

PAUL DEROHANNESIAN, ESQ. (1953-2001)

PAUL DEROHANNESIAN II, ESQ.

DANIELLE R. SMITH, ESQ.

May 15, 2019

CONFIDENTIAL

VIA ELECTRONIC MAIL ONLY

Robert A. Barrer, Esq.
Barclay Damon LLP
125 East Jefferson Street
Syracuse, New York 13202

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

Dear Mr. Barrer,

The Respondent Richard H. Miller, II, submits this letter in reply to the Commission's Post-Hearing Memorandum and Proposed Findings of Fact and Conclusions of Law and its argument at pages 56-59 with respect to application of the missing witness rule. As part of that argument the Respondent notes that Ms. L [REDACTED]'s hearsay testimony of Mr. Iannone was not admitted for its truth but only for a limited purpose and may not be considered as substantive evidence in this proceeding.

As a threshold matter, "the [missing witness] rule ordinarily does not apply when a witness is equally accessible to both parties." People v. Rodriguez, 38 N.Y.2d 95, 98 (1975). Equal availability of the witness requesting the charge precludes a missing witness instruction. Availability involves an analysis of control. There is no proof that Iannone is "under the control" of the Respondent as required for a missing witness instruction. People v. Kitching, 78 N.Y.2d 532, 537 (1991). "Under the control" implies a close relationship as noted by the cases cited by the Commission in its brief. For example, in the cases cited by the Commission, in one, Gonzalez, the witness was a common-law husband and in Keen the witness was a former girlfriend of the defendant and mother of his child. People v. Gonzalez, 68 N.Y.2d 424, 426 (1986) and People v. Keen, 94 N.Y.2d 533, 536 (2000) (applying missing witness charge involving defendant's former girlfriend and mother of his child since it was reasonable to infer the witness was under defendant's control). In People v. Rodriguez, control was established in reference to a defendant's wife. 38 N.Y.2d 95 (1975).

The Commission acknowledged it had subpoenaed Iannone for a deposition in its investigation and procured his testimony. (T1290-91). The Commission offered nothing from its deposition in support of its request for a missing witness inference. The Commission offered no proof or statement what Iannone's testimony would be. Even assuming an inference could be applied in this proceeding, the inference is discretionary and not mandatory. The rule does not permit "speculat[ion] about what the witness would have said, nor may [the factfinder] assume

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that the witness could have provided positive evidence corroborating or filling gaps' in the proponent's case." People v. Paylor, 70 N.Y.2d 146, 149 (1987).

Even though the Commission subpoenaed Mr. Iannone previously in its investigation and obtained his testimony, the Commission had one month between January 11 and February 12 to subpoena Mr. Iannone but chose not to subpoena him. The Commission did not suggest hostility on Iannone's part or an inability to procure his attendance.

It is also a fundamental requirement that the witness be in a position to offer testimony on a material and non-cumulative issue. Kitching, 78 N.Y.2d at 536-37. For example, a witness to the accused's alibi possesses information about a material non-cumulative issue. See e.g. People v. Wilson, 64 N.Y.2d 634 (1984) (holding missing witness instruction proper in case of defendant's wife who was allegedly with him at time of crime since such testimony was neither "trivial or cumulative" testimony). Apart from making no offer of what Iannone could be expected to say, Iannone would have no knowledge what if any photo was allegedly ever in Respondent's possession or displayed by Respondent. Iannone would have no knowledge what transpired in Judge Miller's chambers. The Complaint alleges conduct in chambers for which Iannone would have no direct knowledge. L [REDACTED]'s recounting of what Iannone allegedly described occurred outside of chambers at a restaurant is not part of the Complaint. Iannone is not in a position to offer testimony on a material and important issue when he was not in Judge Miller's presence at the time of the allegations in the Complaint. (See Respondent's Hearing Memo, pp. 13, 21; T270).

It is also important to note that Respondent objected to L [REDACTED]'s hearsay testimony of Iannone. The Commission stated the hearsay was offered for L [REDACTED]'s "subsequent actions" and the referee accepted the testimony for that limited purpose. (T269). The referee overruled the objection and admitted the hearsay, but not for its truth. The Referee accepted Respondent's ongoing objection to L [REDACTED]'s hearsay testimony of Iannone and made clear he was "not accepting" the hearsay "for its truth," but only accepting the hearsay for the purpose of L [REDACTED]'s "state of mind." (T270). L [REDACTED]'s hearsay was not offered for its truth and cannot be used to support any factual allegation relating to Iannone.

For all the reasons set forth in the Respondent's Hearing Memo and his reply, the Commission has failed to meet its burden of proving the charges against Judge Miller by a preponderance of evidence and the charges should be dismissed.

Very truly yours,



Paul DerOhannesian II
Deborah Scalise

cc: Cathleen S. Cenci, Esq.