papers from his Chambers. RB19, RB46. Not only is this statement contradicted by the proof, but it is not established by a preponderance of the evidence.

file the disclosures with the Clerk of the Court. R1672, R1677, R2812. However, as Judge Miller reported his income on his tax returns and on the FDFs, this failure does not constitute an intent to deceive.

While Judge Miller’s financial reporting may be considered “sloppy” or “careless” and an error in management at times, removal is warranted only where there is an “intent to deceive.” See In re Alessandro, 13 N.Y.3d 238, 249 (2009) (“we are unwilling to remove a judge from office for completing loan applications in a sloppy fashion where there is no evidence of intent to deceive”). Petitioner respectfully submits that his undisputed actions to correct his returns and FDF before any inquiry – and before Commission Counsel argues he had any reason to believe that the Commission was investigating his records – belie any intent to deceive.

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

Petitioner’s Opening Brief argued that removal was inconsistent with the Commission’s own precedent and in tension with this Court’s decisions. POB44-54. In support, Judge Miller discussed each case and determination cited by the Commission in the 2020 Determination. Almost universally, each case and determination dealt with significantly more egregious conduct while awarding a sanction less than removal. With one exception, discussed below, Respondent does

not address or rebut this argument or otherwise argue that Judge Miller misinterpreted the cases and determinations cited in the 2020 Determination.

As to the one exception, Respondent argues that “Petitioner’s reliance on *Matter of Dye* and *Matter of Doolittle* in support of his contention that censure in appropriate (PB 45) is misplaced.” RB41 (emphasis in original). However, Commission Counsel once again mischaracterizes Petitioner’s argument. Judge Miller did not rely on either Dye or Doolittle in support of his argument for censure. Rather, the Commission relied on both Dye and Doolittle to establish that Judge Miller’s comments violated the Rules and as part of their overarching position that Petitioner’s conduct warranted removal. R14. Judge Miller merely noted that the conduct described in both Dye and Doolittle was far more egregious than the conduct at issue here, and yet, neither judge was removed. POB44-46. Again, Judge Miller does not contest that his two statements to Ms. Singer violated the Rules. Rather, Petitioner respectfully submits that these two isolated statements do not justify removal when considering his decades on the bench without complaint and the witnesses who testified to his sexual propriety, judicial temperament and honesty. See In re Collazo, 91 N.Y.2d 251, 253-254 (1998) (“isolated occurrences [of sexualized statements], standing alone, would not be sufficient to justify removal” but finding removal was appropriate due to the judge’s “pattern of evasive, deceitful and outright untruthful behavior, evidencing a lack of fitness to hold judicial office”

including his “attempt to conceal the Commission’s pending investigation of the initial complaint while seeking an interim appointment to a vacancy on Supreme Court”).

Appellate Justice Robert Miller and Vice-Chair Harding also agree that removal is “contrary to the Referee’s findings and contrary to long-established precedent of the Commission.” R24.

#### IV. CONCLUSION

For the reasons stated herein as well as in Petitioner’s Opening Brief, Judge Miller respectfully submits that this Court should reject the Commission’s determination, 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 (single spacing for headings, footnotes and block quotes), and the total number of words for the body of the brief is 6,998.

Dated: June 23, 2020  
Albany, New York

  
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