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CONFIDENTIAL

September 20, 2019

VIA EMAIL and FEDERAL EXPRESS
New York State Commission on Judicial Conduct
61 Broadway, Suite 1200
New York, New York 10006
Attention: Celia A. Zahner, Clerk

RE: *Matter of Richard H. Miller, II*

Dear Members of the Commission:

Deborah A. Scalise, Esq. and I represent the Hon. Richard H. Miller, II in the above matter and submit the original and ten (10) copies of this letter brief on his behalf with respect to the oral argument scheduled for October 17, 2019.

Introduction

Referee Robert A. Barrer submitted his Proposed Findings of Fact and Conclusions of Law (hereinafter "Report") after hearing twenty-three (23) witnesses over six (6) days. One hundred twenty-eight (128) exhibits were received. Referee Barrer reviewed them as well as the 1500 pages of transcript of the proceedings. Referee Barrer has 37 years of legal experience and is chief ethics and risk management partner at Barclay Damon LLP and the former chair of the Grievance Committee of the Appellate Division, Fourth Department, Fifth Judicial District.

For the reasons set forth herein, we do not seek to disturb his findings of fact and/or the charges he sustained. Rather, we address the sanction to be imposed and urge the Commission to follow its precedent and impose no greater than a Censure against Judge Miller.

Legal Principles

Referee Barrer followed well-established legal principles in making his findings of fact. In a hearing based largely on the credibility of two witnesses, the Referee based his credibility determinations on traditional yardsticks of credibility determination including the demeanor of the witnesses, the interest of the witness in the outcome of the proceeding and *falsus in uno falsus in omnibus* which permits the factfinder to reject a witness' testimony when the factfinder finds the witness has given demonstrably false testimony. (Report pp. 8-9).

The Referee noted the Commission's portrayal of Judge Miller 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)" is "directly at odds with the evidence introduced by Respondent that he was "fair, judicious, honorable, truthful and universally well-liked and respected in the community." (Report pp. 7-8).

The Referee was also fortunate to consider extensive character testimony not only as to Judge Miller, but also with respect to "the two key complaining witnesses." (Report p.8).

The Referee noted the Commission must establish its charges by a preponderance of the evidence and that the allegations against Judge Miller require "strict adherence" to the standard given that "certain allegations against the Respondent are *so fantastic as to defy reason and which depend entirely on the credibility of the witnesses* [Kachadourian and Gallagher]". (Report p. 10, emphasis added).

The Referee cites numerous and repeated examples of allegations which "defy reason" and "make no sense." (Report pp. 11-12). For example, Mark Kachadourian claimed he was pressured to attend the 2017 Presidential Inauguration by Judge Miller. Yet, Judge Miller produced evidence that Mr. Kachadourian secured the tickets to the event without which he would have been unable to attend the Inauguration. Kachadourian omitted this fact in his testimony. There are also photographs in evidence showing Kachadourian "smiling broadly and seemingly having a good time at the Inauguration." (Referee p. 12). In one instance, the Referee found Mr. Kachadourian's suggestion that an alleged slight over a state senator's declination to provide a cell phone number led to a suggestion by Judge Miller that Ms. Gallagher provide sexual services so "crazy" that it was not credible. (Referee pp.11-12). An alleged threat and statement made by Judge Miller's friends recounted by Kachadourian in the words of the Referee "defies reason." (Referee p. 11). It is not just that alleged statements made by individuals were "crazy" or "defy reason," the Referee also heard from the declarants that those statements were never made, and the Referee likewise had the opportunity to assess their credibility.

In evaluating the credibility of Rachelle Gallagher, the Referee heard testimony about her complaint to the Office of Court Administration in which she alleged Judge Miller sent an attorney to her work area "to spy on her." (Report p.13). Yet, the testimony of the Court Officer present was that "he allowed the attorney to use a secure back exit to the court building because of a threat made by a litigant against the attorney." (Report p.13). With respect to both Ms. Gallagher and Mr. Kachadourian's allegations concerning D[redacted] L[redacted], the Referee found they provided "rehearsed and coordinated testimony using language that varied from the language of the complaint." (Referee p.19). Consistent with these false allegations against a court officer was "uncontradicted" testimony by multiple witnesses describing Ms. Gallagher's reputation for truth and veracity as "untruthful," "manipulator, troublemaker, liar, evil" and "not credible, she's not truthful." In addition to the opportunity to assess her demeanor and the plausibility of Ms. Gallagher's claims, Referee Barrer heard direct evidence of a false allegation by Ms. Gallagher against a court officer and multiple character witnesses about her reputation for deceit, lying and manipulation.

Referee Barrer was in the best position to assess the credibility of the witnesses, particularly Gallagher, Kachadourian and Judge Miller. The highly respected, qualified and experienced Referee's credibility determinations and findings of fact should be afforded great deference. While this is not a lawyer disciplinary proceeding, as it involves a Referee who must decide whether a judge engaged in ethical misconduct, we believe that precedent in that forum is particularly instructive because the Courts in all four Appellate Divisions have deferred to the Referee's judgment when the resolution of issues in a disciplinary proceeding depend on the credibility of the witnesses, a Referee's findings should be accorded great weight. In Matter of Von Wiegen, 146 A.D.2d 901, 903 (3d Dept. 1989) the Court stated in pertinent part:

> This court has consistently recognized that due deference should be given to a fact finder's determination on the issue of credibility (e.g., Town of Ulster v Massa, 144 AD2d 726; Cordts v State of New York, 125 AD2d 746; Oneonta Dress Co. v Ozona-USA, Inc., 120 AD2d 899; Van Valen v Ferraro, 114 AD2d 621; Anthony F. Wasilkowski, M.D., P.C. v Amsterdam Mem. Hosp., 109 AD2d 986; People v Scarincio, 109 AD2d 928; Empire Livestock Mktg. Coop. v Byrd, 78 AD2d 946). Such deference is not the result of any abdication of our fact-finding or review powers; it is predicated on the commonsense notion that a Trial Judge who observes a witness and hears his testimony is in a special position to evaluate and integrate that evidence with other facts before him *(supra)*. There is no reason for applying a different rule in cases involving attorney discipline. In the area of administrative law, the Court of Appeals has said, "The Hearing Officer before whom the witnesses appeared * * * was able to perceive the inflections, the pauses, the glances and gestures -- all the nuances of speech and manner that combine to form an impression of either candor or deception." (Matter of Berenhaus v Ward, 70 NY2d 436, 443).

See also, Matter of Kirschenbaum, 29 A.D.3d 96 (1st Dep't 2006) ("As such, the referee properly concluded that respondent's reimbursement request was nothing more than an attempt to charge a personal expense to Hartman & Craven. The Hearing Panel's rejection of the referee's finding was against the weight of the credible evidence [citation omitted]); Matter of Abady, 22 A.D.3d 71, 86 (1st Dep't 2005) ("[T]he Referee's credibility determinations are entitled to deference by this Court."); Matter of Weinstein, 4 A.D.3d 29 (1st Dep't 2004) ("The Referee's determinations crediting [witness] testimony... should be accorded due deference."); Matter of Leshaw, 254 A.D.2d 569 (3d Dep't 1998)("The Referee appointed by the Third Department deemed the transcript of the Second Department proceedings admissible pursuant to CPLR 4517 based on evidence submitted by petitioner that Izzo was not available to testify because of physical illness. We concur (*cf.*, Matter of James O., 210 A.D.2d 972) and also conclude that the Referee's credibility assessments should not be disturbed (*see, e.g.*, Matter of Shapiro, 207 A.D.2d 946; Matter of Dwyer, 285 A.D.2d 133, 727 N.Y.S.2d 229 (4th Dep't 2001) ("When the resolution of issues in a disciplinary proceeding depends upon the credibility of witnesses, a Referee's findings are entitled to great weight."); Matter of Mitchell, 32 A.D.3d 55 (4th Dep't 2006) ("The Referee did not credit that testimony, however, and declined to find that the withdrawal of funds was authorized by the client as payment for legal fees"[W]hen the resolution of issues in a disciplinary

proceeding depends upon the credibility of witnesses, a referee's findings are entitled to great weight". (Matter of Cellino, 21 A.D.3d 229, 231(2005)).

Accordingly, as we do not contest the Referee's Findings, we will only address the facts and issues relating to the factual allegations and Charges he sustained.

Charge I

With respect to Charge I and the allegations relating to Gallagher and Kachadourian, we agree with the Referee's assessment that these two witnesses were incredible. Thus, the facts and charges based on their testimony should be dismissed in their entirety.

However, the Referee found that on a day in which emergency petitions were being heard Judge Miller "was not professional." (Referee p. 22) The Referee noted it was a particularly "stressful" day, Judge Miller had a medical appointment he needed to get to, and that he interpreted Judge Miller's testimony that Judge Miller had no intent to demean Ms. Vroman whom he considered a hard-working person. (Referee p. 21). The Referee found Judge Miller did not use any "obscenity or other inappropriate words." (Id.)

Examining the context of the February 6, 2017 court calendar is insightful and helpful. As Broome County Family Court Judge, Judge Miller had a rotating assignment to hear emergency petitions, i.e. emergency petitions involving a family offense petition, a request for an order of protection or emergency custody request. (T324).[1] The emergency caseload, which cannot be predicted, is in addition to the regular caseload assigned the judge for the day. (T324). On February 6, 2017, Judge Miller was assigned fourteen (14) "regular calendar" cases for both the morning and afternoon of February 6, 2017. (T347). A "regular" case is allocated approximately 15 minutes for scheduling purposes. (T347).

In addition to the seven (7) "regular" cases assigned to Judge Miller for the afternoon of February 6, 2017, Judge Miller received nine (9) emergency petitions to be heard the afternoon of February 6, 2017 (T325; T349-50). The result: Judge Miller had 16 cases to hear and decide the afternoon of February 6, 2017 during approximately two and one-half hours. The afternoon of February 6, 2017 was described by Ms. Vroman herself as "non-stop court activity" with no adjournments or breaks "because it was so busy." (T350).

Rebecca Vroman was the court assistant on the afternoon of February 6, 2017. Neither Mark Kachadourian, Judge Miller's law clerk, nor Rachelle Gallagher, Judge Miller's secretary, were present to assist Judge Miller on the afternoon of February 6, 2017. (T351). Judge Miller asked Ms. Vroman, "Where's Mark?" and Judge Miller said she responded, "Well, I don't know, he had to go to the bank." (T1355). Ordinarily if either Ms. Gallagher or Mr. Kachadourian had to leave, they were to check with Judge Miller. (T1355). Yet, Mr. "Kachadourian was nowhere to be found. [Judge Miller] didn't hear any information from Ms. Gallagher." (T1397). Court security, usually one person, would also be present observing the court's proceedings that day. (T346).

[1] "T" references are to the page of the hearing transcript.

Because security must leave by 4:30 P.M., court proceedings must end by 4:30 P.M. (T1355). Court ended at "4:30 or a little bit after" according to Ms. Vroman and Judge Miller. (T328, T1398). Judge Miller had a physical therapy appointment on February 6, 2017. (T1354). Judge Miller's secretary, Ms. Gallagher, failed to inform court assistant Vroman of Judge Miller's physical therapy appointments. (T1428, T337-38). The afternoon session began at approximately 2:00 P.M. (T326).

Judge Miller acknowledged in his testimony:

> I am not perfect and can be frustrated on occasion, but even Ms. Vroman agreed that we are busy. After we work hard to get a lot done despite the constraints of having to end our day by 4:30. We often do a lot with very little support. In my case we were short a clerk for more than a year. When I am frustrated, I ask that we push to get things done. I thought that the issue that occurred on February 6, 2017, was past us because Ms. Vroman and I worked together for a long time after the incident. Adjustments were made to at least a number of the concerns that I voiced in my letter to Ms. Singer. I am troubled and sorry that Ms. Vroman is still upset by it and if I'm allowed to return, I will be mindful of my tone and fully explain why I need to leave if I have physical therapy or any other commitment which would require a timely finish to the court date. As to my temperament and lateness, I had back trouble, but my chambers staff was aware of it and I assumed that my court part staff was aware of it also. Later I learned that chambers, Mrs. Gallagher, never informed Rebecca Vroman of my physical therapy appointments. Something which was innocent was presented out of context. Likewise, my complaints about certain employees' work ethic and demands were limited to getting the work done. (T1427-28).

Ms. Vroman agreed that whatever transpired on February 6, 2017 did not impede her and Judge Miller's ability to work together and get the job and work of Family Court completed for several months after that one incident.[2] (T352).

The Referee also found that Judge Miller made inappropriate comments to Debbi Singer, a Family Court Clerk in May and June 2017. (Referee pp. 23-24). The Referee noted that while the comments were inappropriate, Judge Miller had "no intent to harm anyone with comment that may well have been intended to be humorous." (Referee p. 24).

The Referee noted that in both individuals' situations the Judge's comments were not graphic in nature. (Referee p. 24).

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[2] When Judge Miller returned to Family Court after a vacation in July 2017, he notes that Ms. Vroman and he successfully worked together to fill the gap left by the absence of Ms. Gallagher and Mr. Kachadourian. (T1359).

Once again, it is important to note that Judge Miller also averred that he now recognizes that the language he used might be perceived as offensive to those present; apologizes for making such comments; and, will refrain from making any such comments in the future, even in jest. (T1428).

Judge Miller discussed his feelings about the February 6, 2017 emergency calendar and Ms. Singer in his testimony:

> Likewise, I am troubled that Ms. Singer believes that I made demeaning comments to her. I do not have any specific memory of the comments. All she or Ms. Vroman or anyone for that matter had to say was, "Judge, I'm uncomfortable with your manner or the statement you made." I can assure you that I would have apologized and changed my behavior. It does me no good to have my co-workers dislike me. In fact, I try to kid around at times to put at ease- - to put them at ease. This experience has taught me that I must choose carefully not only the words I use but how I deal with others as well as who I can appoint to work closely with me. I know now that all my choices and words or how I treat people must be respectful for them and for my position, so I cannot and will not say anything in jest. (T1427-28).

As to whether the comments were egregious enough to constitute a severe sanction, precedent indicates that the Commission consider the context, nature, extent and number of times such comments were made. And, it is also important to note that more egregious conduct than that which the Referee found here has resulted in the imposition of an Admonition or Censure. Based on the facts herein, the published precedent is distinguishable. See e.g. Matter of Warren M. Doolittle, Determination of the Commission on Judicial Conduct, June 13, 1985 (Admonition imposed because Judge made numerous improper comments to female attorneys in the course of his official duties, referring to their appearance and physical attributes); Matter of Anthony T. Jordan, Determination of the Commission on Judicial Conduct, January 26, 1983 (Admonition imposed because Judge referred to a female attorney as "little girl" when between 30 and 50 people, mostly attorneys, were present in the courtroom; and at the conclusion of argument concerning a request for adjournment, the judge again referred to the attorney as "little girl," stating, "I will tell you what, little girl, you lose." He spoke in a loud voice and clearly intended to insult and demean the attorney); Matter of Edmund V. Caplicki, Jr., Determination of the Commission on Judicial Conduct, September 26, 2007 (Censure imposed because Judge condoned comments a defendant made about his female attorney's physical appearance in open court during formal proceedings by recording them on an arraignment sheet; repeating them and asking the defendant to confirm that he made the comment; and when the female attorney appeared on behalf of other defendants the same day, he asked each defendant if he agreed with the earlier defendant's comment about the attorney's physical appearance); Matter of James H. Shaw, Jr., Determination of the Commission on Judicial Conduct, November 8, 1999 (Censure imposed because the judge engaged in repeated conduct over a period of more than 10 years. He repeatedly made explicit comments to his personal secretary; he commented about how her clothes fit various parts of her

body; repeatedly hugged her, rubbed her back and touched her hand without her invitation or consent; repeatedly asked whether she enjoyed having sex; repeatedly told her that her lips were "wide," "sexy," and "voluptuous"; pulled her into his lap and kissed her on the mouth without her invitation or consent; repeatedly told her she had "big tits" and repeatedly made comments about her nipples); Matter of Luther Dye, Determination of the Commission on Judicial Conduct, February 6, 1998 (Censure imposed because Judge boasted over a two year period about his sexual prowess and sexual experience with other women to his personal secretary; he stated (1) he enjoyed talking to her because she was physically attractive; (2) she had attractive legs; (3) her clothes inspired his sexual feelings; (4) and, he had a strong interest in sex and wanted to have sex with her).

The episodes outlined above should be viewed in the context of the testimony of other court employees and those appearing before Judge Miller over his decades of judicial service. Sgt. Ronald Kreb, OCA court security, Kate Fitzgerald Esq., a longstanding member of the Broome County matrimonial bar, Diane Marusich and D[redacted] L[redacted] (the clerk working with Rebecca Vroman as part of Judge Miller's team) all testified to Judge Miller's judicial temperament and courteous behavior toward court personnel and litigants.

Diane Marusich testified from the perspective of a woman working with court employees and actively involved in community affairs. She indicated there was "no complaint" as to Judge Miller's performance as a judge and that Judge Miller's reputation was that he was "very fair in often times [sic] contentious family court environment." (T1218). And, even witnesses called by the Commission agreed with this assessment: D[redacted] L[redacted], a Family Court Clerk testified that in working on Judge Miller's team, she observed him interact with court personnel, such as Rebecca Vroman, attorneys, litigants and found Judge Miller to treat court personnel "fairly" and "nicely." (T 287-289). Ms. Marusich's opinion of Judge Miller's temperament in the family court environment and D[redacted] L[redacted]'s observations are echoed by an Office of Court Administration security officer, Sgt. Ronald R. Kreb. Among those who work in the courtroom daily overseeing security in Judge Miller's courtroom, Sgt. Kreb testified to Judge Miller's reputation for judicial temperament as follows in the "emotional" world of family court:

> I can speak for my officers and me included, you know, never seen anything that was—anything less than professional. He was always a—pleasant to work [sic] in there. As a matter of fact, coming out of the courtrooms, litigants would even say, you know, that, you know, he is very welcoming, he was very professional, pleasant. Never heard of anything adverse. (T1203).

Kate Fitzgerald, Esq., has practiced family law exclusively for 36-37 years and is a director of the Broome County Bar Association. (T978). Ms. Fitzgerald has no social relationship with Judge Miller but knew him from cases when he was a practicing attorney and as Broome County Family Court Judge. (T980). Ms. Fitzgerald testified that Judge Miller "has exactly the kind of judicial temperament you want to find in a judge. Fair, calm, reasonable, courteous to people in his courtroom, which is always welcome. Not too familiar, just what, personally, I like to see and I believe colleagues like to see." (T980-81).

Charge II: Requiring Chambers Staff to Perform Prohibited Personal and Political Activities

The Referee found no evidence that Judge Miller required either Gallagher or Kachadourian to engage in any political activities and that their testimony lacked credibility. We agree with the Referee's assessment that these two witnesses were incredible with regard to that portion of Charge II that alleges that Judge Miller required Chambers Staff to perform prohibited personal and political Activities. Thus, the facts and charges based on their testimony relating to allegations of requiring Chambers Staff to perform prohibited personal and political activities should be dismissed.

Judge Miller testified that Ms. Gallagher did prepare a letter in November 2015 relating to the fees he was owed for work to close out an estate he had worked on prior to taking the bench in January 2015. (Referee p. 24). Regardless of whether Ms. Gallagher prepared the letter voluntarily or not, and that the Judge may be paid for his legal work prior to assuming the bench, it was improper to have the letter typed by his secretary. (Referee p.25). Judge Miller acknowledges the letter should not have been prepared.

Charge III: Engaging in the Private Practice of Law

The Referee found no credible evidence that Judge Miller engaged in the private practice of law while a judge involving the Estate of Antoinette Saraceno and Estate of Jerry J. Behal. The allegations of the Commission's complaint were contradicted by numerous witnesses. For example, statements attributed to Barbara Sarceno, executrix, in the Commission's complaint were rebutted by her testimony. (Referee p.28). Her testimony was corroborated by Artan Serjanej, Esq. who completed the estate matter. Mr. Kachadourian backed off a statement attributed to him that Judge Miller asked him to help prepare an accounting in the Behal estate. (Referee p.33). Moreover, the unrebutted testimony presented by three other witnesses corroborated Judge Miller's testimony that he did not work on the Behal Estate. Indeed, David Behal, Artan Serjanej, Esq. and Robert Wedlake, Esq. each averred that Judge Miller was not involved with the Behal Estate after he took the bench.

Thus, based on the facts and evidence adduced at the hearing, Charge III should be dismissed in its entirety.

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

There is no issue that Judge Miller's initial financial disclosure form for 2015 and his NYS and Federal Returns did not include extra-judicial income. (Referee pp. 35-39). The Referee noted the timing of Judge Miller's amendment "is a matter in mitigation to be argued directly to the Commission." (Referee, p. 39). Judge Miller submits that the unrebutted record in this proceeding demonstrates that he began the process of filing corrected New York State Financial Disclosure Forms and Tax Returns reflecting his outside income soon after filing his 2016 NYS and Federal Returns on April 15, 2017, *and before any inquiry by the Inspector General or Commission on Judicial Conduct*. Because Judge Miller filed tax returns with the intent of amending them under the advice of his accountant, as provided by law, and was working with and following the advice of his accountant to make the necessary amendments to his tax returns before any inquiry by the

Commission on Judicial Conduct or Inspector General, this charge should be mitigated in light of the factual context of the filings at issue.

Judge Miller's accountant Robin Dean ("Accountant Dean") testified that Judge Miller was challenged in collecting all the documentation necessary for the filing of his tax returns. (T1247-1248).[3] Accountant Dean testified the delay resulted not only from the lack of information but also issues relating to his surgeries. (T1278). Accountant Dean advised Judge Miller to file his tax returns even if not all information was available and to amend the returns if necessary. (T1248-1249, T1251-1252). That advice and process occurred for tax years 2015 and 2016, the years relating to specifications in the Commission's Complaint Charge IV. (T1249-1250). Judge Miller followed his accountant's advice. (T1276, T1280).

Approximately "a month and a half" after the April 15, 2017, filing date for the 2016 tax year, "or sooner," Judge Miller approached Accountant Dean about income and rental expenses which were not accounted for on the 2015 and 2016 tax returns. (T1251-53, T1268). Judge Miller realized that certain income received from his practice of law should be reported in tax year 2015 and 2016. (T1258). Accountant Dean's testimony is unrebutted. This month and one-half time period, which would be approximately the end of May, or early June, is well before either the Inspector General questioned him about his income and tax returns on July 14, 2017.[4] Accountant Dean and Judge Miller were hampered in their ability to complete the amended returns for 2015 and 2016 because necessary records "were taken from him." (T1256). Judge Miller had assembled documents for the accountant which were missing from his office. (T1360-1363). Eventually Judge Miller's records were returned by court administrators and Accountant Dean filed the amended federal and state returns for tax years 2015 and 2016 in June 2017 (T1260). The result of these amended returns was: 1) no reportable income from Judge Miller's properties for either tax years; and 2) additional income for tax year 2015 of $27,388 from the practice of law prior to becoming a judge. (T1258-60; T1285-86). The undisputed and unrebutted testimony of Judge Miller's Accountant Robin Dean as well as his own testimony (T1408-14; T1413-18) can be summarized as follows with respect to Judge Miller's 2015 and 2016 tax years:

- Judge Miller timely filed Federal and New York State joint tax returns with his wife, a physician who had to file and pay estimated taxes with the intent to amend the returns, because he had not assembled all of the necessary records he needed to fully report his earnings from his prior practice of law as well as

[3] Accountant Dean testified "We would always have his wife's information, but Rick would always come in later on, close to the due date with his information, just due to his busy schedule which is a common—We do get a lot of people that last month and we would sit down. It was never a written appointment. It was just, you know, last minute. We would sit down and have a brief meeting and there was [sic] always a couple things lacking. . . it was still trickling down to the wire and that was common for every year that I did his taxes." (T1275-76).

[4] The OCA Inspector General questioned Judge Miller for the first time on July 14, 2017. (T1371). By letter of October 13, 2017 the Commission informed Judge Miller of two complaints it was investigating, neither of which involved financial disclosure. The Commission's inquiry about Judge Miller's income and tax returns for tax years 2015 and 2016 postdated the OCA Inspector General's inquiry.

income from rental properties that his family owned. (T1249-50; T1382-85); Comm. 9A, 9D, 9F, 9I);

- Soon after April 15, 2017, at the end of May or early June, "or sooner," *and before any inquiry by the Inspector General or the Commission, Judge Miller contacted his accountant,* Robin Dean, to start the process of collecting the information necessary to amend his 2015 and 2016 returns. (T1251-53; T1268; T1408-1418);
- Judge Miller had begun to collect and assemble the records placing them in boxes in his office until he could meet with his accountant, but the boxes were taken from his office during the instant investigation by the Commission and later returned to him (T1256; T1360-1363, T1390-1391, T1413);
- Judge Miller met with his accountant and amended the tax returns (T1260; T1382-1385, T1408-1418; Comm. 9B, 9C, 9E, 9G, 9H, 9J); and
- Judge Miller advised the Commission that he had done so prior to the filing of the instant charges (T. 1418; Comm. 10A).

Judge Miller in his hearing testimony acknowledged he did not file disclosure forms with the Family Court Clerk for years 2015, 2016 & 2017. (Referee p.35). After seeking advice of counsel, Judge Miller filed the requisite form and the Referee concluded "[t]here was no evidence presented challenging the accurateness and completeness of the later filed forms." (Referee p.35). Judge Miller apologized for belatedly doing so and explained that he erroneously believed that filing the FDF met his yearly filing obligations.

Based on the undisputed evidence, Judge Miller had a valid excuse for his inaccurate filings in that he spoke with and relied on the advice of his accountant, believing that he could amend his taxes as well as his FDF, and he began to collect the information needed to make the changes prior to the Commission's investigation and left it in a box in his chambers. There is no dispute that he was delayed in making the corrections because the Commission had seized and held the very documents required to amend his returns and filings. Once he secured the documents, Judge Miller made the changes to both his tax returns as well as his FDFs. He also fully cooperated by providing the Commission with the changes.

Of particular relevance are the Observations in the Commission's 2019 Annual Report at pp. 21-22, which state in pertinent part:

> When a judge is late in submitting the annual statement and fails to respond to a "notice to cure," UCS Ethics is required to issue a "notice of delinquency" and to notify the Commission, pursuant to Section 40.1(k) of the Rules of the Chief Judge. **Where investigation by the Commission reveals a valid excuse, discipline would not be imposed. Where the explanations are not persuasive[5] but the delinquency was a first-time oversight and the judge promptly files upon receipt of the UCS Ethics notice, the Commission may issue a confidential**

[5] It is not an excuse that the judge was busy, misplaced the disclosure form, did not check the mail or was distracted by personal matters, particularly if the judge was otherwise fulfilling the responsibilities of office.

Letter of Dismissal and Caution. However, where there are aggravating circumstances with respect to a judge's financial disclosure statements, such as multiple instances of late filings or filings that contain material inaccuracies, public discipline may result. See, Matter of McAndrews, 2014 Annual Report 157; Matter of Nora S. Anderson, 2013 Annual Report 75; Matter of Joseph S. Alessandro, 13 NY3d 238 (2009); Matter of Francis M. Alessandro, Id.; Matter of John J. Elliott, 2003 Annual Report 107; Matter of Robert T. Russell, Jr., 2001 Annual Report 121; and Matter of Bernard Burstein, 1994 Annual Report 57. (Emphasis added).

Judge Miller's case is distinguishable from the above cited cases because the Judges in each of the cases were sanctioned for repeated and additional substantial misconduct, including *inter alia*, failure to cooperate with the Commission's investigation and intentionally omitting material information in their FDF. Even so, in most cases, the Judges were either admonished or censured. See e.g., Matter of Robert T. Russell, Jr., Determination of the Commission on Judicial Conduct, October 31, 2001 (2001 Annual Report 121) (Admonition imposed where the Judge failed to file FDF for seven years, his negligence was exacerbated by his pattern of late filings well past the due date and only after receiving a notice to cure as well as the fact that the late filings continued after he received a Letter of Dismissal and Caution from the Commission concerning his failure to timely file his 1995 FDF); Matter of Bernard Burstein, Determination of the Commission on Judicial Conduct, July 27, 2001 (1993 Annual Report 57) (Admonition imposed because the Judge failed to file his financial disclosure statements; failed to cooperate with the Commission's investigation which included four letters that he failed to respond to; and failed to open letters from litigants, attorneys and witnesses); Matter of Francis Allesandro, 13 N.Y.3d 238 (2009); (The Court of Appeals imposed a Letter of Admonition notwithstanding the Commissions Determination of Removal because the judge failed to fully disclose his assets and liabilities in his financial disclosure statements, but it was not clear that the information was deliberately omitted from his financial disclosure statements; and the omission reflected "carelessness rather than deliberate concealment of material information"); and Matter of John J. Elliott, Determination of the Commission on Judicial Conduct, November 18, 2002 (2003 Annual Report 107) (Admonition imposed where Judge failed to file his financial disclosure statements in a timely manner in three of the preceding five years); Matter of McAndrews, Determination of the Commission on Judicial Conduct, June 18, 2013, (2014 Annual Report 157) (Censure imposed when judge failed to timely file a mandatory FDF with the Unified Court System's Ethics Commission and failed to cooperate with the Commission investigation; stipulating that he had no valid excuse" for his late filing. The Commission stated that the judge's misconduct was "seriously exacerbated by his failure to cooperate with the Commission's inquiry into his dilatory filing," including, *inter alia*, failing to respond to five letters from the JCC related to the investigation and confirming his appearance to give testimony); Matter of Nora S. Anderson, Determination of the Commission on Judicial Conduct, October 1, 2012 (2013 Annual Report 75) (Censure imposed because Judge accepted a total of $250,000 in "disguised contributions" and failed to report the contributions on his FDF as required with the Unified Court System's Ethics Commission and also skirted the Election Law).

Respectfully, the uncontested evidence is that Judge Miller had a valid excuse for the delinquency, was working to correct his tax returns and financial disclosures before any inquiry,

he has fully cooperated with the investigation and made and filed his changes as soon as he was able to do so.

Judge Miller's Sanction for any Violations Should Be Viewed Not Only in the Context of the Referee's Findings of Fact But Also The Mitigating Factors and 23 Years of Judicial Service

Various factors and principles apply in determining the appropriate sanction to impose for judicial misconduct. Justice Miller recognizes that he made mistakes and errors in judgment, mistakes and errors which a judge should not make and that a sanction is appropriate. As a result of these proceedings, he has learned from his mistakes. The sanction imposed should be measured by the principles of judicial sanctions and the facts of this case.

We also acknowledge that Judge Miller has a prior history, in that he agreed to a Censure more than seventeen years ago, in 2002, for conduct that occurred when he was relatively new to the bench and a Part-time Judge. Respectfully, the conduct sustained herein imposed is not similar to that alleged and which he agreed to in the prior matter. Even so, the Commission has on occasion imposed a second Censure when the first matter occurred years earlier, the judge recognized that his behavior was inappropriate; presented testimony from female witnesses indicating that he has been a respectful, able, dignified professional and that the breach of judicial decorum depicted. See e.g. Matter of Caplicki, Determination of the Commission on Judicial Conduct, September 26, 2007 (Notwithstanding a prior Censure for ticket fixing nine years earlier, and his repeated references to inappropriate statements by a defendant that his attorney, a female, was "cute" and had "a nice butt", the Commission imposed a second Censure stating "In considering the sanction, we note that testimonials submitted on respondent's behalf by female attorneys indicate that at other times he has been a respectful, able, dignified professional. Thus, the breach of judicial decorum depicted here, while serious, appears to be an aberration. We also note that respondent recognizes that his comments were inappropriate. We note further that respondent was censured for ticket-fixing in 1978 and has an otherwise unblemished record in more than three decades on the bench").

Here some of the charges sustained against Judge Miller relate to inappropriate comments which appear to be aberrational given the fact that character witnesses and even some of the witnesses called by Commission Counsel attested that he is respectful, honest, trustworthy and a productive judge. Moreover, it appears that the majority of the conduct sustained herein relates to Judge Miller's personal financial matters. Indeed, had these matters been subject to a full investigation, based on the statements in the Commission's Annual Report where, as here, there is a **"valid excuse", discipline should not be imposed.** Judge Miller might not have even been subject to charges relating to the same since he was in the midst of amassing the documents when the Commission subpoenaed the box with the records he was collecting to assist in amending his tax returns and FDF's as well as file reports with the clerk of his court concerning income that he received in excess of $150.

Without diminishing his accountability or dismissing his responsibility, Judge Miller respectfully submits that the findings of fact by the Referee and their context amount to poor judgment at most, but not to the extent that such requires that he be removed. The Court of Appeals has repeatedly stated that the purpose of removal is not punishment, but protection. Removal is

warranted only to safeguard the public by eliminating unfit judges. See generally, Matter of Duckman, 92 N.Y.2d 141, 153 (1998); Matter of Esworthy, 77 N.Y.2d 280, 283 (1991). Removal is "an extreme sanction [that] should be imposed only in the event of truly egregious circumstances" and "should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment." Matter of Cunningham, 57 N.Y.2d 270, 275 (1982); see also, Matter of Kiley, 74 N.Y.2d 364, 369-70 (1989) (characterizing removal as the "ultimate sanction" that should be imposed "only in the event of truly egregious circumstances").

We again note that both witnesses called by the Commission who have worked with Judge Miller during his years on the bench, repeatedly and independently expressed that he is known for his "judicial temperament and courteous behavior toward court personnel and litigants"... being "very fair in often times [sic] contentious family court environment."... "treat court personnel "fairly" and "nicely" ... and that in the "emotional" world of family court: "I can speak for my officers and me included, you know, never seen anything that was—anything less than professional. He was always a—pleasant to work [sic] in there. As a matter of fact, coming out of the courtrooms, litigants would even say, you know, that, you know, he is very welcoming, he was very professional, pleasant. Never heard of anything adverse" ... "has exactly the kind of judicial temperament you want to find in a judge. Fair, calm, reasonable, courteous to people in his courtroom, which is always welcome. Not too familiar, just what, personally, I like to see and I believe colleagues like to see." Judge Miller should be allowed to resume and return to his duties in the Family Court, where he is well respected and well regarded. Thus, the imposition of anything greater than a censure is unwarranted.

Perhaps most important, although Judge Miller rightfully contested the most egregious and incredible charges, he did accept responsibility and apologize for certain of the conduct as set forth above and demonstrating that he has learned invaluable lessons due to these proceedings. His heartfelt statement bears repeating and should be considered in mitigation. He averred:

> I would like to make this personal statement. Referee Barrer, thank you for the time you spent on this matter. I appreciate the fair and thoughtful way that you've handled this matter. You certainly have the toughest job in this room. I hope that you will continue to be fair as you think about the process and in some ways, you more than anyone understands the seriousness of being the person who determines someone's future. Although most of the testimony has been about allegations that are surreal, I hope that you can separate the information from the testimony about the type of judge that I am when I sit in family court.
>
> My reassignment since July 2017 to review foreclosure motions has been difficult because it's not good for litigants who could use my services in a positive way that I was elected for. I love being a family court judge. I take my job seriously because my decisions impact the lives of people who in most cases have nowhere to turn. They very often have serious issues and little access to resources, so I do my best to hear them and to render decisions in a fair and

respectful manner. I am not perfect and can be frustrated on occasion, but even Ms. Vroman agreed that we are busy. And we work hard to get a lot done despite the constraints of having to end our day by 4:30. We often do a lot with very little support. In my case, we were short a clerk for more than a year. When I am frustrated, I ask that we push to get things done. I thought that the issue that occurred on February 6, 2017, was past us because Ms. Vroman and I worked together for a long time after the incident. Adjustments were made as to at least a number of the concerns that I voiced in my letter to Ms. Singer. I am troubled and sorry that Ms. Vroman is still upset by it and if I'm allowed to return, I will be mindful of my tone and fully explain why I need to leave if I have physical therapy or any other commitment which would require a timely finish to the court date. As to my temperament and lateness, I had back trouble but my chambers staff was aware of it and I assumed that my court part staff was aware of it also. Later I learned that chambers, Mrs. Gallagher, never informed Rebecca Vroman of my physical therapy appointments. Something which was innocent was presented out of context. Likewise, my complaints about certain employees' work ethic and demands were limited to getting the work done. Likewise, I am troubled that Ms. Singer believes that I made demeaning comments to her. I do not have any specific memory of the comments. All she or Ms. Vroman or anyone for that matter had to say was, "Judge, I'm uncomfortable with your manner or the statement you made." I can assure you that I would have apologized and changed my behavior. It does me no good to have my co-workers dislike me. In fact, I try to kid around at times to put at ease-- to put them at ease. This experience has taught me that I must choose carefully not only the words I use but how I deal with others as well as who I can appoint to work closely with me. I know now that all my choices and words or how I treat people must be respectful for them and for my position, so I cannot and will not say anything in jest. As to the allegations of sexual harassment, they are simply untrue. I am so disheartened by Ms. Gallagher and Mr. Kachadourian's testimony, much of which is untrue, incredible and surreal. I repeatedly voiced my displeasure with both because they were not providing the work and support needed to get the job done. It was initially a problem because Ms. Gallagher was not doing the secretarial work, including preparing case files, failing to take and convey messages, failing to monitor my emails and deadlines, failing to prepare vouchers and providing my scheduling information to the court clerks that I needed done. She had worked well at her prior task but the volume and challenge in family court was different. We all had to work harder than ever before. As to Mark Kachadourian, it took longer for me to realize that he was not as supportive and was not doing his job. You see, most of our cases

could be resolved by me from the bench. He failed at the basic of his responsibilities, drafting judicial decisions. In two and a half years, he produced two decisions. Certainly, Mark Kachadourian was not productive and not performing his job. This reflects his lack of devotion to the job. I came to learn that my kindness, my patience, and reliance on them was a mistake.... If I can continue, I will certainly use a different process in deciding who to hire. I was not as attentive as I should have been in hindsight because I was busy doing the pretrial conferences, trials, and emergency applications and ensuring that the work of family court was done. I emphatically deny the disgusting and offensive statements and behavior attributed to me by Ms. Gallagher and Mr. Kachadourian. I was in family court every day. Such behavior, which did not happen, would have been inappropriate and disrespectful on so many levels. I'm not only a judge but I'm a family man married for 25 years and the father of four children, two boys and two girls. I was raised in a household of women, grandmother, mother, two sisters. Why would I do anything so foolish to dishonor my family? Also, I'm named after my father. I love him. He has passed but he remains beloved and respected in our community. I would never act so egregiously which would certainly dishonor him, my mother, my wife, my children, my sisters. As to the mistakes that I made, I recognize that whether I knew my obligations as to the FDF and the local report to the clerk, I should have known. I note that the FDF, I should have been more careful with the details. Likewise, my taxes should have been more carefully filled out and more inclusive of all the information so as to not confuse anyone who may review them. I was unaware of the local reporting requirement or that it existed independently of the financial disclosure form filed with the Ethics Commission. I believed that filing a yearly financial disclosure form with the Ethics Commission fulfilled these obligations with respect to all financial disclosures. I did my best to comply with the rules but now realize that I should have done better, to learn and comply with the Rules Governing Judicial Conduct. In hindsight, I recognize and sincerely apologize for any errors or oversights. I have re-familiarized myself with the rules and consulted and will continue to consult with Ms. Scalise and Mr. DerOhannesian to ensure that going forward I do not repeat them. I thank you for your time and hope that you will keep an open mind when you render your report in this matter, which will surely impact my career as well as my reputation. Thank you. (T. 1426-1430).

Accordingly, based on the facts, the charges sustained, and the substantial mitigation presented, we urge that no greater than a Censure be imposed.

Very truly yours,

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