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

MARK J. GRISANTI,

A Justice of the Court of Claims and
an Acting Justice of the Supreme Court,
Erie County.

REPLY MEMORANDUM
TO RESPONDENT'S POST-HEARING SUBMISSION

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PRELIMINARY STATEMENT

This Memorandum is respectfully submitted by Counsel to the Commission on Judicial Conduct ("Commission") in reply to the memorandum by Hon. Mark Grisanti ("Respondent"), dated January 31, 2023.

On the evening of June 22, 2020, Respondent instigated and repeatedly escalated a public street brawl with his neighbor, during which he shouted obscenities and wrestled bare-chested in the street. When the police arrived, Respondent told them assorted lies, made a series of threats, dropped the names of high-ranking police and city officials in an attempt to curry favor, and physically pushed an officer. In his brief, Respondent acknowledges some of that misconduct, as he must – much of it was captured on video. However, he continues to deny critical portions despite overwhelming evidence to the contrary, and what he does not deny, he minimizes or seeks to excuse. Thus, although Respondent claims to have accepted responsibility for his misconduct, his continuing excuses, deflections, and minimizations tell a very different story.

Respondent separately denies accountability for his serial failure to disclose a financial relationship with an attorney who repeatedly appeared before him, and for his materially incomplete financial filings. Apart from the underlying misconduct itself, Respondent's continuing refusal to accept responsibility for his actions shows an ongoing lack of appreciation for his ethical obligations.

POINT I

RESPONDENT IS RESPONSIBLE FOR HIS OWN CONDUCT DURING A STREET BRAWL WITH A NEIGHBOR, AND HIS ATTEMPTS TO DEFLECT BLAME AND DOWNPLAY THE GRAVITY OF HIS EGREGIOUS ACTIONS DEMONSTRATE THAT HE HAS NOT ACCEPTED RESPONSIBILITY FOR HIS CONDUCT (Answering Respondent's Brief, Point I).

Respondent opens his brief by giving a lip-service acknowledgment that his public brawl with Joe Mele was "embarrassing" and "regrettable," and he ultimately concedes that he violated various provisions of the Rules Governing Judicial Conduct ("Rules") by virtue of "his conduct during the [Mele] confrontation" (RespBr: 1, 15), his subsequent pushing of Officer Gehr (RespBr: 16, 20-21), and his public use of profane language while engaging with the Meles and the police (RespBr: 13-14, 21).

He undercuts those acknowledgments, however, by devoting much of his brief to deflecting blame for his misconduct and attempting to minimize his culpability: he blames his neighbors for his own intentional acts; continues to lie about how the altercation began and played out; downplays his two-handed shove of a police officer as "inconsequential"; and spouts a nonsensical rationalization about obvious threats he made to the police. Many of the "facts" Respondent cites as mitigating are flatly refuted by the record, and his repeated deflections and minimizations prove that he has not actually accepted responsibility for his actions.

A. Respondent made a series of intentional choices that drove his egregious misconduct surrounding the brawl with his neighbor, placing the responsibility for his misconduct on his shoulders alone.

The events of June 22, 2020, resulted from a series of intentional choices Respondent made, which individually and collectively reflect egregiously poor judgment on his part. Specifically, as set out more fully in Commission Counsel's main brief (CommBr: 10-34, 51-66), Respondent:

- Instigated the altercation with the Meles by walking across the street from his house to the Meles' driveway (Exs 2 at 07:14:28 – 07:14:33; 42), knowing full well the Meles' reputed propensity for confrontation (Respondent: 1170, 1358-59);

- Invited the physical confrontation when he could have walked away by goading Joe Mele to fight (Ex 2-A, pp 3-4);

- Escalated and prolonged the brawl by twice re-engaging Joe Mele after the two men briefly separated (Ex 2 at 07:14:55 – 07:17:27), provoking more violence each time with threats such as "Come on . . . you think we're done," "You want to go again, tough fucking guy," and "I'll fucking flatten your face again" (Ex 2-A, pp 5, 9);

- Intentionally shoved a Buffalo Police Department (BPD) officer to prevent him from performing his duty (Exs 11 at 00:01:52 – 00:01:54; 12 at 00:01:14 – 00:01:17; 43);

- Repeatedly threatened the police by telling them that they would "be sorry" and were "going to have a problem" if they did not unhandcuff his wife (Exs 11 at 00:02:10 – 00:02:16; 11-A, pp 7-8; 12 at 00:01:35 – 00:02:16; 12-A, p 5-7);

- Attempted to curry favor and leverage his personal and political connections by telling the police that his "son and . . . daughter" were BPD officers, threatening to call them "and their Lieutenants," falsely claiming that a BPD Deputy Commissioner was his cousin, and

volunteering, "I'm good friends with [Buffalo Mayor] Byron Brown" (Exs 11 at 00:06:23 – 00:09:30; 11-A, pp 18, 22; 12 at 00:02:24 – 00:06:07; 12-A, pp 7, 14-15); and

- Lied to several officers by telling them a false version of the fight in which he purportedly was on his own property when the Meles began fighting with his wife, and that he then tried to play peacemaker and entered the fight only to protect his wife (Exs 11 at 00:07:33 – 00:10:08; 11-A, p 20-23; 12 at 00:43:10 – 00:43:36; 12-B, p 4; 13; 13-A, pp 9-10, 14, 20, 24).

The totality of that evidence makes clear that Respondent himself was the driving force behind his misconduct, which was far more egregious than the "embarrassing" or "regrettable" (RespBr: 1-2) episode he describes in his brief.

B. The Meles' actions in the years leading up to the street brawl do not excuse or explain Respondent's misconduct.

In his brief, Respondent contends that his experiences with the Meles in the years leading up to June 20, 2022, "provo[ked]" the clash that night and pushed him "beyond endurance" (RespBr: 1-2). In actuality, Respondent's prior interactions with his neighbors do not provide an excuse for his publicly profane and violent misconduct, and his assertions to the contrary demonstrate his preference to deflect blame rather than accept responsibility for his own actions.

As described by Respondent, his unpleasant history with the Meles amounts to the following:

- He was bothered by the Meles' alleged alternate street side, middle-of-the-curb parking, which was "inconsiderate," but not illegal (Respondent: 1165-67, 1169, 1170, 1330);

- The Meles allegedly parked their cars and trucks so as to "block" his driveway and/or apron (Respondent: 1164-66, 1169, 1328, 1331);[1]

- Joe Mele would allegedly "grunt," "spit," and give Respondent the middle finger at various times (Respondent: 1166, 1169, 1171-72, 1189); and

- Joe Mele allegedly previously taunted a fight by asking if Respondent wanted "a shot at the title" and suggested a "girl fight" between Ms. Grisanti and Ms. Mele (Respondent: 1171-72, 1345-1346, 1358).

Even assuming *arguendo* that Respondent's account of the Meles' conduct is accurate, these alleged inconsiderate and distasteful actions by the Meles in no way justified Respondent's public display of violence and profanity. As a judge, Respondent was obligated to act at all times – even off the bench – with dignity and integrity. *Matter of Kuehnel* 49 NY2d 465, 469 (1980). While a street brawl involving "a member of the public" would be, "at a bare minimum, a flagrant breach of accepted norms," that same act "[w]hen performed by a Judge, a person required to observe high standards of conduct so that the integrity of the judiciary may be preserved . . . is inexcusable." *Id.* (internal quotation marks and citations omitted). Bad neighbors can be annoying, but that is no excuse for disreputable judicial misconduct, especially such very public misconduct involving violence as Respondent exhibited here.

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[1] Respondent repeated this claim when he called 911 just before the brawl, and he continues to assert in his brief that the Meles' truck was "crowding" their driveway such that he "found it difficult to pull into [his] driveway" on June 22, 2020 (RespBr: 10). The video evidence proves that assertion false, as it shows Respondent pulling his car easily into his driveway in one smooth turn (Ex 41 at 07:00:55 – 07:01:10; *see also* Ex 40).

Moreover, the record demonstrates that Respondent's hearing testimony about the alleged bad conduct of the Meles should be viewed skeptically. In the hours after the brawl, Respondent spoke to Detective Moretti and described a relationship with the Meles that was far less problematic than what he described during his hearing testimony. Respondent told Moretti that the Grisantis and the Meles initially had been friendly but fell out after the Grisantis talked "to other neighbors that aren't friendly with them" (Ex 13-A, pp 4, 17-18). Significantly, Respondent told the detective that he had not had an issue with the Meles in "probably three years" (Ex 13-A, pp 21-22). Given the vast discrepancy between Respondent's contemporaneous assertions to Moretti and his eventual hearing testimony, the Referee should infer that Respondent exaggerated his history of conflict with the Meles at the hearing to invent an excuse – even if a bad one – for his misconduct during the street brawl.

C. Respondent's intentional actions instigated and escalated the altercation, and he subsequently lied to police about how the confrontation began.

Another mainstay of Respondent's defense is that he did not instigate the Mele brawl but was forced into it to defend his wife after the Meles provoked a fight with her (RespBr: 1-2, 9-10, 12, 14). As discussed in Commission Counsel's main brief (CommBr: 62-66), that is the same story Respondent told to responding officers in the aftermath of the brawl, and it was no truer then than it is now.

Indeed, the record evidence – including video – makes clear that Respondent's version of how the brawl started is a lie.[2]

When Officers Gehr and Muhammad arrived at the scene, Respondent specifically told them that his wife went across the street on her own while he was "in the house," and he "c[a]me out" to find her already in a confrontation with "the two girls and Joe [Mele]" (Ex 11-A, p 20). Respondent claimed that only then did he "walk[ ] across the street," at which point he declined Mr. Mele's invitation to fight by stating, "No, Joe . . . I'm bringing Maria back" (*id.*). The video and audio recordings of the fight make clear that those statements to the police were false.

In fact, the video evidence shows that Respondent not only accompanied his wife across the street right before the fighting began, but led the way, walking in front of her as he moved from his own property to the Meles' driveway (Ex 42; Respondent: 1352-53). Thus, his statement to the police that he was in his house when his wife walked over to the Meles' property is, quite simply, a lie.

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[2] As to the matter of who started the fight, Respondent asks that the Missing Witness Doctrine be applied because Joe Mele and Theresa D'Antonio, Gina Mele's sister, did not testify (RespBr: 12 n2). Apart from the fact that Respondent could have subpoenaed them himself if he wanted their testimony, a missing witness charge is inappropriate where the testimony of the witness in question would be cumulative to that of other witnesses or evidence, including video evidence. *People v Rivera*, 206 AD3d 498, 498 (1st Dept 2022); *People v Valentin*, 173 AD3d 1436, 1440 (3d Dept 2019); see generally *People v Smith*, 33 NY3d 454, 458 (2019). Here, had Joe Mele or Theresa D'Antonio testified, there is every reason to believe that they would have given the same testimony as Gina Mele, and the video would have been dispositive in any event.

Moreover, in the moment before he crossed the street, Respondent should have been especially sensitive to avoiding a direct confrontation with the Meles, considering that he believed them to be aggressive (Respondent: 1169-72, 1345-47, 1371; *see* RespBr: 10). He crossed the street to engage with them anyway, which increases his own culpability in the brawl that followed.[3]

While Respondent now claims that he fought Joe Mele only "in self-defense and in defense of his wife" (RespBr: 12), the video and audio recordings put the lie to that assertion too. Indeed, those recordings demonstrate that Respondent twice re-engaged Mr. Mele in combat after the two men initially grappled and were separated, despite another neighbor pleading with Respondent to stop and wait for the police (Exs 2-A, p 7; *see* Respondent: 1203). Respondent nonetheless goaded Mr. Mele toward further violence by saying, "Come on . . . you think we're done," "You want to go again, tough fucking guy," and "I'll fucking flatten your face

[3] In his Proposed Findings of Fact and Conclusions of Law ("FOFCOL"), Respondent asks for a factual finding – based on the testimony of Christopher Frigon, LCSW – that the "history of issues with the Mele family was clinically significant because the assumption of safety could not fully be established when there was a random potential of an untoward event happening right at Mark Grisanti's home" (RespFOFCOL ¶ 716). Respondent's proposed finding of fact should be rejected for two reasons. First, Respondent told Detective Moretti that he had not had an issue with the Meles in "probably three years" (Ex 13-A, pp 21-22). In addition, the dispositive video evidence establishes that Respondent crossed the street to initiate the face-to-face confrontation, the brawl that followed cannot be called a "random . . . untoward event."

again" (Ex 2-A, pp 5, 9). Those are not the words or actions of a man defending himself and his wife.[4]

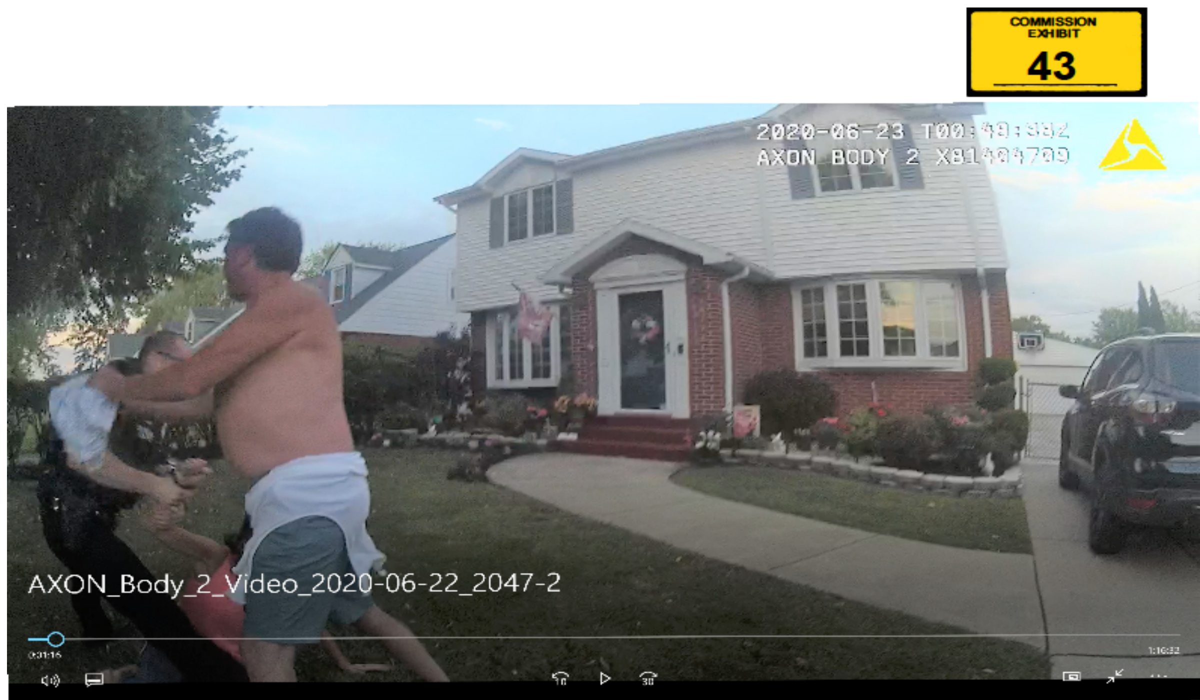
D. Respondent's intentional shove of a BPD officer constituted intentional interference with the officer's official duties.

The video evidence shows that when Officer Gehr attempted to handcuff Respondent's wife, Respondent walked over to Gehr and shoved him with two hands, forcing Gehr backward (Exs 11 at 00:01:48 – 00:01:57; 11-A, pp 6-7; 12 at 00:01:12 – 00:01:21; 43). In his brief, Respondent downplays his physical contact with Gehr, calling it "hardly consequential," and he alternatingly labels his two-handed shove as "reflexive" and an attempt to "get [Gehr's] attention" (RespBr: 16-18, 20). In so doing, Respondent continues to minimize his culpability, and he distorts the record in pursuit of that endeavor.

The video evidence recorded by Officer Muhammad's body camera unequivocally demonstrates that Respondent took several quick steps toward Officer Gehr while yelling, "Hey . . . hey," then put two hands on Gehr's shoulder and pushed him backward while yelling, "Dude, dude . . . You better get off my fucking wife" (Exs 11 at 00:01:48 – 00:01:57; 11-A, pp 6-7; 12 at 00:01:12 –

[4] In his FOFCOL, Respondent asks for specific factual findings based on Frigon's testimony indicating that Respondent acted only in defense of his wife and did not instigate or escalate the violent encounter, including that Respondent "experienced a triggering event which caused him to protect his wife" (RespFOFCOL ¶¶ 705-08). Based on the above-described evidence, those findings are not appropriate on this record, and there instead should be a finding that in brawling with Joe Mele, Respondent was not acting in defense of his wife.

00:01:21; 12-A, p 4). The following still image from the video likewise demonstrates the nature of the contact.



Gehr responded to the physical contact immediately, telling Respondent, "[unintelligible] push me, motherfucker," while Muhammad pulled Respondent into a bear hug and admonished him, "Keep your hands off a cop" (Exs 11 at 00:01:53 – 00:01:55; 11-A, p 6-7; 12 at 00:01:17 – 00:01:20; 12-A, p 4; Gehr: 170). At the hearing, Gehr testified explicitly about Respondent's interference, saying, "I felt a blow on my shoulders, and it allowed [Respondent's wife] to stand

up, didn't allow me to complete the handcuffing" (Gehr: 170).[5] That evidence – along with the video and still image reproduced above – wholly undercuts Respondent's current suggestion that his physical contact with Officer Gehr was inconsequential.

Respondent's assertions that his shove of Officer Gehr was "reflexive" (RespBr: 18) and merely designed to "get [Gehr's] attention" (RespBr: 20) contradict one another and are both patently false. A reflexive action is "completely involuntary"[6] and "done because of a physical reaction that you cannot control."[7] Those definitions do not remotely describe what happened here. Respondent exercised free will to take several steps toward Gehr before deliberately pushing him – all intentional actions wholly within his control.

Nor can Respondent credibly claim that he shoved Gehr simply to get his attention. Given that the shove occurred while Gehr was trying to handcuff Respondent's wife, the obvious conclusion is that the shove was meant to prevent the handcuffing, which it did, if only temporarily. Thus, try as he might,

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[5] Respondent noted that previously, "Gehr told the Commission he did not even notice that Judge Grisanti made contact with his shoulder" (RespBr: 17). Based on the video evidence and Gehr's hearing testimony, noted above, that simply is not true.

[6] *Vocabulary.com*, available at https://www.vocabulary.com/dictionary/reflexive (last visited February 17, 2023).

[7] *Cambridge Dictionary,* available at https://dictionary.cambridge.org/us/dictionary/english/reflexive (last visited February 17, 2023).

Respondent cannot escape responsibility for the fact that he intentionally pushed a police officer to prevent the officer from carrying out his official duties.

Finally, Respondent devotes a sizeable portion of his brief to an argument that his shove of Gehr was not unlawful under the penal law (RespBr: 16-21). That argument simply has no relevance here. Most judicial misconduct is not criminal in nature, and whether Respondent's conduct in shoving Gehr constitutes a crime has no bearing on the plain fact that it violated his ethical obligation to act in a manner that upholds the integrity of the judiciary.

E. <u>Respondent made clear and unequivocal threats to the police.</u>

In his brief, Respondent asserts that he did not threaten Officers Gehr and Muhammad after they detained his wife, but merely offered them "constructive criticism" (RespBr: 23). He also contends that when he invoked his personal relationships with assorted BPD officers and the Mayor of Buffalo, he was not "threaten[ing] . . . retaliation or any exertion of influence," but simply was expressing that he wanted his family members on the force to hear about the incident directly from him, and that he had previously discussed the Meles with Mayor Brown (RespBr: 23-27). Those claims simply are not credible.

The bodycam footage unequivocally shows that Respondent's assertions following his wife's handcuffing were threats. Respondent loudly and angrily told the police, "You arrest my fucking wife, you're going to be sorry" (Exs 11 at

00:02:11 – 00:02:14; 11-A, p 7; 12 at 00:01:34 – 00:01:37; 12-A, p 5), and "If you don't get the cuffs of[f] her right now . . . you're going to have a problem" (Exs 11-A, pp 8-9; 12 at 00:02:03 – 00:02:07; 12-A, p 6). Notably, Officer Muhammad plainly perceived Respondent's statements as a threat, given his immediate admonishment, "We're not doing that; we're not threatening that" (Exs 12 at 00:02:07 – 00:02:08; 12-A, p 6). Thus, Respondent's current assertion that his words were not "taken" as threats (RespBr: 21) is unsupportable.

When the officers did not respond to Respondent's initial threats, he continued. He told the officers that his children were BPD officers and that he was going to "call [them] and their Lieutenants right now" (Exs 12 at 00:02:24 – 00:02:28; 12-A, p 7). In other words, Respondent voiced his intention to appeal to higher ranking officers with whom he had a personal connection – a clear threat to go over their heads. When that did not work, Respondent upped the ante by stating that BPD Deputy Commissioner Joseph Gramaglia was his cousin (a bald-faced lie), and that he was "good friends" with the Mayor of Buffalo (Exs 11 at 00:06:23 – 00:06:43, 00:09:22 – 00:09:30; 11-A, pp 18, 22; 12 at 00:05:48 – 00:06:07; 12-A, pp 14-15). In so doing, Respondent again flaunted his relationships (both real and fictional) with high-ranking officers and political officials, which served to underscore his earlier assertion – now obviously a threat, if that was ever unclear –

that Gehr "would be sorry" and "have a problem." Thus, Respondent's present claims that he did not intend to threaten Gehr (RespBr: 21, 23) fall flat.

At the same time, and again contrary to what he now claims (RespBr: 23-25), Respondent's invocations of Mayor Brown and high-ranking BPD officials also were meant to exert influence over the police on the scene and curry special treatment, as Officer Hy clearly understood. While handcuffing Respondent, Hy said, "You want to drop another copper's name? You want to scream about you know Gramaglia or the Mayor? . . . You're saying everybody's fucking name and dropping everybody's name with a badge, and <u>you're expecting special treatment</u>" (Exs 11 at 00:11:13 – 00:11:41; 11-A, pp 25-27; 12 at 00:10:52 – 00:11:19; 12-A, pp 21-22) (emphasis added). Given the context, Respondent's varying explanations – that he had previously discussed the matter with the Mayor Brown, or that he was somehow giving the police "constructive criticism" (RespBr: 23, 27) – are nothing short of ridiculous.

F. <u>The findings of fact Respondent seeks as to mitigation are not supported by the hearing record.</u>

Finally, Respondent seeks certain findings of fact that he believes are mitigating as to sanction, including that he "acknowledge[d] the inappropriate nature of the conduct," showed "remorse and contrition," demonstrated that "the misconduct was an aberration," and showed that the misconduct "was caused by

depression or other psychological factors" (RespBr: 50). Such facts are not supported by the record, and thus should not be found.

Although Respondent has stated his acknowledgement that his conduct surrounding the Mele brawl was inappropriate and has expressed regret for his actions, his concurrent assertions deflecting blame, minimizing his misconduct, and offering transparently false excuses – all detailed above – severely undercut the sincerity of his acceptance of responsibility. Nor can Respondent reasonably cite "depression and other psychological factors" as the culprit for his flagrant conduct, given that he did not act out in a singular moment of stress or weakness, but made a series of calculated decisions to seek out the fight, escalate and prolong it, serially lie about it to the police thereafter, and then physically attack an officer.

As to Respondent's claim that his brawl with Joe Mele was an "aberrational" event (RespBr: 2, 50), the record refutes that claim too. Respondent himself testified that, in 2012, he participated in a public brawl in a casino (Respondent: 1412-21). Notably, at the hearing, Respondent deflected blame and relied upon his political gravitas to save face as to that altercation, just like he did here. Indeed, he testified that two other individuals were fighting, and while altruistically trying to "defuse the situation," he "tripped on all the people that were trying to break up the fight," which led a security guard to escort him out of the casino because the guard "knew [Respondent] was a Senator" (Respondent: 1413-14). That testimony –

which is ludicrous on its face and should be rejected as incredible – further demonstrates Respondent's penchant for deflecting blame and minimizing his responsibility for his choices.

* * *

In sum, Respondent committed egregious misconduct when he instigated and escalated a public street brawl with a neighbor, physically shoved a responding police officer, repeatedly lied to and threatened the officers, and made a play for special treatment by touting his personal and political connections within the BPD and city of Buffalo. Contrary to Respondent's current claims, the responsibility for his misconduct is his alone, and his varying attempts to deflect blame and excuse his flagrant violations of his ethical duties both wildly distort the record and highlight the fact that he has not truly accepted responsibility for his misconduct.

POINT II

RESPONDENT'S FAILURE TO DISCLOSE HIS FINANCIAL RELATIONSHIP WITH ATTORNEY LAZROE UNQUESTIONABLY VIOLATED THE RULES GOVERNING JUDICIAL CONDUCT (Answering Respondent's Brief, Point II).

At the hearing, Commission Counsel presented evidence that Respondent presided over eight cases involving attorney Matthew Lazroe in which he failed to disclose that Lazroe was paying Respondent hundreds of dollars per month in

connection with his purchase of Respondent's former law practice. Respondent testified at the hearing that he did not disclose that relationship to the parties and disqualify himself from those eight cases because he "didn't know that [he] needed to recuse from any cases" involving Mr. Lazroe, and as to some of them did not even know that Mr. Lazroe represented one of the parties (Respondent: 1237-41, 1322, 1423). He further testified that he learned of the disclosure and recusal requirements after he "researched it, and . . . obtained an [advisory] opinion" (Respondent: 1239-42; *see* Ex 20, pp 19-20).

In his brief, Respondent has changed his tune entirely. He now claims that he made a "judgment" that disqualification from Mr. Lazroe's cases "was not necessary," and that his judgment on that score "was a reasonable exercise of discretion" (RespBr: 28, 36) such that it did not amount to misconduct.

As an initial matter, given the testimony described above and set forth in greater detail in Commission Counsel's main brief (*see* CommBr: 39-43), the record is devoid of a factual predicate to support Respondent's current claim that he made a discretionary judgment to remain on Mr. Lazroe's cases. Moreover, Respondent's candid acknowledgement that he did not even know that Mr. Lazroe was involved in some of the noted cases, and that he "didn't know that [he] needed to" recuse himself in any event (Respondent: 1241, 1423), is wholly inconsistent with his present position. Respondent cannot have it both ways. Because there is

record support for Respondent's hearing testimony and none for the position he takes in his brief, his present position should be summarily rejected.

In any event, for the reasons addressed in Commission Counsel's main brief (CommBr: 66-71), Respondent's present contention that he was not required to disclose and disqualify as to Mr. Lazroe's cases is patently incorrect. *See Matter of Torraca*, 2001 Ann Rep 125, 126 (Commn on Jud Conduct Nov 7, 2000) (disciplining judge for presiding over cases involving an attorney who was making payments to the judge in connection with a business agreement).

In arguing to the contrary, Respondent relies on *Matter of Murphy*, 82 NY2d 491 (1993), for its proposition that "formal charges of misconduct are inappropriate when the circumstances fall in that vast discretionary area over which reasonable Judges can differ" (RespBr: 32) (quoting *Murphy*, 82 NY2d at 495). Respondent's reliance on that assertion is seriously misplaced. First, here – as in *Murphy* – Respondent committed misconduct not by weighing the question of disqualification and making a judgment that recusal was unnecessary, but by failing to disclose the potential conflict and to consider whether disqualification was appropriate at all. In *Murphy* itself, the Court of Appeals found that conduct to violate the Rules and subject the judge to discipline. Moreover, the Court of Appeals has explicitly held, even noting the *Murphy* language Respondent touts, that a judge commits serious misconduct by failing to <u>disclose</u> to the parties a

relationship that could cause an appearance of impropriety. *Matter of LaBombard*, 11 NY3d 294, 298 (2008) (citing *Murphy*, 82 NY2d at 495); *see also Matter of Doyle*, 23 NY3d 656, 662 (2014); *Matter of George*, 22 NY3d 323, 328-29 (2013); *Matter of Assini*, 94 NY2d 26, 28 (1999).

* * *

In sum, Respondent's failure to disclose and disqualify himself from the indicated cases involving Mr. Lazroe constitutes disciplinable misconduct.

POINT III

RESPONDENT COMMITTED MISCONDUCT WHEN HE FAILED TO DISCLOSE RECEIPT OF $15,000 FOR THE SALE OF HIS LAW PRACTICE ON HIS 2015 FINANCIAL DISCLOSURE STATEMENT, AND HE SEPARATELY FAILED TO REPORT MONTHLY EXTRAJUDICIAL INCOME FROM THE SALE OF HIS PRACTICE TO THE CLERK OF HIS COURT UNDER SECTION 100.4(H)(2) OF THE RULES (Answering Respondent's Brief, Point III).

In his brief, Respondent asserts that "if" he failed to disclose on his 2015 Financial Disclosure Statement ("FDS") the $15,000 he received for the sale of his law practice, "any" such failure was inadvertent (RespBr: 43-44, 46). As to his extrajudicial income reporting requirement under Section 100.4(H)(2) of the Rules, Respondent argues that he was not required to report the income he received for the sale of his law firm from 2015 through 2019 on the ground that he

consummated the sale before he became a judge (RespBr: 48-49). As to the former, Respondent absolutely made a material omission from his FDS, and even if was inadvertent, it constitutes disciplinable misconduct. As to the latter, Respondent is simply incorrect.

A. Respondent's material omission of the $15,000 down payment from his 2015 FDS constitutes judicial misconduct, even if the omission was careless rather than intentional.

Respondent unquestionably failed to properly report the $15,000 he received for the sale of his law practice on his 2015 FDS. Indeed, although Respondent reported the $4,380 in installment payments, his responses to questions 12(a), 12(b), 13, and 18 made no reference to the $15,000 down payment (Ex 23; *see* CommBr: 73-75). While he freely admitted at the hearing that he did not include the down payment, he hedges on the issue in his brief, asserting that "[h]e believes that when he filled out the [FDS], he included the down payment," that "[i]t was not [his] intent to conceal the down payment," and "[i]f any information was omitted, it was inadvertent" (RespBr: 43-44).

Given Respondent's clear error in this regard, his doublespeak is troubling and further suggests an unwillingness to accept responsibility for his misconduct (*see* Point I, *supra*). Respondent admitted the omission at the hearing and in his Verified Answer to the Complaint, explaining that he did not include the $15,000 down payment because "at the time [he] got the down payment, [he] was not a

Judge" (Respondent: 1254; Answer ¶ RESPONSE #44). Furthermore, when the missing $15,000 entry was brought to Respondent's attention, he wrote a letter to the Executive Director of the New York State Ethics Commission admitting his incorrect reporting of the income in Question 13 (Ex S). And, Respondent subsequently submitted an amended 2015 FDS, changing his response to Question 13 to reflect that the amount of income received for the sale of his law office from "under $5,000," to "between $5,000 – $20,000" (Ex U).

Materially deficient FDS filings constitute serious misconduct, even where the deficiencies are due to carelessness rather than an intent to conceal information. Indeed, as the Commission has squarely held, FDS filing "lapses are not excused by negligence or inattention" because, "even if inadvertent, [faulty filings] create the appearance that [the judge] was intentionally concealing his extra-judicial activity." *Matter of Ramich*, 2003 Ann Rep 154, 159 (Commn on Jud Conduct Dec 27, 2002); *see Matter of Alessandro*, 13 NY3d 238, 249 (2009) (even "careless" or "negligent" FDS omissions from a constitute misconduct). Thus, a finding of misconduct is required under the present facts, and Respondent's demonstrated unwillingness to fully accept responsibility for his mistake is an aggravating factor that should be found as well.

B. Respondent was required to report his ongoing receipt of income from the sale of his law office to the clerk of his court under Rule 100.4(H)(2).

Respondent acknowledges that he did not report recurring monthly income he received between 2015 and 2019 for the sale of his law office to the clerk of his court under Section 100.4(H)(2) of the Rules, but he claims he was not required to do so because the sale of the practice was consummated before he became a judge (RespBr: 48-49). He also analogizes this circumstance to a judge's receipt of payment for legal work he completed before became a judge, which – according to the Advisory Committee – need not be reported under that Rule (*id.*).

Respondent is simply wrong in his belief that he was not required to report this income, and his analogy is inapt. The payments Respondent received for the sale of his practice were not payments for legal services previously rendered – they were payments for sale of an asset. As a result, Respondent's reliance on AO 89-67 (no reporting requirement for "compensation received for activities completed prior to taking judicial office") is misplaced. Relevant, instead, is the Advisory Committee's position that payments received after a judge takes the bench for the sale of assets of a former business must be reported to the clerk of the judge's court. *See* AO 22-119 (payments for sale of inventory of former business are reportable).

The policy underlying the reporting requirement of Section 100.4(H)(2) – promoting transparency in the sources of income a judge receives so that conflicts may be readily ascertained – furthers this reading of the Rule. Indeed, if Respondent were not required to report this ongoing source of income from the attorneys who had an active contractual agreement for the purchase of his practice, there might have been a higher likelihood that one of those attorneys would mistakenly be allowed to appear before Respondent, as actually happened with Matthew Lazroe (*see* Point II, *supra*). Moreover, Respondent's Administrative Judge plainly read the rule in this fashion, given her email to Respondent in 2021 advising that the 100.4(H)(2) reporting requirement applied to "income due from practice that has been wrapped up but money still owed" (Ex Q). To interpret the Rules Governing Judicial Conduct and Opinions otherwise would hide ongoing financial enrichment of a judge by attorneys and parties appearing in his or her court, and eliminate the transparency needed to identify ethical conflicts necessary to preserve the integrity and impartiality of the judicial system.[8]

[8] In December 2022 the Acting Chief Administrative Judge removed this reporting requirement from Section 100.4 of the Rules, but simultaneously added it the FDS reporting requirements under Part 40 of the Rules of the Chief Judge, in order to promote efficiency in the area of financial reporting by judges. *See* Memorandum by Anthony Perri, dated Oct 12, 2022, available at https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/RPC%20-%20Rule%20100.4.pdf (last visited February 17, 2023). Respondent notes this change (RespBr: 40) but does not cite it in support of his argument that he was not required to report his law practice sale income under Rule 100.4(H)(2).

*   *   *

In sum, Respondent's repeated failure to fully comply with his financial reporting requirements constitutes a serious violation of the Rules.

CONCLUSION

Counsel to the Commission respectfully requests that the Referee adopt the proposed findings of fact and conclusions of law and find that Charges I, II and III of the Formal Written Complaint are sustained.

Dated: February 21, 2023
Rochester, New York

Respectfully submitted,

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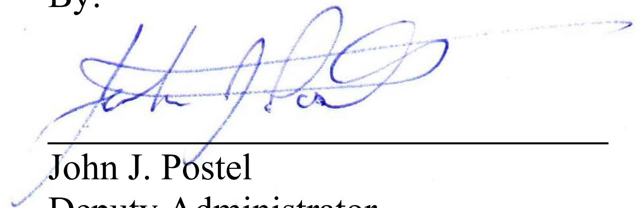
By:



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