STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

TERRENCE C. O'CONNOR,

a Judge of the Civil Court of the City
of New York, Queens County.

DETERMINATION

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Joel Cohen, Esq.
Jodie Corngold
Honorable John A. Falk
Taa Grays, Esq.
Honorable Leslie G. Leach
Honorable Angela M. Mazzarelli
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (Edward Lindner, Mark Levine, Brenda Correa and Daniel W. Davis, Of Counsel) for the Commission

Honorable Terrence C. O'Connor, *pro se*

The respondent, Terrence C. O'Connor, a Judge of the Civil Court of the City of New York, Queens County, was served with a Formal Written Complaint dated May 30, 2017, containing four charges. The Formal Written Complaint alleged that

respondent failed to cooperate with the Commission's investigation (Charge I); was discourteous to lawyers in two cases who responded "okay" to their witnesses' answers, struck the witnesses' testimony and dismissed the cases (Charge II); was discourteous to lawyers in three other cases (Charge III); and sua sponte awarded "fees" to counsel in nine civil actions without affording an opportunity to be heard (Charge IV). Respondent filed an Answer dated June 19, 2017.

By Order dated June 18, 2017, the Commission designated Peter Bienstock, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on September 11 and 12, 2017, in New York City. Respondent did not appear at the hearing or on two subsequent dates scheduled by the referee. The referee filed a report dated December 14, 2017.

Counsel to the Commission filed a brief recommending confirmation of the referee's report and the sanction of removal. Respondent filed a letter dated January 9, 2018, opposing the recommendations. On February 1, 2018, the Commission heard oral argument, at which respondent did not appear, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the Civil Court of the City of New York, Queens County, since 2009. His current term expires on December 31, 2018.

As to Charge I of the Formal Written Complaint:

2. By letter dated September 9, 2016, the Commission advised respondent that it was investigating three complaints concerning his conduct, provided

him with copies of the complaints and requested his written response to the allegations. Respondent replied by letter dated September 22, 2016. By letter dated December 13, 2016, the Commission requested respondent's appearance at the Commission's office on January 4, 2017, to testify in connection with the complaints. The Commission's letter was accompanied by copies of the complaints and related documents.

3. By letter to the Commission dated December 20, 2016, respondent responded: "I have been unable to confer with my attorney due to his undergoing a medical procedure that I am told will last at least six more weeks. Thus I will be unable to appear as you requested until he is back at work and able to confer with me. When he returns I will ask him to contact you."

4. By letter dated December 23, 2016, sent by overnight delivery, the Commission advised respondent that his scheduled January 4th appearance was postponed and requested that he provide his attorney's name and telephone number by December 28, 2016. The letter was delivered to respondent's court address on December 27, 2016. In response, in correspondence dated January 10, 2017, sent by first-class mail, respondent identified his attorney as Joseph V. DiBlasi and provided the attorney's contact information.[1] This correspondence, which was addressed to "Laura Soto / 646 386 4810 / State of New York / 61 Broadway / NY. NY. 10006," was not delivered but was returned to sender by the post office marked "NOT DELIVERABLE AS ADDRESSED." Ms. Soto

[1] Mr. DiBlasi had represented respondent several years earlier in a Commission matter (*Matter of O'Connor*, 2014 NYSCJC Annual Report 174). He had no contact with the Commission in connection with the instant matter.

is an assistant administrative officer in the Commission's legal department.

5. Having received no response to its December 23rd letter, the Commission sent respondent two additional letters, dated January 6, 2017, and January 11, 2017, again requesting that he identify his attorney. On January 30, 2017, the Commission personally served respondent with a letter stating that he had not responded to the Commission's requests for information about his attorney and requesting his appearance for testimony at the Commission's office on February 15, 2017.

6. By letter postmarked January 31, 2017, respondent advised the Commission that he had "responded to your letters on the same day I received them," that "the bulk of [the Commission's] correspondence was sent when the Court was closed for the Holidays" and that he "was out with a back injury the first week of January." (Respondent's absence from work in early January was confirmed by his supervising judge at the Commission hearing.) Respondent's letter further stated that his attorney had died on January 15, 2017, and that once an executor was appointed and it was decided who would be taking over the attorney's cases he would inform the Commission who would be representing him. On February 1, 2017, respondent forwarded to the Commission his original January 10th correspondence which bore a postal sticker indicating that it had been returned, and enclosed a note stating: "This was returned, despite being addressed exactly as on the envelope it came in."[2]

7. By letter dated February 7, 2017, the Commission advised

[2] This is an apparent reference to the return address on the UPS envelope for Commission correspondence, which includes a telephone number of a Commission employee.

respondent that his investigative testimony was postponed to March 7, 2017, and that the inquiry would not be held in abeyance pending the appointment of an executor in his late attorney's estate, the settlement of his estate or the disposition of his law practice.

8. On March 7, 2017, respondent appeared without counsel at the Commission's office before a Commission referee, Malvina Nathanson, Esq. Prior to being asked to take an oath, respondent stated that he was "not prepared to proceed" because he did not "have access to any of the records" of "any investigation" that his late attorney had conducted since no executor had been appointed for the attorney's estate. He stated that he had requested such records from the attorney's family and was told that someone from the law firm of Sullivan & Cromwell would be in charge of his files, but he admitted he had not attempted to ascertain the name of the individual handling the matter.

9. After a short recess, the referee attempted to administer an oath to respondent, but he refused in the absence of counsel to take the oath or to affirm the truthfulness of his earlier statements.

10. Commission counsel requested that the proceeding be adjourned for three weeks and stated that if respondent failed to appear on the adjourned date, counsel would ask the Commission to charge him with failure to cooperate with the investigation. The referee adjourned the proceeding to March 29, 2017, at 10:00 AM.[3]

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[3] Respondent was charged with stating after the March 7th proceeding concluded, in the presence of two Commission staff members, "This place is a fucking clown show." Based on the circumstances presented, including the testimony that respondent, who appeared agitated and upset, made the comment as he was entering an elevator leaving the Commission's office, we have not considered

11. On March 8, 2017, the Commission sent respondent, by hand and overnight delivery, copies of the documents and correspondence previously provided to him during the investigation. The Commission's cover letter noted the date and time of respondent's rescheduled appearance and requested that he advise the staff on or before March 22, 2017, whether he would be represented by counsel and, if so, to identify his attorney. The letter also stated that his failure to appear on the adjourned date may be found to be a failure to cooperate with a Commission investigation. In a follow-up letter to respondent dated March 13, 2017, Deputy Administrator Mark Levine reiterated that admonition, summarized what had occurred at respondent's March 7th appearance and advised him that the proceedings would not be delayed pending the naming of his late attorney's executor or respondent's effort to obtain the attorney's files.

12. Respondent failed to appear for his adjourned testimony on March 29, 2017. On that date, the Commission received a letter from respondent addressed to Mr. Levine, sent by first-class mail and postmarked March 27, 2017, stating: "Based on the blatant lies in your most recent letter, it is clear that nothing you are involved with would be remotely fair and thus I decline your invitation to appear on the 29th."

As to Charge II of the Formal Written Complaint:

13. On September 17, 2014, respondent presided in the commercial landlord/tenant part over a non-jury trial for non-payment of rent in *Main Street Shops v AV Queens Nail Spa Salon.* Attorney Daniel Pomerantz, an experienced practitioner who

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this aspect of the charge in making our determination.

had previously appeared before respondent, represented the landlord/petitioner and intended to call Jacob Sedgh, the agent for the property, as his sole witness.

14. As the proceeding began, respondent made sarcastic comments about the witness' late arrival, and Mr. Pomerantz apologized on his client's behalf. Before a court officer administered the oath to Mr. Sedgh, respondent yelled at him to "Stand up. What's the matter with you?"

15. During his direct examination of the witness, Mr. Pomerantz said "okay" after Mr. Sedgh answered a question. Respondent angrily accused Mr. Pomerantz of leading the witness by saying "okay" after the witness' response and directed him not do so; he referred again to the witness' late arrival, told Mr. Pomerantz that telling the witness that his answer was "okay" was "a form of communication with your client" and warned that he would strike the testimony if the attorney did it again. Mr. Pomerantz apologized.

16. A few minutes later, after the witness responded to a question asking him to name the parties listed on the lease, Mr. Pomerantz said, "Okay, thank you," whereupon respondent sua sponte struck the witness' testimony. When Mr. Pomerantz indicated he had no other witnesses, respondent invited opposing counsel to make a motion to dismiss, then granted the motion that was made. Opposing counsel had never objected to Mr. Pomerantz's use of the word "okay" or to his leading of the witness.

17. Respondent issued an order dated October 7, 2014, granting the motion to dismiss since "petitioner has failed to produce competent evidence in support of the petition." Mr. Pomerantz's client was forced to go through the additional time and

expense of starting a new case against the tenant.

18. On March 12, 2015, respondent presided over a non-jury trial in *N&E Holdings, LLC. v Apex Auto Dealers 2, Inc.*, in which attorney Pamela Smith represented the landlord/petitioner. During her direct examination of one of the principals of her client, Ms. Smith said "okay" after her witness' answers and before her next questions. Respondent told Ms. Smith to "stop telling [the witness] his answers are okay," and Ms. Smith apologized.

19. Shortly thereafter, Ms. Smith again said "okay" after some of her witness' answers; respondent again told her to stop, and Ms. Smith apologized again.

20. When Ms. Smith said "okay" again after her witness' answers, respondent interrupted her for a third time and told her to "[s]top telling [the witness] his answers are okay." Ms. Smith apologized again and explained that it was a "reflex." Respondent said it was not a reflex because she did not do it all the time, warned that he would strike the testimony and dismiss the case the next time she did it, and asked, "Do we understand each other?"

21. When Ms. Smith said "okay" after the very next answer, she caught herself and immediately apologized. Nevertheless, respondent sua sponte excused the witness and struck the testimony and the documentary evidence presented; he told Ms. Smith, "[T]he testimony is stricken because you clearly were leading him by telling him periodically that his answers were okay. And that's totally unacceptable." Respondent then asked Ms. Smith if she had any other witnesses.

22. Ms. Smith called another witness and said "okay" after the witness'

response to her first question. Respondent told her, "That's once. Next time –." When Ms. Smith said "okay" a short time later, respondent struck the testimony of her second witness. Opposing counsel had never objected to Ms. Smith's use of "okay" or asserted that she was leading the witnesses. After Ms. Smith said she had no other witnesses, respondent granted opposing counsel's motion to dismiss for lack of evidence. For Ms. Smith's client, who had been under contract to sell the property, the dismissal meant he had to restart the case, and he lost approximately $90,000 as a result.

23. Ms. Smith, an experienced litigator, testified at the Commission hearing that her "traumatizing" appearance before respondent prompted her to write to Supervising Judge Joseph J. Esposito. Judge Esposito testified at the hearing that shortly thereafter, he moved respondent out of the commercial landlord/tenant part.

As to Charge III of the Formal Written Complaint:

24. On January 29, 2013, respondent presided over a non-jury trial in *57th Avenue Associates v The New Lefrak City Laundromat, Inc.* The petitioner/landlord was represented by attorney Anthony R. Mordente, and Glenn Michaelson represented the respondent/tenant.

25. After the landlord rested, Mr. Michaelson made an application to limit the rent due to the amount originally pled because no motion had been made to amend the petition to include current rent. Respondent asked Mr. Michaelson, "[W]hat is this, just to make money to use so that they'll hire you again for when he brings the next case?" and when Mr. Michaelson responded in the affirmative, respondent said that

"seems totally disingenuous." When Mr. Michaelson argued that it was in his client's interest to pay less money, respondent stated that he and Mr. Michaelson "have probably a different idea of how a professional conducts themselves." Mr. Mordente made an application to amend the petition to include the current rent, which respondent granted.

26. When Mr. Michaelson sought to call his client as a witness, respondent, in the mistaken belief that the attorney had rested his case, said the attorney did not "understand how a trial's conducted" and had "no idea what you're doing," but permitted him to proceed. During the witness' testimony, when Mr. Michaelson said he did not understand a question that respondent posed, respondent said in a mean-spirited tone, "Apparently, there's a lot you don't understand."

27. On February 27, 2014, respondent presided over a non-jury trial in *Haberman v Triple W. Inc.* Attorney Bessie Chinboukas represented the petitioner/landlord in a holdover proceeding to determine whether the tenant's selling of lottery tickets was a violation of the lease.

28. During the landlord's case, respondent told Ms. Chinboukas that she was "wasting everybody's time" when she argued that another lease was relevant; when she continued to argue about the lease, he asked condescendingly if she misunderstood that it had been admitted in evidence. When Ms. Chinboukas asked permission to resume her questioning, respondent chided her for "making speeches" but told her to continue, and when she responded, "Thank you, Your Honor," respondent accused her of being sarcastic, stating, "You don't have to sarcastically say thank you every time I make a ruling, okay counsel?" Ms. Chinboukas apologized and said she had not meant it

sarcastically, but respondent replied, "I don't see any other way to take it, counsel ... It's obviously clear." On rebuttal, when Ms. Chinboukas stated that she wanted "to call the witness one more time" without specifying which one, then apologized when respondent asked her to be more specific, respondent told her, "Maybe you should do something right for a change instead of just apologizing all the time okay, counsel?"

29. On March 12, 2015, respondent presided over a non-jury trial in *Anna Waldman v United Dental Group*. Boris Lepikh, who had been practicing law for about a year, appeared on behalf of the respondent/tenant.

30. Mr. Lepikh entered the courtroom as the case was being called, and the parties began discussing a motion. Respondent became angry and screamed at Mr. Lepikh for interrupting opposing counsel and for not "hav[ing] the courtesy" to take off his coat in court. Respondent denied Mr. Lepikh's motion, which he called a "delay tactic," and ordered him to trial immediately, denying his request for a brief adjournment so that his employer could come to court. When Mr. Lepikh, who was unprepared to try the case, had his phone in his lap to send a text to his employer, respondent yelled at him to put the phone away and said, "Is there some course in law school now, how to be discourteous and how to be rude? Because if there is, you must have gotten an A in it." He then accused Mr. Lepikh of "smirking and laughing" and said, "I'm glad you think it's funny ... No wonder people think lawyers are a disgrace. It's people like you who give them that impression." After a trial in which the petitioner/landlord was the sole witness and Mr. Lepikh presented no evidence, his client lost the case.

As to Charge IV of the Formal Written Complaint:

31. By written order dated May 21, 2015, in *T&J Chiropractic, P.C. v Hertz Co.,* respondent granted the defendant's motion to dismiss and directed that the plaintiff pay $1,500 in "counsel fees" to the defendant's counsel. Neither the defendant nor defendant's counsel had requested that respondent award fees in the matter, and prior to issuing the order, respondent did not inform the parties that he was considering awarding counsel fees or provide an opportunity to be heard on the issue. Respondent's order stated that the plaintiff had failed to comply with an order to provide discovery but did not indicate how the court determined that the amount awarded was appropriate.

32. By written orders dated October 23, 2015, in three related matters entitled *Active Care Medical Supply Corp. v Delos Insurance Co.,* respondent granted the defendant's motion to dismiss, denied the cross-motion for summary judgment and awarded $250 in "fees" to defense counsel in each case. Neither the defendants nor their counsel had requested that respondent award fees in the matters, and prior to issuing the orders, respondent did not inform the parties that he was considering awarding counsel fees or provide an opportunity to be heard on the issue. Respondent's orders stated that the actions were barred by res judicata and collateral estopppel but did not indicate how the court determined that the amount awarded was appropriate.

33. By written orders dated October 23, 2015, in five related matters entitled *Gentlecare Ambulatory Anesthesia Services v Geico Ins. Co.*, respondent denied the plaintiff's motion for summary judgment, granted a cross-motion for summary judgment and awarded $250 in "fees" to defense counsel in each case. Neither the

defendant nor defendant's counsel had requested that respondent award fees in the matters, and prior to issuing the orders, respondent did not inform the parties that he was considering awarding counsel fees or provide an opportunity to be heard on the issue. Respondent's orders stated that the plaintiff had failed to appear for examinations under oath but did not indicate how the court determined that the amount awarded was appropriate.

Additional Findings as to the Hearing Before the Referee

34. On July 21, 2017, Peter Bienstock, the Commission-appointed referee, sent a letter by registered mail to respondent and Commission counsel proposing a pre-trial conference by telephone the following week and a hearing scheduled in August 2017; the letter included the referee's email address and requested that the parties communicate thereafter by email. After Commission counsel responded by an email which was copied to respondent's court email address, respondent, on August 1, 2017, replied by email from his court account, stating that he was "not comfortable" speaking with the Commission staff by telephone based on their prior actions, that he did not wish to communicate "via email which is controlled by the Office of Court Administration" and that any future communication by him would be in writing. Commission counsel replied by email, stating that respondent's request to communicate only in writing by regular mail was "impractical" and could be viewed as "a further manifestation of a failure to cooperate" and suggesting that respondent be directed to provide an alternate email address.

35. On August 2, 2017, by email to Commission counsel and to

respondent at his court email address, the referee scheduled the hearing for September 11 to 15, 2017, and set deadlines of August 14, 2017 for discovery demands and September 1, 2017 for discovery to be provided. The referee's email message stated that there was no reason not to communicate by email and that any alternate email address respondent provided could be used if he did not want to use his court email address. The referee stated further that "[t]here has been, and still is, ample time for [respondent] to retain counsel, if he so chose or now chooses" and that "[t]his issue should not and will not cause delay of the hearing." Respondent did not respond to this email and never provided an alternate email address. The referee and Commission counsel continued to send emails to respondent at his court email address. The record shows no email communications from respondent after August 1, 2017.

36. The credible evidence establishes that respondent received the referee's August 2, 2017 email message and thus, by that date, had actual notice that the hearing was scheduled to begin on September 11, 2017.

37. On August 11, 2017, Commission counsel sent respondent an email with discovery demands; this communication noted the hearing dates as September 11, 12, 13 and 15, 2017. By letter dated August 17, 2017, respondent served Commission counsel with his discovery demands.

38. On August 25, 2017, Commission counsel served respondent with discovery by overnight delivery sent to both his home and court address. Counsel's cover letter, a copy of which was also sent to respondent by email, noted the hearing dates, responded to respondent's discovery demands, listed the potential witnesses, and

enumerated, over seven single-spaced pages, the discovery materials that were contained on an enclosed CD, which included witness statements, dozens of court files and records, audio recordings, correspondence and other documents. The discovery provided fully satisfied the statutory discovery requirements (Jud Law §44[4]; 22 NYCRR §7000.6[h][1]).

39. On August 29, 2017, Commission counsel sent subpoenas to the referee for his signature, copying respondent by first-class mail to his home and court address; the subpoenas specified September 11, 2017, as the hearing date. On September 1, 2017, the referee returned the signed subpoenas to Commission counsel, with a copy to respondent by overnight mail and by email, along with a cover letter referring to the scheduled hearing dates. The referee's letter mistakenly referred to the hearing date as April 11, 2017, an error that was corrected later that day in correspondence sent to respondent by email and by overnight delivery.

40. On September 7, 2017, attorney David Louis Cohen sent an email and fax to the referee stating that respondent had consulted him as to the pending matter "which is scheduled for a hearing before you as Referee commencing on September 11, 2017." Mr. Cohen's communications stated that he was prepared to represent respondent in the matter only if the hearing was adjourned to the week of December 11th or December 18th as he was unavailable before those dates due to a prior trial commitment. Noting that Commission counsel opposed the requested adjournment, Mr. Cohen stated that "in a matter of this importance, the Judge should be given one final opportunity to be represented by counsel," and he attributed the belated request for adjournment to

respondent's "failure to realize the significance of the complaints and the importance of the Commission reaching a prompt and fair adjudication." An earlier email message that day from Mr. Cohen to Commission counsel indicated that respondent had just returned from vacation in France.

41. On September 8, 2017, by email to respondent, Mr. Cohen and Commission counsel, the referee denied the request for adjournment and stated that the hearing would proceed as scheduled on September 11, 12, 13 and 15, 2017.

42. The hearing was held on September 11 and 12, 2017, at the Commission's New York City office. Respondent did not attend the hearing. After the hearing ended the first day, the referee sent an email to respondent advising him that the hearing had commenced and would continue the next day at 9:30 AM.

43. There is no indication of any medical or other impediment to respondent's appearance at the hearing, and there is no basis to conclude that he did not receive the emails sent to his court email address by the referee and Commission counsel, and every reason to conclude that he did receive them.

44. By letter to the referee dated September 11, 2017, which was copied to Commission counsel, respondent asserted that he had not received timely notice of the hearing by personal service or certified mail as required by law, had not received the required discovery in a timely manner, and was prepared to appear "[u]pon proper compliance with the requirements of The Judiciary Law." Respondent's letter was sent by first-class mail and was received after the hearing concluded.

45. By email on September 19, 2017, a copy of which was personally

delivered to respondent the next day, the referee scheduled an evidentiary hearing and argument for October 6, 2017, "to determine the facts underlying [respondent's] request for a new/additional hearing." By letter to the referee dated September 29, 2017, respondent objected to the October 6th proceeding and stated that he had not requested "a new hearing," that he wanted "a fair opportunity to confront my accusers with my attorney present," and that "[i]t is now abundantly clear that you are acting in concert with the Commissions Attorney's [sic] to deprive me of my Constitutional Due Process rights."

46. Since respondent had declined to appear, no proceeding was held on October 6th. In lieu of a personal appearance on that date, Commission counsel submitted an affirmation summarizing the evidence counsel was prepared to introduce regarding the issue of notice and attaching, among other exhibits, an affidavit from an Office of Court Administration employee attesting that the various emails sent to respondent's court email address by the referee and Commission counsel had been received.

47. On or about October 13, 2017, copies of the transcript of the hearing and the exhibits received in evidence were delivered to respondent. By email to respondent and Commission counsel on October 18, 2017, a copy of which was personally delivered to respondent the next day, the referee offered respondent the opportunity to reopen the hearing on November 13, 2017, and continuing each day during that week, so that respondent could call witnesses, testify on his own behalf and present evidence in his defense. The referee's email message requested that respondent confirm in writing by November 3rd whether he would appear at the proceeding. Since respondent did not respond to the referee's communication, the hearing was not reopened.

48. Respondent was provided actual, adequate and reasonable notice of the September 11-12, 2017 Commission hearing, the proceeding scheduled for October 6, 2017 to address the issue of notice, and the opportunity to reopen the hearing on November 13, 2017, and made a conscious and knowing choice not to participate in any of those proceedings. Respondent demonstrated, through his and Mr. Cohen's correspondence with the Commission, that he had actual knowledge of the hearing schedule, and he was not prejudiced in any way by the fact that the initial notice of the hearing date was sent to him via email rather than by personal delivery or by certified mail, return receipt requested.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.3(B)(1) and 100.3(B)(3) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

The extensive record before us, based on an evidentiary hearing before a referee in which respondent willfully refused to participate, establishes that respondent violated well-established ethical standards by mistreating attorneys, abusing his judicial power and failing to follow the law in numerous cases and that his misconduct was significantly compounded by his failure to cooperate with the Commission's

investigation of complaints alleging such behavior. Public confidence in the administration of justice in our society requires that judges, who are empowered to pass judgment on legal matters involving the lives, liberty and property of others, be held strictly accountable when their own actions are examined under duly-authorized procedures, and a judge's willful refusal to cooperate in the disciplinary process is a breach of the public trust. Respondent's lack of cooperation with the Commission, along with the additional misconduct established here, constitutes a level of misbehavior that "cannot be viewed as acceptable conduct by one holding judicial office" (*Matter of VonderHeide*, 72 NY2d 658, 660 [1988]; *Matter of Mason*, 100 NY2d 56, 60 [2003] [judge's "misconduct was significantly compounded by (his) persistent failure to cooperate with the Commission investigation and his marked lack of candor"]). Viewed in its entirety, the record before us amply demonstrates respondent's unfitness to serve as a judge.

Pursuant to its constitutional and statutory mandate to review complaints of judicial misconduct, conduct investigations and, where appropriate, render disciplinary determinations, the Commission is authorized to require the testimony of a judge who is the subject of a complaint under investigation (NY Const Art 6 §22[a]; Jud Law §44[3]; 22 NYCRR §7000.3[e]). By failing to provide testimony as requested during the investigation, respondent impeded the Commission's efforts to obtain a full record of the relevant facts, thereby obstructing the Commission's discharge of its lawful mandate and seriously exacerbating his misconduct. *Matter of Lockwood*, 2007 NYSCJC Annual Report 123 (judge's failure to report and remit funds to the State Comptroller in a timely

manner was compounded by her failure to cooperate during the investigation); *Matter of Mason, supra.*

A review of respondent's conduct during the investigation in this case reveals a consistent pattern of efforts to withhold cooperation and to delay or thwart the investigation. For example:

- Faced with the simple task of identifying his attorney to the Commission, he took a web printout of information on his counsel, scrawled "Here is my atty" on it, and addressed his response to an employee at the "State of New York," using a phone number as the first line of the address and omitting the Commission's name, apparently because that is how it appeared as the return address on the envelope that was sent to him; not surprisingly, it was not delivered.
- When his attorney died, respondent sought to delay his testimony before the Commission by tying it to the appointment of an executor for his attorney's estate, although there is no apparent reason why the handling of the attorney's estate should have had any impact on respondent's ability to respond to questions about his conduct, and he admittedly made no effort to retrieve any relevant materials from the law firm handling the estate.
- When the Commission sought to take his testimony on March 7, 2017, he refused to testify on the basis that he had no access to unspecified investigative materials from his attorney's files that he had made no effort to obtain, and refused to affirm the truthfulness of his own statements made minutes earlier, informing the Commission of those circumstances.

- After another adjournment, to a date almost three months after the initial scheduled date for his testimony and two and a half months after the attorney's death, and after Commission counsel had provided respondent with copies of all the materials previously sent to him and warned that he could be charged with failing to cooperate if he did not appear, respondent declined to appear on the adjourned date, explaining by letter that his refusal was based on the "blatant lies" in the staff's letter describing the events at his earlier appearance.

A request to appear for investigative testimony is not an "invitation"; the statutorily-authorized proceeding before a Commission member or referee is a critical part of the Commission's investigative powers (Jud Law §44[3]). A judge's refusal to testify during an investigation when requested to do so "demonstrates an unacceptable lack of respect for the process, created by Constitution and statute, under which the Commission is empowered to investigate the conduct of judges" (*Matter of Lockwood*, *supra*).

To be sure, every judge has the right to the assistance of counsel throughout Commission proceedings. The record indicates that after respondent was granted an adjournment due to his attorney's illness and identified the attorney after some delay,[4] the attorney died a few days later. Although the record does not indicate how long that

[4] It appears that respondent's delayed responses to requests that he identify his attorney can be attributed to a variety of factors, including his absence from the court and his mis-addressed response, which was mailed two weeks after the staff's initial request. In light of the attorney's unavailability during this period, this delay appears to have been relatively inconsequential. Nevertheless, the manner in which respondent handled this issue is emblematic of the way in which he treated the entire investigation.

attorney had been assisting respondent or what work the attorney may have done on his behalf,[5] under the circumstances presented a reasonable adjournment in order for respondent to retain new counsel and prepare for his investigative testimony was appropriate. On the other hand, such an adjournment cannot be indefinite or open-ended. In this case, the totality of the record establishes convincingly that the Commission staff made reasonable efforts to accommodate respondent's expressed desire to be represented by counsel and that his failure to cooperate was willful, pervasive and strategic.

Respondent's argument that he could not fairly be expected to proceed until he was able to obtain unspecified materials from his late attorney's files rests entirely on speculation since respondent could not or would not indicate what work, if any, the attorney had done in the matter or what materials respondent needed. Moreover, his assertion that he was unable to obtain access to the attorney's files until an executor was appointed is absurd. The record indicates that he made no effort at all to seek the records from the estate's law firm. Further, a client presumptively has full access to an attorney's file on a represented matter upon the termination of the attorney-client relationship (*Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn LLP*, 91 NY2d 30 [1997]). And, after his attorney's death, respondent was provided with copies of all the materials previously sent to him during the investigation (which, he claimed, he no longer had). We also observe that since all the alleged wrongdoing was based on proceedings

[5] We note that the attorney had no contact with the Commission in the instant matter and that respondent's letter to the Commission a few months earlier responding in detail to its request for his response to the allegations does not indicate that he was represented by counsel.

documented by court records and audio recordings, all of which were provided to respondent, there is no apparent other material that would have been helpful to him.

Any one of these actions might be an understandable error. When viewed in toto, we can only conclude that respondent engaged in a pattern of conduct designed to withhold his cooperation and to delay the Commission's investigation.

In conducting its investigation, the Commission must balance two crucial interests: safeguarding the rights of judges to due process and the opportunity to present a defense to charges that can significantly impact their careers, and protecting the public interest in expeditiously investigating and sanctioning judicial misconduct, so as to ensure that the legal system operates in a fair and impartial manner. This difficult balancing act is made impossible when judges flout the Commission's efforts, refuse to cooperate with its investigative proceedings, and engage in tactics clearly intended to hinder proper fact-finding. That is precisely what occurred in this case.

Indeed, respondent's unsupported, unconvincing arguments, if accepted, would have placed the Commission's investigation on hold indefinitely, which would be inconsistent with the fair and proper administration of justice. In that regard, it should also be noted that even six months later, several months after being served with formal charges, respondent still had not retained an attorney, and in fact he did not consult with counsel until the eve of the scheduled formal hearing, at which time he sought a three-month adjournment. This pattern of evasion, avoidance and delay, under cover of asserting the right to counsel, is highly suspect, and it appears that his failure to cooperate and his refusal to accept the Commission's authority was a calculated attempt to delay the

disciplinary proceedings.

As to the underlying allegations, the evidence adduced at the hearing depicts a judge who, in his own court, was belligerent, rude and condescending to attorneys. Quick to chastise lawyers for perceived discourtesy, sarcasm and unprofessional behavior, respondent himself engaged in such conduct, subjecting lawyers to harsh personal criticisms and insults in front of their clients, peers and others in the courtroom. Upbraiding an inexperienced attorney who had his phone in his lap while attempting to contact his employer after unexpectedly being ordered to try a case immediately, respondent yelled at him, "Is there some course in law school now, how to be discourteous and how to be rude? Because if there is, you must have gotten an A in it"; he then accused the startled attorney of "smirking" and said, "I'm glad you think it's funny ... No wonder people think lawyers are a disgrace. It's people like you who give them that impression." When another attorney opposed a motion to amend the petition, arguing that it would be in his client's interest to pay less money now even if it meant the possibility of another proceeding later, respondent reprimanded the attorney for being "disingenuous" and unprofessional; later, when the attorney said he did not understand a question, respondent retorted, "Apparently there's a lot you don't understand." He accused another attorney of sarcasm when she said, "Thank you, Your Honor" after a ruling; when the attorney apologized after respondent criticized her for stating that she wanted to recall a witness without specifying which one, respondent commented, "Maybe you should do something right for a change instead of just apologizing all the time."

Every lawyer or litigant who enters a courtroom has a right to be treated

with dignity, respect and fairness. Comments such as those depicted here, which are typical of those throughout the transcripts of the cases before us, are inconsistent with ethical standards requiring judges to treat others with patience, dignity and courtesy while performing judicial duties (Rule 100.3[B][3]). *See, e.g., Matter of Duckman*, 92 NY2d 141, 155 (1998) (demeaning, insulting comments to prosecutors, including asking a lawyer whether he got his education "on the back of an orange juice carton"); *Matter of Rice* (1998 NYSCJC Annual Report 155) (telling an attorney he had "verbal diarrhea"); *Matter of Sena* (1981 NYSCJC Annual Report 117) (intemperate comments about lawyers' upbringing, education and competence).

In two other cases, involving attorneys who said "okay" after their witnesses' answers, not only was respondent discourteous to the attorneys, but his rulings striking the witnesses' testimony and dismissing the petitions for insufficient proof were an abuse of judicial power that penalized the litigants, subjecting them to undue litigation costs and unnecessary delays. Respondent's explanation that using the word "okay" was an attempt to lead the witnesses by signaling approval of their answers is belied by the transcripts, which show that the word was used even after answers providing basic information (*e.g.* the witness' occupation), and it is also noteworthy that opposing counsel never objected that the attorneys were leading. In *Main Street Shops,* where respondent struck the testimony and dismissed the petition when the attorney said "okay" after warning him only once, respondent's comments during the abbreviated proceeding expressing displeasure at the witness' late arrival to court, coupled with another reference to the witness's lateness when he scolded and warned the attorney, strongly suggest that

he was motivated in significant part by annoyance at the attorney and his client. In *N&E Holdings*, where the attorney repeatedly said "okay" after multiple warnings and used the term only seconds after respondent had warned that the testimony would be stricken if she said it again, it is crystal clear that the attorney's use of the word was simply "a reflex," as she explained. Of course, determining whether an attorney is leading a witness or whether to permit such questioning is a matter within the trial court's discretion, and attorneys are expected to abide by a judge's instructions. However, a judge should be able to distinguish between willful disregard of a judicial order and a verbal tic that is of little consequence. In the circumstances here, including that, because the proceedings were bench trials, there was no danger that any line of questioning would prejudice the jury, respondent's intemperate response to the attorneys' reflexive comments was inconsistent with the fair and proper administration of justice. *See Matter of Hart*, 7 NY3d 1 (2006) (judge held attorney in contempt for insisting on making a record of an out-of-court encounter involving the judge); *Matter of Corning*, 95 NY2d 450 (2000) (judge suspended defendant's license out of animosity against his attorney).

It was also established that in nine no-fault insurance cases respondent sua sponte awarded counsel fees upon granting defendants' motions for dismissal or summary judgment without complying with court-mandated procedures governing such awards (22 NYCRR §130-1.1). While a court may award such amounts for "frivolous conduct" upon its own initiative, the court must afford "a reasonable opportunity to be heard" before doing so (22 NYCRR §130-1.1[a], [d]). In the cases at issue the attorneys never had an opportunity to address whether such an award was appropriate and, if so,

the appropriate amount. Moreover, although respondent's orders specified the basis for dismissal, they did not set forth "the reasons why the court found the amount awarded or imposed to be appropriate" as required by court rules (22 NYCRR §130-1.2). Although the requirements of section 130-1.2 need not "be followed in any rigid fashion" and a short-form order may suffice,[6] the requirement of an opportunity to be heard on the issue – as to both the imposition of fee awards and the appropriate amount – is an essential predicate for such an order under court rules.[7] In view of the lack of notice or an opportunity to be heard, the amounts respondent awarded appear entirely arbitrary ($250 in eight cases, $1,500 in one case) and the parties were deprived of due process. Even if the procedural infirmities in these cases can be characterized as legal error, judges are required to "be faithful to the law and maintain professional competence in it" (Rules, 100.3[B][1]), and legal error and judicial misconduct "are not necessarily mutually exclusive" (*Matter of Feinberg*, 5 NY3d 206, 215 [2005], citing *Matter of Reeves*, 63 NY2d 105, 109-10 [1984]).

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[6] *See Benefield v NYCHA*, 260 AD2d 167, 168 (1st Dept 1999); *Saleh v. Hochberg*, 5 AD3d 234 (1st Dept 2004); *Liang v. Wei Ji*, 155 AD3d 1018, 1020 (2d Dept 2017) (the requirements of section 130-1.2 were satisfied since it was "clear from the context of the order that the court found the plaintiff's conduct to be frivolous for the same reasons it gave for directing dismissal of the complaint").

[7] Our finding of wrongdoing as to these fee awards is based on the rules cited herein, which govern the award of "costs" and the imposition of "sanctions" for "frivolous conduct." Such awards are distinct from "costs" awarded to a party in whose favor a judgment is rendered, which are statutory (CPLR Art 81 and 82). The ambiguity presented by the language in respondent's orders makes it difficult to determine what occurred here and might best have been resolved at a hearing, but as respondent has never explained his fee awards and chose not to participate in the hearing, our finding is based on the provisions cited in the Formal Written Complaint (¶72), which respondent has not challenged. The misconduct we find as to these awards is not as significant as the other misconduct presented in this record.

This record of respondent's misbehavior both on the bench and in his failure to cooperate with the Commission investigation, which is amply supported by the testimonial and documentary evidence adduced at the hearing, is plainly inconsistent with a judge's obligation to observe "high standards of conduct" and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules, §§100.1, 100.2[A]). While respondent's failure to testify at the hearing or offer any proof to contest the charges permits us to draw a negative inference to support the misconduct findings (*Matter of Reedy,* 64 NY2d 299, 302 [1985]), we find it unnecessary to do so in view of the persuasive evidence before us establishing his misconduct.

As the record indicates, respondent, who is unrepresented, declined to appear at the hearing before the referee; nor, after objecting that he had not been properly notified of the hearing date, did he appear on two subsequent dates scheduled by the referee affording him an opportunity to address the issue of notice and to reopen the hearing. We also note that respondent chose not to appear at the oral argument before the Commission members. It is apparent from the record that respondent made a conscious and knowing choice not to participate in these proceedings, just as he chose not to testify during the Commission's investigation. The conclusion is unavoidable that by declining to appear at these proceedings, respondent demonstrated that notwithstanding his objections that the proceedings lacked fairness for various reasons, he was simply unwilling to testify under oath or be subject to questioning by the Commission members concerning his behavior.

We find no merit to respondent's argument that the hearing was a nullity

since he did not receive timely notice of the hearing date by personal service or by certified mail as required by statute (Jud Law §44[4]). Personal jurisdiction was established when he was served with the Formal Written Complaint commencing the proceeding, and while due process requires timely notice of the hearing date, the form of the notice is not jurisdictional; the due process obligation can be satisfied by providing actual, adequate notice, which was provided here (*see Ross v New York State Dept of Health*, 226 AD2d 863 [3d Dept 1996]). It is abundantly clear that respondent had timely, actual notice of the hearing date since he not only received the initial notice of the hearing, which was sent by email, more than a month before the scheduled hearing but also received numerous subsequent communications, sent by email and by overnight delivery, that referred to the hearing date. (Respondent has never denied receiving these communications.) It is also clear that respondent waived any technical deficiency in the hearing notice by participating in discovery 25 days before the hearing, by seeking an adjournment four days prior to the hearing without objecting to the notice, and by not raising his objection "at any time when corrective action might have been taken" (*Alamia v Medical Center of Brooklyn, Inc.*, 119 AD2d 711, 712 [2d Dept 1986], citing *Barry v Manglass*, 55 NY2d 803, 806 [1981]). He also abandoned his claim that the notice was deficient by failing to appear, when offered the opportunity, at subsequent proceedings to present evidence in support of his claim and to reopen the hearing. *See Plantation House & Garden Prods. v R-Three Investors*, 285 AD2d 539, 540 (2d Dept 2001); *Acovangelo v Brundage*, 271 AD2d 885, 886 (3d Dept 2000).

Respondent's remaining contentions that he was denied due process are

also without merit. The record establishes that he had ample opportunity to retain counsel, and thus the denial of his request for a lengthy adjournment on the eve of the hearing – nine months after his attorney's death – was not unreasonable. The record also establishes that prior to the hearing he was provided with timely discovery that satisfied the statutory requirements (Jud Law §44[4]; 22 NYCRR §7000.6[h][1]).

Finally, we note that respondent has previously been censured (*Matter of O'Connor*, 2014 NYSCJC Annual Report 174) and that his ethical transgressions in the current matter (except for conduct in a 2013 case that preceded his censure) began within a year after he was disciplined. As the Court of Appeals has noted, "[t]he mere existence of a prior censure would be noteworthy regardless of whether it was related to the instant misconduct" and "[w]ithout question, a heightened awareness of and sensitivity to any and all ethical obligations would be expected of any judge after receiving a public censure" (*Matter of Doyle*, 23 NY3d 656, 662 [2014]; *see also Matter of Kuehnel*, 49 NY2d 465, 470 [1980]). Far from showing a "heightened... sensitivity" to his ethical obligations, respondent's conduct in this case shows a contumacious disregard for those responsibilities.

Public confidence in the courts requires a judiciary that is both independent and accountable. Viewed in its entirety, respondent's conduct, seriously exacerbated by his failure to cooperate, demonstrates his unfitness for judicial office and thus warrants the sanction of removal.

By reason of the foregoing, the Commission determines that the appropriate

disposition is removal.

Mr. Belluck, Mr. Harding, Mr. Cohen, Ms. Corngold, Judge Falk, Ms. Grays, Judge Leach, Judge Mazzarelli, Mr. Stoloff, Judge Weinstein and Ms. Yeboah concur.

Mr. Belluck and Mr. Cohen file a joint concurring opinion.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: March 30, 2018

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

TERRENCE C. O'CONNOR,

a Judge of the Civil Court of the City
of New York, Queens County.

CONCURRING OPINION
BY MR. BELLUCK AND
MR. COHEN

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As the Determination makes extremely clear, respondent's conduct in defying the Commission is hard to abide, but also hard to understand. Why did a long-tenured judge, who clearly knows better, set out on a campaign that is contemptuous of – indeed, to essentially ignore – the statutory authority of the Commission to *require* him to adhere to the rules, regulations and practices of the Commission? Speculation runs rampant, particularly since, as Commission counsel conceded during oral argument, it is quite possible that the Commission staff would not have sought respondent's removal were it not for his resisting the many efforts of the Commission to gain his mandated cooperation in these proceedings.

The Determination goes to great lengths to describe the unquestionable duty of a sitting judge to comply with the authority of the Commission. It is understandable that it has done so – not simply to explain the basis or justification for our severe and unhappy conclusion that respondent should be removed from office, but also

to underscore the importance of a judge's obligation to comply with the rules and protocols of the Commission which, indeed, has Constitutional authority. There should be little doubt that the judges of this State know or should know of their obligation – as respondent should have known – and it is noteworthy that the Commission has rarely been faced with such a willful refusal to cooperate by a respondent-judge. It seems unlikely that respondent, who as a judge demanded strict adherence to what he viewed as proper procedures by individuals appearing before him, would countenance this type of willful disregard for a tribunal in his own court.

We, and no doubt our colleagues as well, greatly wish that respondent had cooperated with the Commission's investigation and the instant proceedings so that we might have decided his case solely on the merits of his underlying conduct. But if the seat on the bench that he has occupied is to have any meaning, he must be treated with the same severity as would any litigant appearing before him who is required to cooperate with the rules, regulations and practices of the court – but refuses to.

We concur.

Dated: March 30, 2018

Joseph W. Belluck, Esq., Chair
New York State
Commission on Judicial Conduct

Joel Cohen, Esq., Member
New York State
Commission on Judicial Conduct