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

MICHAEL F. MCGUIRE,

a Judge of the County and Surrogate's Courts, an
Acting Judge of the Family Court and an Acting
Justice of the Supreme Court, Sullivan County.

REPLY MEMORANDUM BY COUNSEL TO THE COMMISSION

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PRELIMINARY STATEMENT

This Memorandum is respectfully submitted in reply to Respondent's submission to the Referee.

Each of the thirteen charges set forth in the Formal Written Complaint were conclusively established by the hearing record evidence and should be sustained. Respondent's attacks on the credibility of multiple witnesses are without merit and his attempt to shift the blame to others demonstrates his inability to accept responsibility for his actions.

The portion of Respondent's submission entitled "Conclusion" should be disregarded at this stage of the proceeding since the Referee is not permitted to make a recommendation with respect to sanction. *See* 22NYCRR 7000.6(1).

ARGUMENT

THE THIRTEEN CHARGES IN THE FORMAL WRITTEN COMPLAINT ARE WELL-SUPPORTED BY THE EVIDENCE AND SHOULD BE SUSTAINED.

As set forth in more detail in the Commission's main brief, each of the charges in the Formal Written Complaint was supported by considerable credible evidence.

A. CHARGES I to VII

Faced with overwhelming evidence, Respondent admits that he summarily committed two litigants to custody without warning or an opportunity to be heard (Charges I and II; Resp Br 3-4),[1] summarily detained four others without notice or a

[1] Citations to "Resp Br" refer to Respondent's main brief to the Referee. Citations to "Comm Br" refer to Commission counsel's main brief.

hearing (Charges III-VI; Resp Br 4-7) and threatened to arrest three additional litigants for contempt (Charge VII; Resp Br 8-12). Respondent further admits that he failed to address these litigants in a patient, dignified and courteous manner (Resp Br 7).

These acknowledgments, and his claims that he has "changed his practice" and "his belief about his authority under the Judiciary Law" (Resp Br 4, 7), in no way minimize or excuse his misconduct. As the Court of Appeals stated in *Matter of Bauer*, 3 NY3d 158, 165 (2004), "[i]n some instances contrition may be insincere, and in others no amount of it will override inexcusable misconduct." *Matter of Bauer,* 3 NY3d 158, 165 (2004).

At the hearing, Respondent demonstrated a lack of understanding of the purpose of the summary contempt power, testifying that litigants "gained greater insight and appreciation of the authority of the court" after they were taken into custody and handcuffed (Tr 2440-41). And notably, Respondent continues to argue that he "did not violate the Rules of Judicial Conduct" by threatening T E with contempt because he (A) gave Ms. E "repeated non-verbal warnings to desist" from her allegedly disruptive behavior and (B) Ms. E "was not removed from the courtroom or held in contempt" (Resp Br 9, 11).

Respondent's arguments miss the mark for several reasons. First, the court's summary contempt power may be exercised only in "exceptional and necessitous circumstances." *See Matter of Singer*, 2010 Ann Rep 228, 231 (Commn on Jud Conduct, July 1, 2009) *quoting* 22 NYCRR 604.2(a)(1). The threat of contempt against Ms. E for supposedly "turning around and speaking with Mr. F" (Resp Br 9),

was excessive and inappropriate. Moreover, Respondent never told Ms. E[redacted] what conduct he viewed as disruptive before threatening, "[Y]ou are three seconds from getting yourself put in handcuffs and taken out of here" (Exs VII-5, VII-5a). There is no evidence in the record that anyone witnessed Respondent's "non-verbal warnings," much less Ms. E[redacted]'s allegedly disruptive conduct (Tr 520-22, 599; Exs VII-5, VII-5a).

Even assuming, *arguendo*, that Respondent gave Ms. E[redacted] "repeated non-verbal warnings," those silent signals are no substitute for explicitly telling her that her specific conduct could result in contempt if she did not desist and giving her an opportunity to be heard. *See* Comm Br 105-06 and cases cited therein.

Finally, the fact that Respondent did not act on his threat against Ms. E[redacted] and hold her in contempt does not excuse his misconduct. As the Commission has made clear, a baseless threat of contempt or jail is inappropriate, notwithstanding that a judge does not act on his threat. *See Matter of Hart*, 2009 Ann Rep 101 (Commn on Jud Conduct, March 7, 2008); *Matter of Waltemade*, 37 NY2d (nn) (Ct on the Judiciary 1975).

B. <u>CHARGE VIII</u>

The credible evidence establishes that on repeated occasions over several years, Respondent demeaned, harassed and threatened his court staff. Respondent's attempt to discredit these witnesses should be rejected.

Respondent's argument that Wendy Weiner's testimony should be discredited as inconsistent (Resp Br 18-20) is contradicted by record evidence. Ms. Weiner testified credibly concerning her encounter with Respondent on January 14, 2015, explaining that

it left her "shaking" and "scared" (Tr 1449, 1584, 1589, 1592, 1601, 1609, 1611). Significantly, Ms. Weiner's testimony was corroborated by the testimony of two court officers who witnessed Ms. Weiner's condition shortly after her encounter with Respondent. Both Officer Downs and Sergeant Olivieri described Ms. Weiner as upset, shaking, crying and scared (Tr 163, 375, 376, 435). Sergeant Olivieri went so far as to write a report about his conversation with Ms. Weiner (Tr 164), which in turn led to an investigation by the Office of the Inspector General (Tr 2429-30; Resp Br 1). The findings of that investigation and Ms. Weiner's transfer to another position in the court system further bolsters Ms. Weiner's account (Tr 986-88, 1460-61).

Respondent's attack on Ms. Weiner due to her purported inability to recall or recollect her prior testimony on cross-examination, and her ability "to clearly and concisely recall events" on direct examination (Resp Br 19), does not discredit Ms. Weiner. It is not surprising that Ms. Weiner would specifically remember Respondent becoming "very upset and agitated," yelling at her and throwing a computer jump drive at her while they were alone in chambers (Tr 1443-49). This is particularly so, since the incident left her "shaking," scared," and "very upset" (Tr 1449, 1584, 1589, 1592, 1601, 1609, 1611) and was the impetus for an investigation by the Inspector General and her transfer out of Respondent's court (Tr 986-88, 1460-61, 2429-30).

Respondent's repeated attempts to downplay his behavior and challenge the credibility of the Commission's witnesses demonstrate his continuing failure to acknowledge wrongdoing. While Respondent characterizes his conduct toward his court clerk, Andrea Rogers, as a "difference of opinion" (Resp Br 21), Ms. Rogers credibly

testified that Respondent regularly spoke to her in a "very condescending" manner (Tr 1139, 1140, 1142, 1145), frequently extended his arm and palm in the direction of her face when she asked a question and rolled his eyes when she asked a question (Tr 371-72, 433, 1141, 1143-44).

Similarly, Respondent portrays his conduct toward Court Officer Diaz as a "single incident," notwithstanding Officer Diaz's testimony that on three different occasions, Respondent yelled at him or spoke to him in a "loud" and "angry" tone (Tr 1674-76, 1683, 1679-81). The officer's testimony is corroborated by audio recordings that captured Respondent yelling at Officer Diaz during *D* [redacted] *v T* [redacted] *N* [redacted] (Exs VIII-2, VIII-2a) and *H* [redacted] *v E* [redacted] (Exs VIII-3, VIII-3a), and the testimony of Sergeant Oliveri, who heard Respondent yelling at Officer Diaz over the radio during *E* [redacted] (Tr 117, 275, 293). The officer's account is also bolstered by the testimony of Andrea Rogers that Respondent yelled at Officer Diaz "frequently" (Tr 1159, 1236).

Respondent also attempts to excuse his conduct toward Sergeant Olivieri, by claiming that the encounter "did not result in any physical conduct" and did not violate the Rules (Resp Br 25). The fact that Respondent appeared on the verge of initiating a physical confrontation with a court officer, but did not make physical contact, is not an excuse. The undisputed evidence establishes that Respondent approached Sergeant Olivieri in a "very aggressive manner" (Tr 123-24, 125, 1163, 1238, 1464-67) and yelled at him (Tr 123, 125-26, 130-31, 314, 1163), which is a plain violation of a judge's duty to be "patient, dignified and courteous" under Section 100.3(B)(3) of the Rules.

C. CHARGE X[2]

Given the uncontroverted evidence that he filed a notice of appearance and personally appeared in the Oneonta City Court (Tr 2395, 2563-64; Exs X-1, X-1a, X-2, X-2a, X-47q), Respondent admits, as he must, that he improperly practiced law on behalf of his son in *People v W M* (Resp Br 40).

Despite Respondent's arguments to the contrary, however, the Commission's proof amply demonstrates that, notwithstanding the rule that prohibits it, Respondent also practiced law on behalf of his wife, Corinne McGuire, as well as Eileen and Phillip Moore and his former clients George Matisko, Ricky Pagan and Christopher Lockwood.

The letter Respondent wrote to the Wawarsing Town Justice on behalf of his wife, Corrine McGuire, clearly refutes his claim that he did not practice law or "expect[ ] to receive a benefit based upon his being a judge" (Resp Br 41). Respondent submitted the letter on his former law firm's letterhead and explicitly requested that the court take a specific action on his wife's ticket. He made this request after identifying himself as a County Court Judge, with the disclaimer that he could not represent "this or anyone other client" (Tr 2569, 2571, Ex X-3a). Respondent's conduct in requesting a specific plea conveyed the plain impression that he was acting as his wife's attorney, and his gratuitous reference to his judicial status in the letter can only be seen as an attempt to influence the outcome of his wife's case.

[2] Commission counsel notes that with respect to Charge IX, Respondent admits that his comments in the child custody matter *M M v R H* were "inappropriate" (Resp Br 30).

There is no evidence in the record to support Respondent's claim that unbeknownst to him and entirely without his authorization, Ms. Weiner independently negotiated a settlement on behalf of Mr. Matisko, prepared a release and notarized that release (Resp Br 41-42). Respondent offers no plausible motive why Ms. Weiner would undertake these alleged rogue actions on behalf of Respondent's former client. It is far more likely, as Ms. Weiner testified, that Respondent, who represented Mr. Matisko while in private practice, continued his representation after he took the bench and asked for Ms. Weiner's help.

It is telling that Respondent argues that the Commission should have called George Matisko as a witness "to corroborate Ms. Weiner's account" (Resp Br 44). If Respondent believed that Mr. Matisko, with whom he had a relationship prior to becoming a judge (Tr 2383), would confirm his version of the facts, it was incumbent on him to present this evidence by calling Mr. Matisko to testify.

Respondent offers not a single citation to the record for his assertion that he "provided no legal advice after January 1, 2011" to the parties in the sale of the property to Ricky Pagan (Resp Br 47). To the contrary, the evidence introduced at the hearing refutes this assertion. In 2012, while a full-time judge, Respondent called Mr. Pagan and advised him to pay the remainder of the money for the property after learning from the seller that she had received a foreclosure notice (Ex X-42r). The next year, while still a full-time judge, Respondent advised Mr. Pagan about "how to go about finishing the deal" (Tr 468-69, 472, 2606-07; Ex 42-r) and mailed a cover letter, documents and a check to the seller (Exs X-42r, X-43c, X-43d). The recording page of the deed filed in

the Sullivan County Clerk's Office in November 2013, shows that the deed was received from "MCGUIRE" and the deed itself directs that it should be returned to Michael F. McGuire at his PO Box (Exs X-39, X-43c).

Respondent's insistence that it was his brother, Ken McGuire, who "provided assistance, without fee to Mr. & Mrs. Moore" and "reviewed the contract of sale" for the Moores (Resp Br 44), pointedly ignores the Moores' testimony.[3] While the Moores acknowledged that Respondent told them that his brother may be willing to assist them without charge (Tr 702-03), they also testified that Respondent brought the contract of sale to their home, explained the document, indicated where it needed to be signed, stayed as the contract was signed and left the house with the signed contract (Tr 681-84, 688-90, 696-97, 698, 704-05, 1372, 1398, 1525, 2103, 2583-85; Exs X-18, X-19, X-42b, X-42e). The Moores never met Ken McGuire and never spoke to him (Tr 680-81, 696). The only email addresses provided to the seller during the real estate transaction belonged to Respondent and his wife and the only telephone number provided to the seller's attorney was Respondent's cell phone (Tr 2586-88; Exs X-23, X-24, X-26, X-28, X-29, X-30, X-34).

Respondent similarly alleges that his brother took over Christopher Lockwood's speeding ticket case (Resp Br 47-48). However, the Liberty Town Court Clerk testified that it was Respondent that returned her phone call concerning the case (Tr 1800-01) and a letter signed by Respondent's brother was sent to the prosecutor on the letterhead of

[3] In addition, as set forth in the Commission's main brief, pp. 142-145, the Referee should draw an unfavorable inference against Respondent for his failure to call his brother as a witness.

Respondent's former law office (Ex X-46d), notwithstanding that Respondent had closed his law office and was serving as a full-time judge. Ms. Weiner testified that it was Respondent who filled out an Application to Amend Traffic Infraction for Mr. Lockwood (Tr 1485, 1486-87, 1657, 1658), and that she thereafter sent the form to the Liberty Court Clerk with Respondent's knowledge (Tr 1485-87, 1657; Ex X-40e). Respondent proffers no reason why Ms. Weiner would fabricate such testimony, instead generally stating that her testimony should not be credited because her testimony did not jibe with that of the court clerk on an insignificant fact (Resp Br 49). Indeed, that very same witness whose testimony Respondent relies upon to discredit Ms. Weiner testified that she never received Ken McGuire's contact information, never spoke to him and he never appeared in court during the Lockwood case (Tr 1809).

D. CHARGE XI

Record evidence establishes that Respondent presided over numerous cases where his impartiality could reasonably be questioned.

1. *Relationship with attorney Zachary D. Kelson*

Respondent's attempt to minimize his failure to disqualify himself in cases where attorney Zachary D. Kelson appeared before him by noting that "Sullivan County is a small and rural county" (Resp Br 61) is without merit. As the Commission held in *Matter of Young*, 2012 Ann Rep 206 (Commn on Jud Conduct, October 7, 2011),

> in small communities, local justices may frequently be presented with matters in which they have some personal relationship with the parties. Although disqualification may occasion some inconvenience and delay, every judge must be mindful of the importance of adhering to the ethical

> standards so that public confidence in the impartiality of the judiciary may be preserved.

Id. at 218, *citing Matter of Thwaits,* 2003 Ann Rep 171, 174 (Commn on Jud Conduct, December 30, 2002).

As Respondent's brief makes clear, he still does not understand that a clear conflict existed when Mr. Kelson represented his and his family's friends and at the same time appeared before him in court (Resp Br 66-68). Even if it is true that Respondent demonstrated no "bias in favor of Mr. Kelson's cause" (Resp Br 66-67), any appearance by Mr. Kelson raised a potential conflict of interest that needed to be disclosed to the parties. *See e.g., Matter of Valcich,* 2008 Ann Rep 221, 223 (Commn on Jud Conduct, August 21, 2007).

2. Tina McTighe

Inexplicably, Respondent alleges that he "took no action with respect [to] Ms. McTighe's ticket" and that it was Respondent's wife who suggested Ms. McTighe contact Mr. Kelson (Resp Br 51, 63). But in direct refutation of that claim, Mr. Kelson testified that Respondent told him about Ms. McTighe's traffic ticket and/or emailed the ticket to him (Tr 661). And the record makes clear that Respondent answered multiple emails sent by Mr. Kelson updating him on the status of the case (Tr 670, 669-70, 673, 2634, 2628-29; Ex XI-7, XI-8). In those emails, Respondent asks "are we going to be able to get a 1201-a out of this" (Tr 669-70; Ex XI-7) and assures Mr. Kelson that he will "absolutely … take care" of making sure Ms. McTighe knows of the disposition and pays

the fine (Tr 673; Ex XI-8). Respondent's claim that he "took no action" with respect to Ms. McTighe's ticket is simply false.

3. *County of Sullivan v Estate of Lydia Fernandez and Eye Physicians of Orange County, PC v Gerardo Fernandez.*

In defense of his conduct in the cases involving Jerry Fernandez, Respondent makes multiple references to statements he made during his 2017 appearances during the Commission's investigation (Resp Br 52). The Referee should disregard these statements as outside the record because the transcripts of Respondent's June 12, June 19 and June 23, 2017 appearances were not placed into evidence.

4. Willie Williams

Respondent's claim that he "was unaware that [Willie Williams] had received a traffic infraction and unaware that he was using Mr. Kelson to assist him with that matter" (Resp Br 55) is also flatly contradicted by Mr. Kelson. Mr. Kelson testified that Respondent asked him to represent Mr. Williams, with whom Respondent was acquainted from the time Respondent was employed by Sullivan County Community College (Tr 755-56; Ex XI-26)

5. Lori Shepish

Respondent again tries to minimize his misconduct by falsely stating that he "played no role in [Lori Shepish's] selection of Mr. Kelson" (Resp Br 56, 66). Mr. Kelson testified that Respondent had given Ms. Shepish his name along with the names of two other attorneys (Tr 763, 861).

6. Dean v Boyes

Respondent's attempts to undercut the testimony of his law clerk, Mary Grace Conneely, are without merit. His disingenuous claim that Ms. Conneely did not inform him that Boyes & Torrens were still working on her house on a "new contract" at the same time he was presiding over *Dean v Boyes* (Resp Br 60) is mere obfuscation. Respondent admitted on cross-examination that Ms. Conneely told him that Boyes & Torrens was doing "touch-up work" and "replacing a cabinet door" while he was presiding (Tr 2625). Even if it were true that he did not know about a "new contract" – an assertion that is directly contradicted by Ms. Conneely's credible testimony that she fully disclosed the full extent of Boyes' continuing work (Tr 1342-43, 1346) – Respondent was required to disclose the continuing work he admits Ms. Conneely told him about.

Respondent's claim that Ms. Conneely "did not recognize the existence of a real or potential conflict as a result of her new contract with Boyes and (sic) Torrens" is also contradicted by the record. Ms. Conneely clearly testified that during the pendency of the case, she recognized that there was a conflict, believed the parties should be informed and conveyed this information to Respondent, who assured her that a record had been made (Tr 1267-68, 1274-75, 1280, 1342, 1345, 1347, 1351).

Instead of taking responsibility for his actions, Respondent blames Ms. Conneely for his failure to inform the parties that a conflict existed (Resp Br 70 -72) – an argument so weak that Respondent is reduced to faulting Ms. Conneely because she did not "discuss this matter everyday unless something new came up" (Resp Br p 70). Clearly,

Respondent had an ethical obligation to disclose the conflict the first time Ms. Conneely brought it to his attention. It is no defense that she did not remind him of his obligation "everyday."

Respondent is also incorrect when he argues that since he directed Ms. Conneely to conduct conferences with the parties it "would have fallen upon her to make that disclosure" (Resp Br 70-71). Respondent fails to note that he told Ms. Conneely he had already disclosed the conflict to the parties and she therefore believed that the matter had been properly dealt with (Tr 1268, 1271, 1275, 1280, 1345, 1351). In any event, the Rules make clear that it is the judge's responsibility – not his law clerk's – to ensure that litigants are informed of potential conflicts and given the opportunity to move for his recusal. *See* Rule 100.3(E)(F).

E. CHARGE XII[4]

Respondent's attack on the credibility of Wendy Weiner's testimony as to the pistol permit interviews (Resp Br 80-81) is unpersuasive and belied by the record.

The crux of Respondent's argument is the baseless claim that Ms. Weiner "mold[ed] her … testimony to comport with her contrived narrative" (Resp Br 80). The only evidence Respondent offers in support of that claim is a purported inconsistency in Ms. Weiner's recollection as to when the interviews at the Villa Roma occurred (Resp Br

[4] With respect to Charge XIII, Respondent admits that he used the email address judgemcguire@[redacted] while he was a sitting judge (Resp Br 83).

80-81). But a close reading of the transcript makes it clear that there was no inconsistency in Ms. Weiner's testimony.

During the hearing, Ms. Weiner testified that the interviews at the Villa Roma started at 4:30, after referring to the printed interview schedule introduced into evidence (Tr 1518, 1520; Ex XII-1a). She readily conceded that at the time of the hearing, she had no present recollection of the time the interviews began, and that she based her statements regarding the timing on her reading of the hearing exhibit (Tr 1555-56). There is no inconsistency between Ms. Weiner's current testimony that she doesn't recall what time the interviews took place, and her testimony during the Commission's investigation that the interviews started at 1:30 or 2:00 (Tr 1554).[5]

Significantly, Respondent makes no argument that there is any inconsistency between Ms. Weiner's testimony during the investigation and her testimony at the hearing that Respondent instructed her to inform the applicants that "the reason we were holding [the interviews at Villa Roma] was because of the [Friends of the NRA] dinner and that they were more than welcome to partake if they were interested" (Tr 1519-20).

[5] Respondent again refers to things outside the record when he states that Ms. Weiner was "able to recall minor details about the planning and management of the event when she provided her deposition to the Commission" (Resp Br 81). Ms. Weiner's prior testimony was not an exhibit and therefore any statement about it should be disregarded.

CONCLUSION

Counsel to the Commission respectfully requests that the Referee adopt the proposed findings of fact and conclusions of law enumerated in Appendix A to our October 2, 2019, Memorandum and find that Charges I through XIII of the Formal Written Complaint are sustained.

Dated: October 16, 2019
New York, New York

Respectfully submitted,

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