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 the Honorable

RICHARD H. MILER, II,

A Judge of the Family Court, Broome County.

REFEREE'S REPORT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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PRELIMINARY STATEMENT

This proceeding is before me pursuant to the Order of the Commission dated September 18, 2018 designating the undersigned to hear and report. By Complaint dated July 9, 2018, the Commission charged Respondent with misconduct ranging from sexual harassment and

maintaining a hostile work environment in his chambers, to practicing law while a sitting judge and failing to declare income on, and properly file, his financial disclosure forms and tax returns. Respondent served an Answer to the Complaint dated August 8, 2018 in which all material allegations were denied.

Hearings were held in Binghamton, New York on January 7-11, 2019 and in Albany, New York on February 12, 2019. Testimony was received from 23 witnesses; 128 exhibits were received in evidence.[1] Post-Hearing briefing was completed on May 15, 2019. The charges against Respondent are serious and were hotly contested.

The Commission and Respondent were represented by counsel who were exceedingly professional, skilled and well-prepared. Respondent was present throughout the Hearing and testified on his own behalf. Transcripts of the Hearing were prepared and post-hearing submissions (original and reply) were received.[2] In accordance with Commission Rule 7006.6(l), this Report constitutes my proposed findings of fact and conclusions of law for consideration by the Commission.

THE PLEADINGS

The Complaint charges Respondent with four broad allegations of judicial misconduct as follows:

Charge I

> From in or about January 2015, when he became a Family Court Judge, to in or about July 2017, when he was reassigned by the Office of Court Administration from presiding over Family Court matters to handling foreclosure matters in a

[1] There were six Referee exhibits that addressed procedural issues, but none of them are substantive evidence for consideration on the merits of the allegations against Respondent.

[2] *See* Commission's Post-Hearing Memorandum and Proposed Findings of Fact and Conclusions of Law dated May 1, 2019, Respondent's Hearing Submission dated May 1, 2019, Commission's Reply Brief dated May 15, 2019 and Respondent's Reply Letter Brief dated May 15, 2019.

different building, Respondent engaged in a pattern of inappropriate behavior toward certain staff members of the Broome County Family Court, *inter alia* making unwelcome comments of a sexual nature to and about them, and threatening their physical safety and wellbeing.

[Complaint, ¶ 6.]

Charge II

From in or about November 2015 to in or about May 2017, Respondent lent the prestige of judicial office to advance his own private interests and/or the interests of others, and failed to conduct his extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that, on multiple occasions, he importuned chambers staff (i.e. his court secretary Rachelle Gallagher and his court attorney Mark Kachadourian) to perform services unrelated to their official duties, including prohibited political activity.

[Complaint, ¶ 27.]

Charge III

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

A. In or about October 2016, Respondent told the wife of the executor of the Estate of Antoinette Saraceno that he would finish the remaining work on the estate and thereafter, in a phone conversation with the Chief Clerk of the Tioga County Surrogate's Court, Respondent requested that the court allow the estate to be closed by motion instead of a formal accounting; and

B. In or about May 2017, Respondent met in his Family Court chambers with the executor of the Estate of Jerry J. Behal, Jr., reviewed the estate's accounts, went to his former law office, reviewed the estate file and sought to enlist the efforts of his court attorney, Mark Kachadourian, in completing the estate accounting.

[Complaint, ¶ 34.]

Charge IV

> Since becoming a Family Court Judge on or about January 1, 2015, to the date of this Formal Written Complaint, Respondent has failed to file timely and accurate disclosure reports of his income from extra-judicial activities to the Ethics Commission for the Unified Court System, the Internal Revenue Service, the New York State Department of Taxation and Finance and the Clerk of the Broome County Family Court as required.

[Complaint, ¶ 63.]

APPLICABLE RULES OF JUDICIAL CONDUCT

The Commission charges that the above-described conduct violates Sections 100.1[3], 100.2(A)[4], 100.2(C)[5], 100.3(B)(3)[6], 100.3(C)(1)[7], 100.4(A)(2)[8], 100.4(G)[9], 100.4(H)(2)[10], 100.4(I)[11], 100.5(A)(1)[12] and 100.5(C)(4)[13] of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct ("the Rules"). The Rules which the Commission has charged Respondent with violating provide as follows:

> **Section 100.1 A judge shall uphold the integrity and independence of the judiciary.**
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective.

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[3] Charges I, II, III and IV.
[4] Charges I, II, III and IV.
[5] Charges II and III.
[6] Charge I.
[7] Charge IV.
[8] Charges I, II and III.
[9] Charge III.
[10] Charge IV.
[11] Charge IV.
[12] Charge II.
[13] Charge II.

Section 100.2 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

(A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

. . . .

(C) A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others . . . .

Section 100.3 A judge shall perform the duties of judicial office impartially and diligently.

. . . .

(B) **Adjudicative Responsibilities.**

. . . .

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

. . . .

(C) **Administrative Responsibilities.**

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

Section 100.4 A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations

(A) **Extra-Judicial Activities in General.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:

. . . .

(2) detract from the dignity of judicial office;

. . . .

G) **Practice of Law.** A full-time judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to a member of the judge's family.

(H) **Compensation, Reimbursement and Reporting.**

. . . .

(2) ***Public Reports.*** A full-time judge shall report the date, place and nature of any activity for which the judge received compensation in excess of $150, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

(I) **Financial Disclosure.** Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this section and in section 100.3(F), or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.

Section 100.5 A judge or candidate for elective judicial office shall refrain from inappropriate political activity.

(A) **Incumbent Judges and Others Running for Public Election to Judicial Office.**

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

(a) acting as a leader or holding an office in a political organization;

(b) except as provided in Section 100.5(A)(3), being a member of a political organization other than enrollment and membership in a political party;

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

. . . .

(C) **Judge's Staff.** A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

. . . .

(4) political conduct prohibited by section 50.5 of the Rules of the Chief Judge (22 NYCRR 50.5).

As stated above, Respondent's Answer denies the material allegations in the Complaint. Pursuant to Commission Rule 7000.6(i)(1), the burden was on counsel for the Commission to prove each of the charges and violations.

THE ISSUES

The most serious questions presented in this proceeding revolve around the way that Respondent conducted himself in Chambers following the time that he assumed the Family Court bench on January of 2015. The Complaint and the evidence introduced by counsel for the Commission paints a picture of Respondent as a cross between the worst type of sexual predator currently being reported in the media and a stereotypical *noir* crime boss (thinly veiled threats of harm and even a reference to "cement shoes"). This characterization was directly at odds with

the evidence introduced by Respondent that he was fair, judicious,[14] honorable, truthful and universally well-liked and respected in the community. Where appropriate, reputation testimony was considered as to Respondent[15] and as to the two key complaining witnesses, Mark Kachadourian and Rachelle Gallagher.[16]

APPLICABLE LEGAL PRINCIPLES

In arriving at the following proposed findings of fact, familiar legal principles were considered including those relating to observation of the demeanor of the witnesses during their testimony, consideration of whether the witness was interested in the outcome of the proceeding and *falsus in uno falsus in omnibus*.[17] Respondent is, of course, interested in the outcome of the proceeding. The key complaining witnesses, Mr. Kachadourian and Ms. Gallagher are also "interested" by virtue of the recently commenced federal court civil action in which they seek damages against the Unified Court System and Respondent individually. *See Gallagher v. The Unified Court System*, Civil Action No. 3:18-cv-01476-TJM-DEP (N.D.N.Y., commenced on Dec. 12, 2018).

To the extent that Respondent is found guilty of judicial misconduct in this proceeding, that would certainly benefit Mr. Kachadourian and Ms. Gallagher in their civil suit against Respondent and the UCS. Respondent also suggested that Mr. Kachadourian and Ms. Gallagher were interested in the outcome of this proceeding because of fear of loss of their positions with the Unified Court System. Where competing versions of the same event were offered,

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[14] On December 30, 2002, the Commission censured Respondent in his capacity as a Justice of the Union Town Court. The censure was based upon conduct showing "insensitivity and inattention to his ethical responsibilities and, in particular, to the special ethical obligations of judges who are permitted to practice law."

[15] *People v. Kuss*, 32 N.Y.2d 436, 443 (1973); *People v Kennard*, 160 A.D.3d 1378, 1379-1380 (4th Dep't 2018).

[16] *People v. Fernandez*, 17 N.Y.3d 70, 76 (2011).

[17] *See, e.g., Washington Mut. Bank v. Holt*, 113 A.D.3d 755, 756-757 (2d Dep't 2014) ("Where a witness has given testimony that is demonstrably false, we may . . . choose to discredit or disbelieve other testimony given by that witness.").

consideration was given to, *inter alia*: (a) the motive or lack of motive of the witness to tell the truth; (b) the ability of the witness to have heard or observed the event in question; (c) whether any inaccurate testimony was offered intentionally or as a result of a faulty memory; and (d) whether the proffered version of an event could be corroborated by independent as opposed to interested witnesses. *See, e.g.*, N.Y. Pattern Jury Instructions—Civil 1:8 (3d ed. 2019).

THE MISSING WITNESS ISSUE

Although the testimony of 23 witnesses was introduced, not every individual named in the Complaint appeared at the hearing. Counsel for the Commission requested that an adverse inference be drawn from the failure of Respondent to call David Iannone as a witness. An adverse inference would, of course, be appropriate if the missing witness had knowledge material to the issues, would be expected to offer noncumulative testimony favorable to the party against whom the inference is sought and was available to be called to testify for that party. *People v. Smith*, 2019 N.Y. Slip Op. 04447, 2019 N.Y. LEXIS 1629, *5 (June 6, 2019) (citing *People v. Gonzalez*, 68 N.Y.2d 424, 427 (1986).

It is odd and, frankly, surprising, that Mr. Iannone was not called to testify. However, it is far from certain that Mr. Iannone would have offered testimony **favorable** to Respondent. The Complaint alleges in paragraph "14" that in March or April of 2017, Mr. Iannone and Respondent engaged in a graphic discussion of sexual matters while in Respondent's Chambers. This allegation finds its way into the Complaint because it is believed by counsel for the Commission to be accurate. If this allegation is accurate, then Mr. Iannone's testimony would not be favorable to Respondent. Instead, it would be favorable **to the Commission**. Counsel for

the Commission seeks an adverse inference against Respondent seemingly on the assumption that Mr. Iannone would falsely deny this version of the event.[18]

Mr. Iannone, who is apparently within the subpoena power of either party,[19] is not under the "control" of Respondent and is "equally available" to both the Commission and Respondent. *See People v. Gonzalez*, 68 N.Y.2d at 428; *People v. Davydov*, 144 A.D.3d 1170, 1172-1173 (2d Dep't 2016). This lack of control and equal availability, coupled with the lack of assurance that he would testify favorably to Respondent, mandates that no adverse inference be drawn against either Respondent or the Commission for the failure to call David Iannone as a witness.

THE BURDEN OF PROOF AND CREDIBILITY ISSUES

The burden of proof is upon counsel for the Commission to prove the Charges against Respondent by a preponderance of the evidence. [Commission Rule 7000.6(i)(1).] If the evidence fails to establish that any fact is more likely than not true, including if the proof and the countervailing proof are equally likely, then counsel for the Commission will have failed to meet that burden.

This matter has an unusual component to it that has made strict adherence to the preponderance of the evidence standard all the more necessary. That component is the presence of certain allegations against Respondent that are so fantastic as to defy reason and which depend entirely on the credibility of the witnesses.

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[18] The Complaint also alleges in paragraph "13" that Respondent showed Mr. Kachadourian a cell phone picture of the torso of a nude woman. It is alleged that although Mr. Iannone was not present at the time, the picture originated with him. If Mr. Iannone had been called as a witness, he surely would have been asked about this picture and whether he was the source who allegedly provided it to Respondent.

[19] Given that the Commission actually served a subpoena on Mr. Iannone and compelled his testimony in Albany as part of its investigation [Tr. at 1480-1481], a better argument could be made that an adverse inference should be drawn against the Commission on this issue. For the reasons stated in the text above, no adverse inference is considered with respect to Mr. Iannone's failure to appear and testify.

For example, the Complaint charges that shortly after assuming the bench in January of 2015, Respondent called Mr. Kachadourian from his cell phone and passed the phone to Respondent's friend James Stilloe who then threatened both Mr. Kachadourian and Ms. Gallagher that if they ever "betrayed" Respondent, then they would have to answer to him (Mr. Stilloe). [Complaint, ¶ "9"; Tr. at 53.] This alleged incident defies reason because there was no evidence offered to suggest that either Mr. Kachadourian or Ms. Gallagher had ever betrayed, or had ever threatened to betray, Respondent so early in their tenure of employment or that Mr. Stilloe, or anyone else, would act as an "enforcer" for Respondent.

The absurdity of the allegation also raises the natural question in response, namely, who could possibly make up something so outlandish? In other words, is this allegation so outlandish that it must be true? Such a supposition is not accepted because it is inconsistent with strict adherence to the burden of proof and also runs contrary to experience, common sense and logic. In this regard, a recent decision from the Second Department is on point.

> The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case.

People v. Maiwandi, 170 A.D.3d 750, 751 (2d Dep't 2019) (quoting *People v Garafolo*, 44 A.D.2d 86, 88 (2d Dep't 1974)).

A further example is found in paragraph "21" of the Complaint where it is alleged that Respondent became incensed when a New York State Senator refused to give Respondent his cell phone number following a meeting that took place in Albany in May of 2017. [Tr. at 45-46.] According to Mr. Kachadourian, Respondent was so angry at this perceived personal slight that he told Mr. Kachadourian that Ms. Gallagher should be sent to Albany to provide "sexual

favors" for the Senator as a means to allow Respondent to obtain the Senator's personal phone number. [Tr. at 46.] While Mr. Kachadourian may be correct that such a suggestion is "crazy" [Tr. at 46], the assertion is so crazy that it is simply not credible and I so find.

Yet another example of testimony that makes no sense involves Mr. Kachadourian's alleged forced attendance at the 2017 Presidential Inauguration in Washington, D.C. with Respondent and his close friend David Behal. Although this incident was not included in the specifications to any of the charges in the Complaint, it bears directly on Mr. Kachadourian's overall credibility as a witness.

Mr. Kachadourian testified that he was pressured by Respondent to attend the Inauguration and did not want to do so. [Tr. at 181-183.] Yet, when Mr. Behal testified, he explained that it was Mr. Kachadourian who secured the tickets to the event. [Tr. at 1131.] This testimony was uncontradicted.

Why Mr. Kachadourian would agree to travel against his will by car from Binghamton, New York to Mr. Behal's home in Virginia is a mystery. Respondent also offered two photographs that were received in evidence that show Mr. Kachadourian smiling broadly and seemingly having a good time at the Inauguration. [Ex. AA and BB.] His smiling face in the photographs belies the assertion that he did not wish to be there with Respondent or that he was not enjoying himself. [Tr. at 183.] Frankly, the fact that Mr. Kachadourian omitted from his testimony that it was he who procured the tickets for the group completely undermines his assertion that he was forced to attend and, as stated above, undermines his credibility. To be clear, and as explained more fully in the body of this Report, I find that Mr. Kachadourian was not a credible witness.

Similarly, I found that Ms. Gallagher was not a credible witness. There were instances where she was unable to recall the specifics of events that should have been easy to recall. In another instance, Ms. Gallagher implied that there was some type of conspiracy directed against her because court security officers allowed an attorney who was a friend of Respondent to walk by her desk in an otherwise restricted area and that the attorney made "threatening direct eye contact." [Tr. 747.] Ms. Gallagher filed a complaint against court security as a result of the incident because she believed that Respondent sent the attorney there to spy on her.[20] As it turns out, a court security officer explained that that it was he who allowed the attorney to use a secure back exit to the court building because of a threat made by a litigant against the attorney. [Tr. 1199-1201.]

I found that Ms. Gallagher was consciously trying to make Respondent sound "connected" to bad people. If this were really the case, it is surprising that Ms. Gallagher would have wanted, or accepted, the position as secretary given the fact that she had worked closely with Respondent for many years at Johnson City Village Court.

Apart from the above, the evidence received at the Hearing established that Ms. Gallagher has a poor reputation in the community for truth and honesty. *See generally People v. Fernandez,* 17 N.Y.3d 70, 76 (2011). Witnesses Sandra Conklin, Lisa Wojdat and Diane Marusich described Ms. Gallagher as "untruthful [Tr. 1013, 1020], a "manipulator, liar, troublemaker, evil" [Tr. 1090] and that "she's not credible, she's not truthful. She will deflect and place blame upon others for actions that she, herself, was responsible for and did not make." [Tr. 1225.] This evidence was uncontradicted.

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[20] Ms. Gallagher also filed a complaint against court employee [redacted] because "she heard" that Ms. [redacted] had made a threat against Mr. Kachadourian. Ms. Gallagher conceded that she had no first-hand knowledge of this alleged threat. [Tr. 748.]

These types of issues were troubling to say the least and I observe that despite what they claimed to be upsetting events, neither Mr. Kachadourian (a lawyer) nor Ms. Gallagher (a long-time government employee with a history of filing complaints against co-workers) made and kept contemporaneous notes of the alleged incidents that are the subject of this proceeding. Based upon the applicable burden of proof, I am guided by this principle. Namely, if the competing versions of a given incident are equally **implausible**, then counsel for the Commission has not met the burden of proof that the incident either occurred or is chargeable to Respondent.

PROPOSED FINDINGS OF FACT

Preliminary Matters and Background

1. Each of the following proposed findings of fact are found to have been established by a preponderance of the evidence in accordance with Commission Rule 7000.6(i)(1).

2. Respondent was admitted to the practice of law in New York in 1994. He served as a Justice of the Union Town Court, Broome County, from 1996 to 2014 and as a Justice of the Johnson City Village Court, Broome County, from 2002 to 2014. Since January 1, 2015, Respondent has been a Judge of the Family Court, Broome County; his current term expires on December 31, 2024. [Complaint ¶ 4; Answer ¶ 4.]

3. Prior to becoming a full-time Broome County Family Court Judge. Respondent operated his law practice from an office in Endicott, New York, in a building owned by his wife. [Tr. 1307.]

4. When Respondent took office as Family Court Judge (his first full-time judgeship), attorney Artan Serjanej took over his office space in the building owned by Respondent's wife. [Complaint ¶ 4; Answer ¶ 4.] According to Respondent, his wife has owned this building since 2002. [Tr. 1307.]

5. The office of Family Court Judge in Broome County to which Respondent was elected was newly created in 2014 and became the subject of an election in November of that year. [Tr. 1305.]

6. Mark Kachadourian is an attorney who has practiced law in the Tioga and Broome County areas since he was admitted in 1985. [Tr. 22.]

7. Mr. Kachadourian knew Respondent for ten to fifteen years before agreeing to become Respondent's law clerk. [Tr. 23.]

8. At some point in 2014, Mr. Kachadourian began to work on Respondent's campaign for Family Court Judge. [Tr. 24.] Mr. Kachadourian placed campaign signs, helped Respondent prepare for a debate and appeared with Respondent at local events during the campaign. [Tr. 24-25.]

9. Respondent offered Mr. Kachadourian the position as Court Attorney (the functional equivalent of a law clerk) and he accepted. [Tr. 26.]

10. Mr. Kachadourian began work as the Court Attorney on or about January 2, 2015. [Tr. 26.]

11. Respondent was a childhood friend of Rachelle Gallagher's husband, Scott Gallagher [Tr. 542, 1312.]

12. Respondent and Rachelle Gallagher first became acquainted in the early 2000s and, in 2002, Respondent performed the Gallaghers' wedding ceremony. [Tr. 542, 1326.]

13. In 2005, Respondent asked Ms. Gallagher to work for him at the Johnson City Village Court where, for almost 10 years, she served under Respondent as the chief court clerk until December 31, 2014.

14. Ms. Gallagher was active in Respondent's 2014 campaign for Family Court Judge and served on the campaign committee. [Tr. 545.]

15. When Respondent became a Family Court Judge, he appointed Ms. Gallagher as his personal secretary. [Complaint ¶7; Answer ¶7; Tr. 546-47.]

16. Ms. Gallagher began work as Respondent's secretary on or about January 2, 2015.

17. At all times relevant to these proceedings, Mr. Kachadourian and Ms. Gallagher were personal appointees of Respondent.

18. Respondent, Mr. Kachadourian and Ms. Gallagher interacted with each other on a daily basis. [Tr. 30, 33, 548.]

19. Respondent's chambers occupied a suite on the first floor of the Broome County Family Court Building consisting of his office and Ms. Gallagher's adjoining office [Tr. 33-34, 547, 562-63.] Mr. Kachadourian's office was located on the second floor of the Family Court Building, but he spent most of his time in the first floor office suite including directly in Respondent's personal office. [Tr. 33, 548-49.]

Charge I
(Personal Misconduct in Chambers)

20. Paragraph 8 of the Complaint alleges that beginning in 2015, Respondent commented on various occasions to Ms. Gallagher and Mr. Kachadourian that his sexual needs were not being met, and that Ms. Gallagher needed to satisfy his needs in this respect. While making these alleged statements, it is further alleged that Respondent would at times point to his

genital area. Both Mr. Kachadourian and Ms. Gallagher so testified at the hearing. [Tr. 29, 550-552.] Respondent denied the allegation in both his Answer and in his testimony. [Answer ¶ 8; Tr. 1392-1393.]

21. Based upon my observation of the demeanor of the witnesses during their testimony, the lack of credibility of Mr. Kachadourian, Ms. Gallagher's poor reputation for truth and honesty and the lack of corroborating evidence from uninterested witnesses, I find that this allegation was not proved. A similar allegation may be found in paragraph 11 of the Complaint. For the reasons stated above, I find that this allegation was also not proved.

22. Paragraph 9 of the Complaint alleges that in or about early 2015, on an occasion when he was away from the courthouse, Respondent, using his cell phone, telephoned Mr. Kachadourian. Respondent, who at the time was with James Stilloe, gave the phone to Mr. Stilloe who then stated to Mr. Kachadourian that if he or Ms. Gallagher were ever to betray Respondent, they would have to answer to Mr. Stilloe. Respondent denied the allegation in both his Answer and in his testimony. [Answer ¶ 8; Tr. 1393.] Mr. Stilloe testified and denied that the incident ever occurred. [Tr. 867.] There was no additional proof on this issue.

23. I find that the "betrayal" allegation was not proved. Although it could be argued that the evidence was equally balanced on the issue, based upon Mr. Kachadourian's lack of credibility, I do not believe that the incident occurred. The idea that a friend of Respondent would, out of the blue, make such a threatening statement to Mr. Kachadourian immediately after Respondent assumed office and without any predicate defies logic and is contrary to common experience.

24. Counsel for the Commission spent a substantial amount of time on the issue of whether, and to what extent, various friends of Respondent including Mr. Stilloe had criminal

records. This originated in paragraph 10 of the Complaint and was a frequent subject of questions to witnesses and the proffer of various exhibits, none of which were received. However, the question is not whether any given witness had, or did not have, a criminal record, but rather whether such fact was known by Ms. Gallagher and Ms. Kachadourian and, if so, whether the criminal record had any relationship to the events at issue in the proceeding.

25. For example, if Mr. Stilloe had a criminal record of threats of violence or even perjury—he does not—then such a fact could arguably be relevant. Mr. Stilloe readily admitted that he was convicted of the misdemeanor of falsely reporting child abuse that occurred in connection with a contested divorce matter.[21] [Tr. 872.] That conviction is irrelevant to the matter at hand.

26. Paragraphs 12 and 13 of the Complaint allege that Respondent displayed photographs of nude women on his cellphone to Mr. Kachadourian. Respondent denied the allegation. [Answer ¶¶ 12 and 13; Tr. 1394-1395.] Although the photograph allegedly originated from Mr. Iannone, he was not called as a witness by either party. The photograph was not presented as evidence at the Hearing.

27. I[redacted] I[redacted], who is alleged in paragraph 13 of the Complaint to have been the subject of the photograph depicting a nude female torso, admitted that she had seen such a photograph [Tr. 270] and believed that she was the one depicted.[22] However, there was no credible[23] or admissible evidence received to establish that such a photograph was ever on Respondent's cell phone. At best, Ms. I[redacted]'s testimony established that the photograph was on Mr. Iannone's cell phone.

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[21] N.Y. Penal Law § 240.50(4).

[22] Ms. I[redacted] and Mr. Iannone dated for some period of time and she acknowledged that the relationship was intimate and included consensual videography. [Tr. 266, 306.]

[23] For the reasons previously discussed, Mr. Kachadourian was not a credible witness.

28. Ms. I[redacted]'s testimony that Mr. Iannone said that he (Mr. Iannone) showed the photograph to Respondent and Mr. Kachadourian while at a restaurant is both hearsay and contrary to the allegations in the Complaint that Respondent showed a photograph on his cell phone to Mr. Kachadourian while in Chambers. Indeed, Ms. I[redacted]'s testimony about what Mr. Iannone allegedly told her about the display of the photograph was not accepted for the truth of the matter. [Tr. 270.] Given the inconsistency in accounts and the lack of credible corroborating evidence, I find that the allegation was not proved.

29. Paragraphs 14 and 15 of the Complaint allege that Respondent engaged in graphic sexual discussions on the phone with third parties and that Respondent's end of the conversations could be overheard by Mr. Kachadourian and Ms. Gallagher. Mr. Kachadourian testified to these alleged occurrences [Tr. 36-38] as did Ms. Gallagher. [Tr. 557-559.] Respondent denied these allegations. [Answer ¶¶ 14 and 15; Tr. 1394-1395.]

30. With apologies to the reader, the Complaint contains crude descriptions of Ms. I[redacted]'s sexual proclivities and bodily functions that would make most people blush. Again, whether this allegation is so outrageous that it must be true runs counter to strict adherence to the burden of proof. What is worth noting is that both Mr. Kachadourian and Ms. Gallagher gave what I found to be rehearsed and coordinated testimony using language that varied from the language used in the Complaint.[24]

31. Paragraph 16 of the Complaint alleges that Respondent was overheard on the phone indicating that he had cement boots in the shoe sizes of Mr. Kachadourian and Ms. Gallagher and that it they ever betrayed Respondent, they would be found at the bottom of the river. Mr. Kachadourian and Ms. Gallagher testified to these alleged occurrences. [Tr. 54, 571.]

[24] Again, with apologies to the reader, each used the same term to describe Ms. I[redacted]s intimate functions (a "sprayer"), but this term was not the one used in the Complaint (a "squirter"). I do not believe that the variance in terms was inadvertent.

Respondent denied the allegation. [Answer ¶ 16; Tr. 1397.] There was no additional proof on this issue and, given my findings on the credibility of these witnesses, I find that this outlandish allegation was not proved.

32. Paragraph 17 of the Complaint alleges that Respondent made derogatory comments about Court Assistant Rebecca Vroman. Ms. Gallagher testified that Respondent complained to her that he would become "the laughingstock" of the County for having Ms. Vroman serve as his deputy court clerk. [Tr. 591]. Respondent denied the allegation. [Answer ¶ 17; Tr. 1397.] There was no additional proof on this issue and, again, given the credibility issue with respect to Ms. Gallagher, I find that the allegation was not proved.

33. Paragraph 18 of the Complaint alleges that Respondent loudly and angrily admonished Ms. Vroman in open court.

> On or about February 6, 2017, in the courtroom after a court session, Respondent loudly and angrily admonished Ms. Vroman for scheduling emergency petitions that required Respondent to work past 4:00 PM that day, notwithstanding that he was the assigned emergency intake judge and had not notified Ms. Vroman that he intended to leave early.

Respondent denied the allegation in the form stated. [Answer ¶ 18; Tr. 1397.] Ms. Vroman testified that the incident occurred while the parties from one case were being escorted out of the courtroom by the court security officer. [Tr. 328.] There was no testimony from any court security officer who would likely have been present during court proceedings.

34. According to Ms. Vroman, this incident occurred on a day when Respondent was assigned to hear emergency petitions and there was an issue with additional matters being added to the calendar via email to Ms. Vroman during the ongoing proceedings. Ms. Vroman testified that Respondent "yelled at me and told me I was going too slow and that I needed to move faster

and he just was being very rude and disrespectful and condescending and demeaning and just very belligerent to me." [Tr. 327.]

35. As stated above, Respondent denied that he yelled at Ms. Vroman and explained that this was a day when he had a physical therapy appointment and that Ms. Gallagher had neglected to inform Ms. Vroman of the fact that Respondent had such an appointment and needed to leave early. [Tr. 1397.] Respondent further explained that it was a particularly stressful day, they were short-staffed and that "we were really getting the work done." [Tr. 1398.] He also testified that, in hindsight, this was something that he could look at (which I took to mean that upon reflection his reaction to what occurred was not appropriate), and that he had no intent to demean her because she was a hard working person. [Tr. 1398.]

36. There is nothing in the record to indicate that Respondent used obscenity or other inappropriate words in his statements to Ms. Vroman. Whatever he said, and whatever tone was used, was sufficient to upset Ms. Vroman who immediately reported the incident to her supervisor Margaret Raftis [Tr. 329], and then detailed it in a writing to Chief Court Clerk Debbie Singer. [Tr. 329-330, 348.][25] Ms. Singer testified that Ms. Vroman came to her complaining that Respondent berated her in open court. [Tr. 371-372.]

37. Thereafter, when Respondent learned that Ms. Vroman had complained about the incident, he wrote a letter dated March 1, 2017 to Ms. Singer to complain about Ms. Vroman. [Ex. V.] Respondent's letter generated a response by Ms. Singer dated March 10, 2017. [Ex. 12.] According to Ms. Singer, she investigated Respondent's complaints about Ms. Vroman and determined that they were largely unfounded. [Tr. 372-373.]

38. Based 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

[25] Ms. Vroman's February 8, 2017 letter to Ms. Singer was marked as Exhibit Q but was not received into evidence.

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 Respondent's demeanor was "loud and angry."[26]

39. Paragraph 19 of the Complaint alleges that Respondent handed Ms. Gallagher a folded piece of paper containing drawings of fruit that, when opened, contained drawings of nude females inside. Ms. Gallagher testified to this alleged occurrence. [Tr. 564.] Respondent denied the allegation. [Answer ¶ 19; Tr. 1398.] There was no additional proof on this issue nor was the drawing produced. Given my finding on Ms. Gallagher's lack of credibility, I find that the allegation was not proved.

40. Paragraph 20 of the Complaint alleges that Respondent stated to Mr. Kachadourian that it would be "great" to have sex with Court Attorney S[redacted] I[redacted] while she was bent over a desk. Mr. Kachadourian testified to this alleged occurrence. [Tr. 44.] Respondent denied the allegation. [Answer ¶ 20; Tr. 1398.] There was no additional proof on this issue[27] and, given my finding on Mr. Kachadourian's lack of credibility, I find that the allegation was not proved.

41. Paragraphs 21 and 22 of the Complaint raise the issue concerning Respondent's meeting in Albany with a State Senator and the allegation about sending Ms. Gallagher to perform sexual favors in exchange for learning the Senator's private cell phone number. Mr. Kachadourian and Ms. Gallagher testified to these allegations [Tr. 46; 565-567] which were vehemently denied by Respondent. [Answer ¶¶ 21 and 22; Tr. 1399.] For the reasons stated

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[26] As stated above, there was no testimony from any Court Security Officer about the incident.

[27] Counsel for the Commission suggested in the Commission's Post-Hearing Brief that the comment "could have been heard" by Ms. L[redacted]. If Ms. L[redacted] had actually heard the comment, she would surely have been called as a witness at the Hearing—she was not.

earlier in this Report regarding my finding that Mr. Kachadourian and Ms. Gallagher lack credibility, I find that this allegation was not proved.

42. Paragraphs 23 and 24 of the Complaint allege that Respondent made inappropriate comments to the former Chief Clerk of Broome County Family Court, Debbi Singer. Ms. Singer is retired. [Tr. 356].

43. Ms. Singer testified that in May of 2017, Respondent made a comment to her at a "dish to pass" court luncheon.

> After the luncheon, the judge stopped in my office to say he really liked the dish that I made and he said, "If I knew you could also cook, I would have gone for the widow." I happen to be a widow. I took it to mean, you know, he would have made a pass or something, if you will.

[Tr. 367.] Ms. Singer deflected the comment, but felt "surprised, shocked, and disgusted." [*Id.*]

44. Ms. Singer also testified that in June of 2017, Respondent made a comment about the outfit that she was wearing.

> I was standing in the middle of my office doing something, my door was open, he walked by, he-- Judge Miller walked by, he stopped--he stepped in and said to me, "You look really hot in that outfit. You should always wear that outfit."

[Tr. 370.] Ms. Singer stated that she was "shocked and disgusted" by the comment. [*Id.*]

45. When asked whether he made these comments to Ms. Singer, Respondent testified that he had no recollection. [Tr. 1428, 1476.] Although the allegations relating to Ms. Singer were denied in the Answer [Answer ¶¶ 23 and 24], in his testimony Respondent did not deny making the comments outright as he did when responding to other allegations in the Complaint. [Tr. 1392-1418.]

46. Ms. Singer was a credible witness with no interest in the outcome of the proceeding. Based upon my observation of her demeanor while testifying, I find that

Respondent in fact made the comments to Ms. Singer that were testified to in the preceding paragraphs.

47. While I accept and credit Respondent's testimony that he had no intent to harm anyone with comments that may well have been intended to be humorous, the comments made to Ms. Singer were inappropriate.

48. A final observation about the allegations in Charge I. Specifically, I do not find that the fact that Respondent made unprofessional comments to Ms. Vroman and Ms. Singer to be probative of the more sensational allegations against Respondent in this Charge discussed more fully above. This is so because the comments were made directly to Ms. Vroman and Ms. Singer and not behind their backs. Nor were the comments graphic in nature. In short, the proof of the Vroman and Singer comments fails to support, either directly or indirectly, proof of the other comments in this Charge.

Charge II

(Requiring Chambers Staff to Perform Prohibited Personal and Political Activities)

49. Paragraph 29 of the Complaint alleges that on November 6, 2015, Respondent directed Ms. Gallagher to type a letter in the name of his former law office secretary as part of an effort by Respondent to be paid for his work on the *Estate of Roger L. Funk*. Respondent denied the allegation that he "directed" Ms. Gallagher to type the letter, but admitted that she did so (voluntarily). [Answer ¶ 29.] A copy of the letter appears as Exhibit A to the Complaint. In his testimony, Respondent indicated that Ms. Gallagher volunteered to type the letter. [Tr. 1400.]

50. The letter had nothing to do with the work of the Family Court and was instead related to Respondent's former private practice of law. Regardless of whether Respondent

directed Ms. Gallagher to type the letter or she volunteered to do so, I find that having Ms. Gallagher type the letter was improper.

51. The Complaint alleges that the letter was prepared in furtherance of an effort by Respondent and his former law office secretary to be paid for their work on the *Funk* Estate. Given that the letter referred to uncashed checks to Respondent and his former legal secretary, I find that the preparation of the letter was indeed part of an effort to obtain payment for prior legal work performed by Respondent and was improper.[28]

52. Paragraph 30 of the Complaint alleges that Respondent told Mr. Kachadourian and Ms. Gallagher that he wanted his Chambers to be a "campaign office" and for them to keep a list of names for use in future campaigns. Mr. Kachadourian did not testify to the "campaign office" allegation. Ms. Gallagher testified that Respondent asked her to create a campaign office for Arten Serjanej. [Tr. 593.] Respondent denied all of the allegations in this paragraph. [Answer ¶ 30; Tr. 1401.] Given their overall lack of credibility and the lack of any corroborating evidence on this point, I find that the "campaign office" allegation was not proved.

53. Both Mr. Kachadourian and Ms. Gallagher testified that Respondent asked them to maintain a list of potential donors for future campaigns. [Tr. 57, 592-593.] There was no additional evidence offered on this point, including any offer of the actual donor lists that Ms. Gallager testified she maintained. Nor was there evidence offered to suggest that what Respondent asked Mr. Kachadourian and Ms. Gallagher to do was simply maintain campaign information and donor lists that had just been compiled in the campaign of that previous November. Mr. Kachadourian testified that the request involved **future** interactions with potential donors. [Tr. 57.] Given the lack of credibility of Mr. Kachadourian and Ms. Gallagher,

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[28] Nevertheless, there is no dispute that a judge may be paid for work performed before assuming the bench. *See, e.g.*, N.Y. State Advisory Comm. on Jud. Ethics Op. 15-126 (July 11, 2015).

the fact that Respondent had just been elected to the Family Court bench and that it is unlikely that any newly elected judge would immediately start to run a campaign for an election a decade down the road, I find that the allegation was not proved.

54. Paragraph 31 of the Complaint alleges that Respondent "importuned" Ms. Gallagher to collect signatures for designating petitions for the campaign of his brother-in-law Rick Balles who was running for Mayor of Johnson City. Mr. Kachadourian and Ms. Gallagher so testified. [Tr. 57, 593-594.] Ms. Gallagher did not engage in this activity. Respondent denied this allegation. [Answer ¶ 30; Tr. 1401.] There was no additional evidence offered on this allegation and, again, based upon the lack of credibility of Mr. Kachadourian and Ms. Gallagher, I find that it was not proved.

55. Paragraph 32 of the Complaint alleges that Respondent requested that Mr. Kachadourian help him prepare an accounting for the *Estate of Jerry J. Behal, Jr.*, a matter formerly handled by Respondent's private law practice. This allegation was denied by Respondent. [Answer ¶ 32; Tr. 1401.] When asked about the allegation, Mr. Kachadourian testified that Respondent did **not** ask him to prepare an accounting. Rather, Respondent asked Mr. Kachadourian whether he could obtain a specific form to be used or could locate an attorney to prepare the accounting.[29] [Tr. 61-63.] Accordingly, I find that this allegation was not proved.[30]

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[29] This issue is discussed in greater detail in paragraph 72 of this Report, *infra*.

[30] Mr. Kachadourian was also asked whether Respondent requested that Mr. Kachadourian prepare an accounting for the *Estate of Anoinette Saraceno*. Mr. Kachadourian testified that Respondent made no such request. [Tr. 73.]

Charge III
(Engaging in the Private Practice of Law)

56. Paragraph 34 of the Complaint, including sub-paragraphs A and B, alleges that Respondent engaged in the practice of law following his election to the Family Court bench in November of 2014 and his assumption of the Bench in January of 2015. Specifically, it is alleged that Respondent performed legal work in connection with the *Estates of Antoinette Saraceno* and *Jerry J. Behal, Jr.* Respondent denied the allegations. [Answer ¶¶ 34, 34A and 34B.]

57. A full-time judge may receive payment for legal work performed before assuming the bench and may perform limited administrative functions in order to assist in the transition of work to substitute counsel. N.Y. State Advisory Comm. on Jud. Ethics Op. 15-126 (July 11, 2015); N.Y. State Advisory Comm. on Jud. Ethics Op. 15-128 (June 11, 2015). Such limited work includes responding to questions about the work performed before assuming the bench. N.Y. State Advisory Comm. on Jud. Ethics Op. 18-22 (Jan. 24, 2018).

The *Saraceno* Estate

58. The specifications to the Charge relating to the *Saraceno* Estate are found in paragraphs 35-45 of the Complaint. Respondent admitted the allegations in paragraphs 35-38 and denied knowledge or information sufficient to form a belief as to the bulk of the allegations in paragraphs 39-45 subject to certain partial admissions. [Answer, ¶¶ 39-45.]

59. Respondent represented the *Saraceno* Estate before his election to the Family Court bench. He performed work and was paid a fee. Respondent failed to file a Consent to Change Attorney with the Tioga County Surrogate's Court and testified that he thought that all of the assets had been distributed and the work completed. [Tr. 1318.]

60. In August of 2016, the Tioga County Surrogate's Court wrote a letter to Respondent at his old law firm address inquiring about the status of the *Saraceno* Estate. Respondent spoke by telephone with the Clerk, advised that a substitution of counsel would be filed and inquired whether the Estate could be closed by motion. There was no testimony from any witness that Respondent told the Clerk that **he** was still handling the matter or that a motion to close the estate, if allowed, would be filed by **him**. Respondent was ultimately informed by the Clerk that an accounting would be required. Attorney Artan Serjanej filed a Notice of Appearance on January 29, 2018 and the Court accepted that substitution of counsel on February 5, 2018.

61. It is alleged in paragraph 43 of the Complaint that Respondent spoke with Barbara Saraceno, the widow of the executor, and told her that "he would be finishing up the estate." However, Ms. Saraceno testified and that testimony did not support the statement attributed to her in the Complaint. Rather, she testified about her phone conversations with Respondent as follows:

> Q. Around-- In August of 2016, around when you received this letter, were you communicating with the Tioga Surrogate's Court?
>
> A. Yes. They had called me.
>
> Q. How many times did they call you?
>
> A. Probably three times altogether.
>
> Q. What was the subject matter of those calls?
>
> A. They just asked-- told me again that this was not resolved yet, wasn't sent in, and they had asked me to get another attorney to finish it and I had said that that I had talked to-- I believe, I don't-- **That I had talked to Rick and he said that he was going to get someone-- It was going to be taken care of and not to worry about it.**

[Tr. 475 (emphasis supplied).]

Q. I'd like to direct your attention to October 2016. Did you speak to Judge Miller about the estate?

A. I think at that time I did. I did and then he said, "Okay, this—this was-- would be taken care of."

Q. Who initiated that call? Did you call Judge Miller?

A. I must-- Yes, after I got this and this was in '16. Yes, I did call.

Q. How did you reach him? How did you reach him?

A. Probably at-- I don't know. I think I might have had his cell phone number at one point. Or the office. That'd be the only way.

Q. What did you say to Judge Miller when you spoke to him?

A. That I got this letter and that it wasn't-- It needed to be taken care of--That things weren't filed.

Q. After your conversation with Judge Miller, did you speak to the Tioga Surrogate's Court?

A. Yes, I think I did. I think that was another call that they made to me and I told them that it was going to be taken care of.

Q. Ultimately, did another attorney take over the case?

MR. DEROHANNESIAN: Object to the form--

A. --Yes—

MR. DEROHANNESIAN: --of that question.

THE REFEREE: Overruled.

A. Yes, they did.

Q. Who was that attorney?

A. Ari-- I don't know his last name.

Q. Is it Artan Serjanej? Artan Serjanej?

A. Yes. In fact, he came to the house.

Q. Mrs. Saraceno, when you spoke to the Tioga County Surrogate's Court after speaking to Judge Miller, what did you say to the court? To the best of your recollection?

MR. DEROHANNESIAN: If she recalls.

A. I don't know.

[Tr. 476-477.]

62. Respondent was asked about his conversations with Ms. Saraceno and testified as follows with respect to the "take care of it" language.

Q. Now earlier when you testified, you told her-- you testified that you said you would take care of it. What did you mean by that? Did you mean that you would be finishing up the estate?

A. No, not that I would be finishing up the estate. Actually, I told her that-- to contact attorney Serjanej and attorney Serjanej would be finishing up the estate.

Q. What did you mean by take care of it? Do you remember that testimony?

A. That attorney Serjanej would file whatever paperwork needed to be filed on behalf of the executor of that estate to make sure it was concluded.

Q. Okay, but again, it's a very specific term, you would take care of it. Did you have any involvement in what Mr. Serjanej did with respect to the Saraceno estate?

A. No. When attorney Serjanej had the case, he decided what needed to be done. It was up to his judgment.

THE REFEREE: **Did you tell Mrs. Saraceno that you would take care of it? Did you use that phrase?**

THE RESPONDENT: **No, I-- The phrase I think I actually used was, "It would be taken care of."**

THE REFEREE: Okay, thank you.

A. Not that I would do it. She understood that I was a judge. In fact, they helped me get elected. They knew I was a judge and they knew I couldn't be involved.

[Tr. 1403-1404 (emphasis supplied).]

63. The Commission offered the testimony of Court Clerk Deborah Stone who identified certain records of the *Saraceno* Estate. Ms. Stone was unable to offer any first-hand information about what Respondent did or did not say to Ms. Saraceno. Ms. Stone's testimony did not establish that Respondent performed legal work on the *Saraceno* Estate.

64. There was no proof offered that Respondent did anything with respect to the *Saraceno* Estate other than respond by telephone to a letter that he received from the Clerk of the Court and to inquire whether the Court would accept a motion instead of an accounting to close the Estate. Respondent never told Barbara Saraceno that he would personally finish the work necessary to close the Estate, did not tell the Clerk that he was still handling the Estate and performed no legal work toward closure of the Estate. The only evidence received on that issue established that Mr. Serjanej met with Ms. Saraceno and worked on his own toward closure of the Estate. [Tr. 1037-1041.]

The *Behal* Estate

65. The specifications to the Charge relating to the *Behal* Estate are found in paragraphs 46-61 of the Complaint. Respondent admitted the allegations in paragraphs 46-48[31] and denied the allegations in paragraphs 57-59. Respondent also denied knowledge or

[31] Respondent initially denied knowledge or information sufficient to form a belief as to the allegations in paragraph 48, but that was changed by stipulation during the hearing to a straight admission.

information sufficient to form a belief as to the bulk of the allegations in paragraphs 49-56 and 60-61 subject to certain partial admissions. [Answer, ¶¶ 46-61.]

66. Prior to his election to the Family Court bench, Respondent represented his close friend David Behal who was the executor of the Estate of Mr. Behal's late brother, Jerry J. Behal, Jr. Respondent testified that Mr. Behal was his best friend growing up and that he had not intended to charge a fee. [Tr. 1324.] There was no evidence received to the contrary on the fee issue.

67. On March 20, 2015, David Behal signed a Consent to Change Attorney form substituting Artan Serjanej as the attorney for the Estate. Respondent testified that he did not direct Mr. Serjanej in the handling of the *Behal* Estate. [Tr. 1323.] The Complaint recites alleged shortcomings of Mr. Serjanej in his handling of the *Behal* Estate. [Complaint ¶¶ 50-55.] However, these alleged shortcomings are not attributable to Respondent and are an attack on Mr. Serjanej. As such, I find them to be irrelevant and thus warrant no further discussion.

68. What is alleged against Respondent are the allegations in paragraphs 56-59 that Respondent performed substantive legal work on the Estate during the period March 1, 2017 through and including May 22, 2017. Paragraph 56 alleges that David Behal sent an email to Respondent and Respondent's former legal secretary (who then worked for Mr. Serjanej) about the Estate. The fact that an email was sent, received and read, in and of itself, does not prove that Respondent practiced law.

69. Paragraph 57 of the Complaint alleges that in May of 2017, Respondent met with David Behal in Chambers and "went over" the Estate accounts. Mr. Kachadourian testified that he saw this occur. [Tr. 63.] Respondent testified that he met with Mr. Behal in his Chambers, but that they did not go over Estate matters.

70. Assuming for the sake of discussion that the two men "went over" the Estate account, there was no evidence offered to explain what it means "to go over" the account. Does that mean that Respondent explained to Mr. Behal what each entry was on the accounting? Does that mean that Respondent offered Mr. Behal legal advice on how the accounting should be prepared or completed? Does that mean that Respondent answered questions posed by Mr. Behal about what had occurred in the past? Any of these scenarios is possible, but none were established.

71. In paragraph 58 of the Complaint, it is alleged that the email and attached spreadsheet referred to in paragraph 56 of the Complaint were shown to Mr. Kachadourian and that Respondent asked Mr. Kachadourian to help prepare an accounting for the Estate. However, when asked about this incident, Mr. Kachadourian testified that he was not asked to prepare the accounting. [Tr. 61-63.] Instead, Mr. Kachadourian testified that Respondent asked him whether he could locate a form or recommend an attorney to perform the work. [Tr. 61.]

72. While it could be argued that merely asking the question about a form or referral source in Chambers is improper, I find that this conduct was trivial. Simple human interaction between people working in close proximity is commonplace. Forbidding such interaction would make the work environment artificially sterile and unpleasant. In the circumstances, I find that the allegation in paragraph 58 was not proved.

73. Paragraph 59 of the Complaint alleges that on or about May 22, 2017, Respondent "worked on the *Behal* estate accounting at his former law office. Respondent had not yet been paid his legal fee." Respondent testified that he never intended to charge his close friend a legal fee [Tr. 1324] and there is no evidence that he ever did so. Accordingly, the second sentence of this paragraph is not supported. Mr. Kachadourian testified that he would frequently sit in the

lobby of the law office and wait for Respondent so he could not know what actually occurred. [R. 221.] Again, Respondent denied that he performed legal services for the *Behal* Estate after his election to the Family Court bench [Tr. 1407-1408]. It is speculation to assume that "legal work" was performed on this particular occasion and I find that this allegation was not proved.

74. What was proved is that Respondent had a personal friend in his Chambers and discussed work that had been performed prior to Respondent's election to the Family Court bench. Given the close friendship between the two, it is certainly understandable that such an interaction would occur. I find that although it could be argued that Respondent may have used poor judgment in discussing the Estate matter in Chambers (if in fact he did so), the allegation that this constituted the practice of law was not proved by any credible evidence.

Charge IV
(Failure to Submit Accurate Financial Disclosure Forms and Tax Returns)

75. Paragraph 63 of the Complaint, as detailed by paragraphs 64-73 (including sub-paragraphs A-C), charges that Respondent did not accurately disclose all of his income on his 2015 and 2016 Federal and New York State Income Tax Returns and 2015 UCS Ethics Commission Financial Disclosure Form ("FDF"). In addition, Respondent is alleged to have failed to file required disclosure forms with the Clerk of the Broome County Family Court for the years 2015, 2016 and 2017.[32] Respondent admitted the allegations in paragraphs 64-65, denied the allegations in paragraphs 63 and 74, denied a portion of the allegations in paragraphs 67-72 and denied knowledge or information sufficient to form a belief as to portions of paragraphs 66 and 73 (including sub-paragraphs A-C). [Answer, ¶¶ 63-73.]

[32] Apparently the "local" filing is different than the statewide FDF. There was no explanation provided by either party as to the difference between the two forms.

76. In his testimony at the hearing, Respondent readily conceded that he failed to file the required disclosure forms with the Family Court Clerk for the years 2015, 2016 and 2017 for the simple reason that he did not know of the filing requirement. [Tr. 1380.] This is so notwithstanding the fact that the District Executive sent a reminder of the filing requirement to all judges in the Sixth District. [Ex. 18.] The statement in Respondent's Post-Hearing submission that neither Mr. Kachadourian nor Ms. Gallagher reminded him of the filing requirement is rejected as irrelevant. The obligation to file was personal to Respondent and he failed to comply with that obligation.

77. Respondent apologized for the oversight and indicated that he has since familiarized himself with the requirements of Section 100.4(h)(2) of the Rules and has sought the advice of counsel regarding his filing requirements. Respondent apparently filed all of the required forms in January of 2019. [Tr. 1469.] There was no evidence presented challenging the accurateness or completeness of the later-filed forms.

78. With respect to his tax returns and FDFs. Respondent testified that he worked with his accountant to complete the required filings and did so to the best of his abilities. [Tr. 1380-1381.] The issue is their accuracy and completeness including, specifically, the failure to declare non-judicial income.

79. Respondent's 2015 FDF was filed on or about May 15, 2016. [Ex. 8B.] An amended 2015 FDF was filed on or about November 16, 2017. [Complaint § 66; Ex. 8D.] Respondent's 2015 Federal and New York State Tax Returns were filed on or about April 18, 2016. [Ex. 9A and 9D.] Respondent's 2016 Federal and New York State Tax Returns were filed on or about April 12, 2017. [Ex. 9F and 9I.] Respondent's 2015 and 2016 Amended Federal and New York State Returns were filed on or about August 2, 2017. [Ex. 9B, 9C, 9E,

9G, 9H and 9J.] Respondent and Ms. Dean testified that work on amended returns began in April of 2017. [Tr. 1258, 1410.]

80. Counsel for the Commission argues that Respondent did not attempt to correct the omissions in these filings until after the investigation that led to this proceeding began. Respondent urges that the opposite is true.

81. There was no evidence received establishing exactly when the Commission's investigation of Respondent was formally opened with respect to the FDF and tax return issues or when the previously commenced investigation was expanded to include these issues. Some type of investigation was ongoing as early as November of 2017 when Respondent appeared and gave testimony at the Commission's Office in Albany. [Tr. 1469.] Counsel for the Commission questioned Respondent about the timing of his amended filings and asked Respondent directly whether he only did so after the Inspector General questioned him on the subject as part of its investigation—he said "no." [Tr. 1468.]

82. Nor was there any evidence received establishing exactly when the Inspector General questioned Respondent on this issue or when Respondent was placed on notice by the Inspector General that it was looking at this issue.[33] On this Record, I find that Respondent's amended FDF and tax return filings were made before he was placed on formal notice by the Commission that the Commission was looking into these issues.[34]

83. Respondent offered the testimony of his accountant, Robin Dean. Ms. Dean described Respondent as "old school" in terms of how he kept his records and supplied them to

[33] There is a letter in the Record dated May 7, 2018 from counsel for the Commission to Respondent advising him that the Commission was investigating the failure to properly report and file issue. [Ex. 10B.]

[34] Counsel for the Commission urges that notice should be inferred as early as July of 2017 when Respondent learned that the Commission had taken boxes from his Chambers that included tax materials. [Post-Hearing Submission of CJC at pp. 49-50.] I do not find that this circumstance translates into knowledge that a tax investigation was ongoing.

her for the preparation of his tax returns. [Tr. 1247.] The manner in which Respondent kept his records and the timing of when he supplied them to his accountant is irrelevant because Respondent was certainly aware of the April 15 deadline for filing tax returns. Respondent was similarly aware of the obligation to accurately report his income and the consequences of failing to do so.

84. Respondent failed to include rental income on his tax returns which were filed jointly[35] with his wife. Respondent also failed to include income received from the practice of law (earned before he assumed the bench).

85. The Commission's Post-Hearing Brief provides an excellent summary of the omissions from Respondent's tax and FDF filings as follows:

- Respondent was paid $16,203.60 as his legal fee for his handling of the Estate of Deborah Brigham by three separate checks dated November 24, 2015 (FWC ¶64; Ans ¶64; Tr 841, 843-44; Ex 6Q).

- By checks dated December 1, 2015, Respondent received payment of $11,184 as his legal fee for work he had performed as the estate attorney in Estate of Roger Funk. (FWC ¶65; Ans ¶65; Tr 833-34, 839-40; Ex 2W).

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

- Respondent received a check for $500 each month ($6,000 per year) from tenant Louis Micha, for the rental of the apartment upstairs from the law office at 2[redacted] North Street (Tr 523; Ex 7C). Respondent's wife is the owner of the building (Tr 828). Mr. Micha, who had been Respondent's legal client, moved into the apartment in November 2013, after his divorce (Tr 522-23). There was no lease and the rent did not include utilities (Tr 524).

- Respondent and his mother have an LLC which owns property at 394 Main Street and 3[redacted] Oakdale Road in Johnson City (Tr 830-

[35] The fact the building in which at least one of the tenants lived was owned by his wife is irrelevant because the tax returns were filed jointly.

> 32). 3[redacted] Oakdale Road is a one-family residential property rented by David English and Michelle Caforio (Tr 831). Respondent received rental payments from Ms. Caforio and Mr. English totaling $1,400 in 2015 and $9,600 in 2016 (Ex 10C, pp 1, 3).

86. Ms. Dean testified that the omission of the rental income had a neutral effect on Respondent's overall tax returns because Respondent also failed to include certain expenses incurred with his rental properties that, when considered together, offset the rental income. [Tr. 1259-1260.] There was no testimony, nor could there be, about the omitted income from legal fees having a neutral effect on Respondent's tax liability. The failure to include income from legal fees increased Respondent's income and tax liability for the years in question. [Tr. 1260.]

87. Counsel for the Commission correctly cites to *Matter of John G. Dier* (Comm'n on Jud. Conduct, July 14, 1995) for the proposition that the failure to disclose income is misconduct. Counsel for the Commission also argues that *Matter of Thomas E. Ramich* (Comm'n Jud. Conduct, Dec. 27, 2002) stands for the proposition that it is misconduct for a judge to fail to report income on his tax return, notwithstanding that an "amended return was filed by respondent prior to the issuance of the Formal Written Complaint issued by the Commission, but following the initiation of an investigation by the Commission." Again, this is correct, but I do not believe that *Ramich* controls the instant matter. This is so because, as stated above, there is a lack of proof as to precisely when the investigation into Respondent's FDF and tax filings began.

88. Counsel for the Commission proved Respondent's failure to file reports with the Broome County Family Court (which was conceded by Respondent).

89. Counsel for the Commission proved Respondent's failure to include extrajudicial income on his FDFs and tax returns.

90. In my view, the **timing** of Respondent's amendment of his FDFs and tax returns is a matter in mitigation to be argued directly to the Commission.

THE OBLIGATIONS OF A JUDGE

The actions of judges "must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved." *Matter of Restaino*, 10 N.Y.3d 577, 589 (2008) (citing *Matter of Lonschein*, 50 N.Y.2d 569, 572 (1980)). "[A] judge has a duty to act 'in a manner as to inspire public confidence in the integrity, fair-mindedness and impartiality of the judiciary.'" *Matter of Ayres*, 30 N.Y.3d 59, 62-63 (2017) (citing *Matter of Esworthy*, 77 N.Y.2d 280, 282 (1991)).

PROPOSED CONCLUSIONS OF LAW

As to Charge I

1. Respondent's comments to Court Assistant Rebecca Vroman violated Section 100.3(B)(3) of the Rules in that he failed to be patient, dignified and courteous to court staff.

2. Respondent's comments to former Chief Court Clerk Debbie Singer violated: (a) Section 100.1 of the Rules in that he failed to establish and maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved; and (b) Section 100.3(B)(3) of the Rules in that he failed to be patient, dignified and courteous to court staff.

As to Charge II

3. Respondent's request to have Rachelle Gallagher type a letter regarding the *Estate of Roger L. Funk* violated Section 100.2(C) of the Rules in that he lent the prestige of judicial office to advance his own private interests and the private interest of another.

As to Charge III

4. In order to practice law, a person must exercise judgment on behalf of and provide advice to particular clients. *Matter of Rowe*, 80 N.Y.2d 336, 342 (1992). *See generally* N.Y. Jud. Law § 484. There was no evidence adduced at the Hearing to support the claim that Respondent practiced law (appeared in an action or proceeding on behalf of a client, exercised judgment on behalf of, or provided advice to, any client) with respect to the *Saraceno* or *Behal* matters. Respondent's conduct regarding these matters fell within the ambit of permitted activities.

Charge IV

5. Respondent's failure to file annual reports with the Clerk of the Family Court violated Section 100.3(C)(1) of the Rules in that he failed to diligently discharge his administrative duties.

6. Respondent's failure to include extra-judicial income on his FDFs violated: (a) 22 N.Y.C.R.R. § 40 and Section 100.4(I) of the Rules in that he failed to minimize the risk of conflict with judicial obligations; (b) Section 100.3(c)(1) of the Rules in that he failed to diligently discharge his administrative duties; and (c) Section 100.2(A) of the Rules in that he demonstrated a lack of respect for and compliance with the law.

7. Respondent's failure to include extra-judicial income on his Federal and New York State Tax Returns violated: (a) Section 100.4(H)(2) of the Rules in that he failed to minimize the risk of conflict with judicial obligations; and (b) Section 100.2(A) of the Rules in that he demonstrated a lack of respect for and compliance with the law.

PENALTY

If the proposed findings of fact and conclusions of law contained in this Report are accepted by the Commission, the question of penalty rests solely with the Commission. In accordance with Commission Rule 7000.6(l), I make no recommendation as to any penalty.

DATED: June 20, 2019
Syracuse, New York

Robert A. Barrer
Special Referee