

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding  
Pursuant to Section 44, subdivision 4,  
of the Judiciary Law, in Relation to

**RICHARD H. MILLER, II,**

a Judge of the Family Court,  
Broome County.

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**HEARING SUBMISSION FOR  
RESPONDENT RICHARD H. MILLER, II**

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## **INTRODUCTION**

This matter is a proceeding initiated by the New York State Judicial Conduct Commission (the “Commission”) based on a Formal Written Complaint served on the Hon. Richard H. Miller, II, (“Judge Miller”), a Judge of the Broome County Family Court, pursuant to Section 44, subdivision 4, of the Judiciary Law for acts of judicial misconduct in violation of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct (the “Rules”).

The Complaint asserted four charges, the gist of which, were essentially that over a two-and-a-half-year period after he was sworn in, Judge Miller:

- engaged in inappropriate behavior toward certain staff members of the Broome County Family Court, making unwelcome comments of a sexual nature to and about them, and threatening their physical safety and wellbeing (Charge I);
- lent the prestige of judicial office to advance his own private interests and/or the interests of others, and failed to conduct his extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that, on multiple occasions, he importuned chambers’ staff to perform services unrelated to their official duties (Charge II);
- engaged in the practice of law and/or conveyed the impression that he was still engaged in the practice of law as a full-time judge, with respect to two Estate matters that he handled in private practice prior to becoming a full-time judge (Charge III); and
- failed to file timely and accurate disclosure reports of his income from extra-judicial activities to the Ethics Commission for the Unified Court System, the Internal Revenue Service, the New York State Department of Taxation

(Charge IV).

Judge Miller denied the allegations in large part, in his Verified Answer and during the proceedings presenting witnesses and evidence in his defense.

At the conclusion of the proceedings, Special Referee Robert Barrer, Esq., issued a directive that the parties file proposed findings of fact and conclusions of law. Accordingly, we submit the instant proposed findings of fact and conclusions of law on behalf of Judge Miller.

### **PROCEDURAL BACKGROUND**

After a lengthy investigation by the Commission, in which Judge Miller fully cooperated, on or about July 9, 2018, the Commission served a Notice of Formal Written Complaint and the Formal Written Complaint (the “Complaint”) in this matter asserted that Judge Miler should disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, and set forth four Formal Charges and the factual basis in support of the Charges.

On August 8, 2018, Judge Miller filed a Verified Answer denying the Charges.

Thereafter, Special Referee Robert A. Barrer, Esq. was assigned to preside over the matter.

Special Referee Barrer presided over the six (6) day hearing. Deputy Administrator Cathleen Cenci, Esq., S. Peter Pedrotty, Esq., and Eteena J. Tadjioqueu, Esq., appeared for the Commission. Paul DerOhannesian, II, Esq., and Deborah A. Scalise, Esq., appeared as counsel to Judge Miller. References to the transcript are indicated as “T#” and references to Exhibits are indicated as “Comm. X” for the Commission’s exhibits and “Resp. X” for Respondent’s exhibits.

The hearing was held on January 7, 8, 9, 10, 11, 2019, and February 12, 2019. (T1-T1500). The Commission called the following nine (9) witnesses: Mark Kachadourian, Esq. (T-

19-246; D [REDACTED] L [REDACTED] (T260-319); Rebecca Vroman (T321-52); Debbi Singer (T355-405); Deborah Stone (T410-66); Barbara Saraceno (T469-85); Robert Wedlake. Esq. (T486-517); Louis Micha (T521-32); and Rachelle Gallagher (T541-786). Judge Miller testified (T1296-1491), and also called the following thirteen (13) witnesses: Police Officer Jolene Payne (T799-809); James Stilloe (T856-82); Martin Shaw (T908-20); Jerry Penna (T921-61); Richard Balles (T962-75); Katherine Fitzgerald, Esq. (T976-94); Sandra Conklin (T996-1021); Artan Serjanej, Esq. (T1022-1070, T1100-1112); Lisa Wojdat (T1074-1099); David Behal (T1114-86); Sgt. Ronald Kreb (T1193-1209); Diane Marusich (T1209-35); and Robin Dean (T1241-87).

During the hearing, the Commission submitted 114 documents (Comm.: 2-V, 2-W, 4-C, 4-Y to 4-III, 5-A to 5-VV, 6-Q, 7-C, 8-A to 8-D, 9-A to 9-J, 10-A to 10-C, 12, 15, 17, 18 and 19) which were admitted into evidence; Judge Miller submitted 16 documents (Resp.: L, V, X, AA, BB, CC, DD, FF, GG, HH, II, LL, MM, NN, OO and PP) and the Special Referee admitted six documents (Referee Exhibits: 1 to 6) (Ti-xxi).

At the close of the hearing, the parties were directed to simultaneously submit proposed Findings of Fact and Conclusions of Law. Accordingly, this Findings of Fact and Conclusions of Law is respectfully presented to address the factual and legal issues that have arisen in this case in order to assist the Referee and the Commission in determining whether the Charges should be sustained and, to assist the Commission in determining the appropriate sanction for Judge Miller's conduct.<sup>1</sup>

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<sup>1</sup> We recognize and agree that the duties of a Special Referee are to hear the proceedings and to issue a report only as to the violations of the Rules of Conduct. However, since the issues with respect to mitigation were introduced into evidence, such issues are set forth herein, so that the Commission has a complete record of the evidence offered at the underlying proceedings in order to determine the appropriate sanction.

## **FACTS**

The following facts constitute the undisputed facts based on the evidence adduced at the hearings which were conducted before the Special Referee Robert Barrer, Esq. on January 7, 2019, through January 11, 2019, and February 12, 2019. We note that unless otherwise mentioned the remaining facts are disputed.

### **I. Background Facts**

Judge Miller was admitted to the practice of law in New York in 1994. (T1300). He was elected in November 2014 as a Judge of the Family Court, Broome County, and began his term on January 1, 2015. (T360, T1150, T1315). He previously served as a Justice of the Union Town Court, Broome County, from 1996 to 2014 and the Johnson City Village Court, Broome County, from 2002 to 2014 (T1301-05; T1315). His current term expires on December 31, 2024. Although he remains a Family Court Judge, on or about July 11, 2017, Judge Miller was reassigned by Court Administrators from presiding over Family Court matters to handling foreclosure matters in another building, where he remains assigned to date. (T375; T1418-20).

Prior to becoming Broome County Family Court Judge, Judge Miller operated his law practice from an office in Endicott, New York. (T1305-10). When he took office as Family Court Judge, attorney Artan Serjanej, Esq., took over his office space in the building owned by his wife. (T1307-10). Mr. Serjanej and other attorneys also substituted as counsel on certain matters that Judge Miller handled during his practice of law prior to January 1, 2015. (T1306-13).

### **II. The Complainants**

From February 2005 through December 31, 2014, Rachelle Gallagher worked with Judge Miller as the Clerk of the Johnson City Village Court. (T543-45; T648-51). Thereafter, when he took office in the Family Court, he appointed Ms. Gallagher as his Secretary, and she thereby

became employed in the Broome County Family Court, as of January 1, 2015, where she remains employed to date. (T650-53; T1312-25; T1337). The two have known each other for many years as Ms. Gallagher is married to Judge Miller's childhood friend, Scott Gallagher; they no longer socialize. (T 542-43; T636-37; T1312).

In addition, Judge Miller also hired Mark Kachadourian, Esq., as his Law Secretary/Court Attorney, and he thereby became employed in the Broome County Family Court, as of January 1, 2015, where he remains employed to date. (T26-27; T1334). The two have known each other for many years having met as Family Court practitioners and were formerly colleagues. (T27-29; T1334-36; T1340). Mark and Nora Kachadourian, owners of Noramar Corporation, sold used cars and sold a Dodge Caravan van to Judge Miller in 2001. (T76; T1336)

Both Ms. Gallagher and Mr. Kachadourian no longer work with Judge Miller. (T48-49; T1375; T1392). Their allegations in this matter form the basis for most of the charges in the instant matter.

Debbi Singer is the former Chief Clerk of the Broome County Family Court, she retired in June of 2018. (T356-57; T1334). She has known Judge Miller for many years and describes their relationship as "good. He would come down and discuss things with me and he was, you know, quite open about that, you know, stopping by and saying hello." (T360). Notwithstanding the foregoing, when Ms. Singer was interviewed by the Judicial Conduct Commission with respect to Ms. Gallagher's and Mr. Kachadourian's claims, Ms. Singer also made allegations against Judge Miller regarding alleged comments that he made to her personally, as well as his dealings with another Family Court employee, Rebecca Vroman. (T358-404).

In or around November 2016, Rebecca Vroman was hired as Supervising Court Assistant in the Broome County Family Court and was assigned as part of Judge Miller's Family Court

Part. (T354; T1347). They worked well together in a very busy Court Part which was short staffed. In or about February 6, 2017, Judge Miller's Court Part was assigned its regular calendar as well as emergency petitions. (T354; T1347). However, at the time, for administrative purposes, the Court's calendar had to conclude no later than 4:30pm. (T1355). Unbeknownst to Ms. Vroman, Judge Miller had a physical therapy appointment that day, so he had to depart early. (T337-338; T1428). Although Judge Miller had advised Ms. Gallagher of his physical therapy appointments and asked her to ensure that they were in his calendar so that other Family Court personnel were aware of his schedule, Ms. Gallagher apparently failed to do so, and therefore, other court personnel (Ms. Vroman and/or Family Court Chief Clerk Debbi Singer) were unaware that during that time period Judge Miller had to leave early for his treatment. (T337-338, T1428). In addition, neither Ms. Gallagher (she was out that day) nor Mr. Kachadourian (Ms. Vroman believed he went to the bank) were available to assist with what became a very heavy calendar (T351); normally Judge Miller's part had between fourteen (14) and eighteen (18) matters per day, but that day the emergency petitions added nine (9) matters to the calendar in the afternoon. (T349-54; T1355). The two completed the calendar by a little after 4:30 pm. (T328, T1397-98).

Thereafter, Ms. Vroman as well as Judge Miller complained to Family Court Chief Clerk, Debbi Singer, who addressed the issues with both, noting that Judge Miller had several valid points in his letter and asking Ms. Vroman to correct these issues. (T371-74, T394-98; Resp. V). Thereafter, Ms. Vroman and Judge Miller often worked well together, handling the heavy case load in his understaffed part. (T352). Judge Miller and Ms. Vroman worked together in July 2017 to manage the Court Part when Ms. Gallagher and Mr. Kachadourian failed to appear for work. (T352, T1359).

### **III. Judge Miller's Income from Sources Other than OCA**

Prior to taking the bench full-time as a Family Court Judge in January 2015, Judge Miller was a Part-time Judge and had a private practice. (T1300-1301; T1402; T1431-32; T1440). Among the matters he handled in private practice were:

- the Estate of Deborah Brigham on behalf of its Executor Beverly Brigham (T1464; T1469);
- the Estate of Roger Funk on behalf of its Executor, Robert Hayes T1390; T1400-01; T1454-59);
- the Estate of Antoinette Saraceno on behalf of its Executor, Frank Saraceno, Sr. (T1401-06; T1445-54; T1489);
- the Estate of Jerry J. Behal, Jr. on behalf of its Executor, David Behal (T1377-79; T1406-08; T1438-46; T1489-90); and
- other legal matters for Jeff Jump and Alyssa Durkee<sup>2</sup>.

Once he became a Family Court Judge, Judge Miller informed his clients, including the Executors of each of the above-mentioned Estates, that he could no longer handle their matters and referred them to Mr. Serjanej and or other attorneys. (T1313; T1431-32; T1440).

Thereafter, Judge Miller's involvement in each of the Saraceno and Behal Estate matters was limited to providing factual information based on his prior handling of the matter. (T1313-15). He did not provide legal advice or direct Mr. Serjanej as to what legal steps needed to be taken for his former clients. (T1313-15).

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<sup>2</sup> There are no specific references in the testimony to these clients.

On occasion, Judge Miller received inquiries from a former client, a court clerk or one of the parties in matters which he had been the prior attorney. (T1313-15). Among the inquiries were:

- calls from Chief Clerk of the Tioga County Surrogate Court Deborah Stone, with respect to the Saraceno Estate (T1402-03, T1447-49);
- a call from Barbara Saraceno with respect to the Saraceno Estate (T1451-1454); and;
- a call from Robert Wedlake, Esq., with respect to the Behal Estate.(T489; T503-04; T506-07; T514-17; T1322; T1324-25; T1407).

Judge Miller did not give legal advice in any matter. As to the Saraceno Estate, he advised Ms. Stone and Ms. Saraceno that he was now a Family Court Judge and could not handle the matter. (T428; T451-54; Comm. 5A ). And as to Ms. Saraceno, her husband was ill, so he told her words to the effect that he would handle or take care of it, with the intention that Mr. Serjanej would follow up to close the matter. Mr. Serjanej completed the Estate without any direction or input from Judge Miller.). As to his conversation with Mr. Wedlake, Judge Miller contacted him to discuss a personal real estate matter, but it was Mr. Wedlake who asked him about the Behal Estate, and in particular, Mr. Serjanej's involvement in the matter. Mr. Wedlake and Mr. Serjanej later settled the matter without any input from Judge Miller. Judge Miller did not in any way provide legal advice or direction on behalf of either the Saraceno Estate or the Behal Estate. (T506-07; T514-17; T1050-54; T1138-79).

In addition, Judge Miller received the following payment for legal services he performed as follows:

- about \$16,203 in payment for legal work he had performed in the Estate of Deborah Brigham on November 24, 2015, (T 1464-1465, T1469; Comm. C);
- about \$11,184 in payment for legal work he had performed in the Estate of Roger Funk on December 1, 2015, (T1463-1464; T1487-1490; Comm. 2V); and
- legal fees totaling from clients Jeff Jump and Alysa Durkee in 2015.

Judge Miller also received payment for rental properties he owned with his family as follows:

- \$6,000 per year in 2015, 2016 and 2017 (\$500 per month in rent from tenant Louis Micha. (T521-33, T1311, T1383-91, T1408-14, T1433-36, T1467; Comm. 7C; Resp. E); and
- \$1,400 in 2015 and \$9,600 in 2016, from tenants David English and Michelle Caforio; (T1311, T1383-91, T1467-68; Comm. 7-B).

Judge Miller also received payment for weddings at which he officiated as well, but as he had donated the payment to his church, he did not declare it as income because he did not take a deduction on his tax returns for the funds that he donated to his church. (T1416-18; T1263).

Initially, the above-referenced payments were not disclosed in Judge Miller's Federal or New York State Tax Returns (which he filed jointly with his wife, who needed to pay estimated taxes and therefore wanted to timely file the returns), as well as his New York State Financial Disclosure Forms (FDF), which are required to be filed annually by May 15th with the Ethics Commission for the Unified Court System. (T1381-1385; Comm. 8-B, 8-C). However, on or before April 15, 2017, he had spoken with his accountant, Robin Dean and filed them with the understanding that the tax returns and the FDF may needed to be amended because he needed to compile documents with regard to income outside of his salary from OCA, so he began to gather

documents which he needed to amend both the tax returns as well as the FDF forms. (T1249-50; T1382-85). As he compiled the documents, he put them in boxes under his desk in his chambers; the boxes were taken pursuant to a subpoena by the Commission regarding the underlying investigation of this matter. (T1256; T1260; T1360-63, T1390-91, T1413). Shortly after his boxes of documents were returned by the Commission, Judge Miller amended his 2016 and 2017 Federal and New York State Tax Returns as well as his 2015 Annual FDF the Ethics Commission for the Unified Court System. (T1258-60; T1285-86; T1413; Comm. 9-B, 9-C, 9-E, 9-G, 9-H, 9-J; 8-D).

There was also an additional Report that Judge Miller was unaware of but was nonetheless required to file with the Clerk of the Family Court which he filed on January 31, 2019. (T1387-1388, T1430, T1464-1467; Resp. PP). The Reports included any income that Judge Miller received in excess of \$150 and were filed for the years 2015; 2016; 2017 and 2018, respectively. (T1387-138, T1430, T1464-1467; Resp. P).

## **ARGUMENT**

### **I. The Accusations of Rachelle Gallagher and Mark Kachadourian Lack Reliability and Credibility: Deceit, Craftiness, Prevarication of Rachelle Gallagher and Mark Kachadourian Coupled with Their Actions Belies Their Testimony**

As set forth above Rachelle Gallagher and Mark Kachadourian were each appointed to their respective positions in the Broome County Family Court by Judge Miller, effective January 1, 2015; Ms. Gallagher as his Secretary and Mr. Kachadourian as his Law Secretary Court Attorney. The two remain in their positions to date due to the underlying charges in this matter based on their incredible, incendiary, and unreliable claims against Judge Miller. They bring this case because they feared losing their jobs because Judge Miller, the very person who had the discretion to hire or fire staff for their positions, had begun to question Ms. Gallagher's lack of work ethic as early as 2015 and later began to

question Mr. Kachadourian's work ethic as well. Thus, they conjured up allegations of inappropriate conduct against Judge Miller, who has been relegated to handle foreclosure matters and thereby is unable to do the job he is elected to do, that of a Judge duly elected to the Broome County Family Court by the public.

Indeed, as will be amply demonstrated herein, Ms. Gallagher and Mr. Kachadourian not only maligned Judge Miller with the allegations which they shopped to the OCA IG, the Commission and their civil counsel, they have also made false claims about innocent bystanders, family, friends and colleagues of Judge Miller, whose only misdeeds were their connection to Judge Miller.

#### **A. Mr. Kachadourian's Testimony Lacks Credibility**

Mr. Kachadourian testified on the first day. (T19-246). His testimony was not only incredible but ridiculous in that he could remember certain salacious details on direct examination but feigned being traumatized claiming "I can't specifically recall specific months. This whole experience has been very traumatic and it's difficult for me to remember and a lot of it, I've tried to erase from my memory. But, there was a time period that occurred that yes, I was concerned about his conduct, espec-- when it came to the way he was-- the way he was talking about, you know, wanting me to speak to Rachelle about, you know, about certain things and about him, you know, wanting to have this Lisa Wojdat, you know. And-- But, I don't know specifically what timeframe that was." (T139). In fact, whenever an inquiry was made about specific dates, times and places regarding the allegations that he has now made against Judge Miller before two state agencies and in the Federal Civil action, Mr. Kachadourian's response was vague or non-responsive. (T139-145).

From almost the inception of his testimony, Mr. Kachadourian refused to provide details as to his relationship with Judge Miller claiming:

- that he first became acquainted with Judge Miller ... “that was probably, I would say, 10, 15 years ago, roughly” (T22); that he worked on Judge Miller’s campaign for Family Court with others and listing their names but then qualifying his answers with the fact that he could not be sure as to what they did as well as others who may have been involved (T24-25);
- that he “ --I didn’t-- I don’t know like the legal ramifications or definitions of personal appointee. I know I was paid by New York State, I worked for Broome County Family Court, so-- and I worked under Judge Miller. That’s the best I can explain it.” (T27); and
- that he could not recollect when the nature of his relationship with Judge Miller changed asserting in pertinent part “I can’t rem-- I can’t point out a specific day, but it did change. There were certain issues that came up that caused it to change.” (T27).

And, early on in his testimony, he claimed that Judge Miller had made statements about his dissatisfaction with Ms. Gallagher’s work and such comments went beyond her secretarial duties and included references of a sexual nature. However, in response to the question “Did the judge ever express to you or in your presence to Rachelle any dissatisfaction with her secretarial duties? He-- I cannot recollect him expressing it to her. He would always express it to me. In June of 2017, she went on a trip to, I think it was to Clemson, South Carolina, and during that time, he started berating me and saying, ‘I wish I had fired her. I should have never listened to you,’ and he said that he was looking for a file and he couldn’t find it and he asked me how she filed her files, and he couldn’t find a file and that was one occasion I could remember where he expressed the dissatisfaction of-- It was June 2017.” (T29). When further questioned he realized that he had related an event that would corroborate that Judge Miller had

appropriately voiced his complaints about Ms. Gallagher, he then enhanced his commentary to comport with his previous statements to the Commission, the OCA IG and as reflected in the Federal civil action. (T29-44).

Included among Mr. Kachadourian's claims against Judge Miller, all of which Judge Miller and others vehemently deny, were events that he claims that Judge Miller engaged in with his acquaintances such as:

- overhearing telephone conversations with the Judge's friend Jerry Penna about the sexual relationship and interactions between D [REDACTED] L [REDACTED] and David Iannone, who had been introduced by Judge Miller; (T36-39). Judge Miller and Mr. Penna later testified and credibly refuted those allegations (T 922-929, T1395-1396, T1481-1482).
- overhearing a conversation in which Mr. Penna made a sexual reference was made to Asian women's private areas. (T42; T206-07; T209-11). However, Mr. Kachadourian could not pinpoint a date "Let's see. Again, I would say late '16, early '17." (T42-43) Moreover, this proceeding was the first time he made this allegation. And, Judge Miller and Mr. Penna later testified and likewise credibly refuted these allegations. (T922-29; T1395-96; T1481-82).
- viewing a photograph on Judge Miller's telephone in chambers which purportedly was taken by Mr. Iannone of Ms. L [REDACTED]'s torso. Interestingly, Mr. Kachadourian claimed that he could identify Ms. L [REDACTED] because of "D [REDACTED]'s build-- D [REDACTED]'s build-- I've worked with her, you know, the last-- prior to that photograph, probably the last two years,

you know and we've seen each other on a daily basis. She has a very thin frame and she does have large breasts and you know, it just-- you could recognize who it was by--..." (T40). Moreover, there was never any evidence produced indicating that Judge Miller's telephone did contain such a photograph or for that matter other nude photographs from a strip club that Mr. Kachadourian claims that Judge Miller also showed him on his telephone. Judge Miller denied the allegations. (T1394-98). And, as Ms. L [REDACTED] herself was unable to say with certainty that she was in the photograph, but did say that Mr. Iannone<sup>3</sup> later admitted that he had taken the photograph and shown it to Mr. Kachadourian at a local restaurant. (T270-71). Notably, there are discrepancies as to the location: Mr. Kachadourian claims it was in the Judge's Chambers on the Judge's cell phone, but Ms. L [REDACTED] testified that Mr. Iannone admitted that he showed it to Mr. Kachadourian on his cell phone at a restaurant. (T270-271)

- traveling to and from Albany from Binghamton with Judge Miller and attending several meetings with Judge Miller and other legislators, including a New York State Senator that Judge Miller knows from Broome County, Fred Akshar and that Judge Miller came up with a plan to have Ms. Gallagher sleep with Sen. Akshar to obtain Sen. Akshar's telephone number, because Sen. Akshar refused to provide the number to him earlier that day. (T45-48). However, Judge Miller already had Sen. Akshar's

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<sup>3</sup> Mr. Iannone did not testify in these proceedings.

numbers as he had called to arrange the meeting and had known him for years since Judge Miller's now deceased father also served as a State Assemblyman. Senator Akshar was a former Broome County Sheriff's Department Employee for fifteen (15) years. He started in 2000 as a Sheriff's Deputy, Detective of Sergeants, Captain and Broome County Undersheriff in 2015. Judge Miller has known Senator Akshar for his entire career. (T1473-1476).

- that he had concerns about his personal safety due to statements he alleged were made by Judge Miller and/or his friends: Jerry Penna, David English<sup>4</sup>; Marty Shaw; James Stilloe; and David Iannone<sup>5</sup>. (T49-56). Judge Miller denied these allegations. (T1393). Likewise, Mr. Penna, Mr. English and Mr. Stilloe denied these allegations. (T867, T912, T922-23, T929)
- Judge Miller requested that he and Ms. Gallagher engage in improper political activities in chambers by keeping a list of persons they met and circulate petitions for his brother-in-law, Rick Balles Mayoral campaign in 2017. (T56-58). However, no list was ever produced and neither Ms. Gallagher nor Mr. Kachadourian circulated any petitions on behalf of Mr. Balles. When asked about what he knew about restrictions that he may have been under as to his political activity

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<sup>4</sup> Mr. English did not testify in these proceedings.

<sup>5</sup>The Commission's request to introduce the prior criminal records of several persons was objected to and denied. However, they were allowed to question witnesses who appeared as to their criminal records which were not only unrelated and collateral to the instant matter, but long attenuated. Accordingly, the records were inconsequential and irrelevant; they did not indicate a current propensity for violence or that the witnesses actually engaged in the alleged behavior.

as a court attorney, Mr. Kachadourian replied: “It’s my understanding that-- I don’t have any first-hand knowledge of this, that we’re not allowed to-- We’re under the same guidelines as the judge, so... it’s my belief we’re under the same guidelines as the judge where it’s prohibited.” (T56). Mr. Kachadourian admitted that he never even reviewed the Judge’s Rules and later admitted that he never reviewed the Rules Governing Conduct of Nonjudicial Court Employees (T115). Yet, he apparently advised Ms. Gallagher that they were prohibited from engaging in “political activity.” See supra Part IX.

- that he went to Judge Miller’s former law office on about “30 separate occasions” ... that Judge Miller did not say why he wanted Mr. Kachadourian to accompany him but that “he would work on cases, law-- legal cases” and that he would work with “Donna Filip, who was his former secretary” and “Artan was present and then they’d start working on these cases” ... that on his first trip he “was so upset about it and disturbed by it, I-- We were all in a conference room, I said-- I said, ‘This is not going to happen. This is going to stop.’ I slammed my fist on the table, the conference table, and I said, "Judge Miller is not going to risk-- He just was elected family court judge. Just-- It's like-- That's like signing a \$2 million-dollar contract, and he’s not going to risk his career for \$10,000, \$15,000 paydays, you know, for legal fees,’ and af-- and nobody listened to me. He wouldn’t listen to me and he would just-- And I just-- And then the visits continued and continued. He continued to work on

cases after that and he never respected my point of view or my opinion on that.” (T60-61). Mr. Kachadourian claimed that he continued to go on the subsequent occasions but that he would wait in the office lobby reading “I would-- He wanted me to accompany him. I would just read automobile magazines in the lobby. And one particular magazine I read over and over again. It was about a 1965 white Buick Riviera because a friend of mine in New Jersey has a 1965 Riviera, so I would sit there and just read that same article over and over again.” (T221) We are not quite sure as to what Mr. Kachadourian was referring to when he mentioned “the \$2 million-dollar contract” since Judge Miller’s position in Family Court is salaried and his tax returns indicate that he earned \$ 140,845.00 in 2015 and \$152,963.00 in 2016.. (Comm. 9-A, 9-F) Moreover, he was not able to say what Judge Miller was doing in the other room. Judge Miller admitted that he went to see Mr. Serjanej at his former law office but averred that the visits were limited to personal legal matters that Mr. Serjanej was handling for him or members of his family as well as picking up mail that was delivered to his former law office or rent payments that had been left there for him by tenants from buildings owned by his family. (T1436-37). Mr. Serjanej corroborated his testimony. (T1035, T1110-11).

Moreover, generally speaking Mr. Kachadourian's overall testimony on matters unrelated to the instant matter also raised concerns about his veracity, as he often gave inconsistent, vague or evasive responses<sup>6</sup>. For instance:

- Mr. Kachadourian worked for Judge Miller for almost three years and in that time period he wrote only two decisions. When questioned about the details, he could not remember the names or the specific facts of either case or whether he had redacted copies for use or submission as writing samples for other positions that he had recently applied for in the Unified Court System. (T153-57; T220; T242-43).
- Mr. Kachadourian claimed that he was afraid and traumatized by Judge Miller. Yet in early 2016, Mr. Kachadourian arranged for tickets (via his sister), so that he, Judge Miller, Richard Balles and David Behal could attend the Presidential Inauguration. (T179-84; T971-75; T1130-33). The two traveled to and from Virginia and stayed overnight at Mr. Behal's residence in Virginia. (T179-84; T971-975; T1130-33). Mr. Kachadourian is shown smiling in photographs with Judge Miller and others. (T971-75; T1130-33; Resp. AA, BB).

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<sup>6</sup> Bizarrely, on Redirect examination, Mr. Kachadourian took out a pen and paper in the middle of a question, wrote a note to himself and the following colloquy occurred:

Q. What'd he-- What did he say to you about Debbi Singer?

MR. DEROHANNESIAN: Could I have a cop-- whatever Mr.-- the witness is writing down?

THE REFEREE: I don't know what he's doing.

What-- Mr. Kachadourian, what are you doing?

THE WITNESS: Just making a note. I was a member of the House of Delegates in the New York State Bar Association, so I wrote, "House of Delegates."

THE REFEREE: Okay."

(T227) *See also* (T239).

- Mr. Kachadourian and his wife owned and ran a business; the entity was named “Noramar” and they sold used cars. (T76-77). When questioned about the business, he repeatedly gave vague responses<sup>7</sup> as to his position as President; an investigation by NYS authorities about his wrongful use of Dealer License Plates; and his failure to disclose his involvement and income from Noramar on his OCA Employment Application at the end of 2014 and his 2017 Financial Disclosure Form with the Ethics Commission for the Unified Court System, both of which required that he certify or affirm the accuracy as to the information he listed. (T110-114; Resp. L).
- Kachadourian apparently registered internet domain names including DaleEarnhardtInc.com, ThomasWLibous.com and senatorThomasWLibous.com; as to the DaleEarnhardtInc.com domain name, an Arbitrator found that he “obtained and used the name in bad faith” and as to the Libous domain names, he never received permission or authority from the late Senator Libous or his family. (T115-19); and
- Mr. Kachadourian never told his wife about the “issues” he was having at work. (T243).

## **B. Ms. Gallagher’s Testimony Lacks Credibility**

Likewise, Ms. Gallagher’s testimony was incredible and ridiculous in that she also claimed to remember certain salacious details on direct examination but could not give specifics. (TT541-786). In addition, the evidence is clear, some of it included her own notes that as Judge

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<sup>7</sup> He twice refused to Answer, and at one point stated “You know what? I think at this point, I may request an adjournment to have my counsel present.” (T101). His request was denied.

Miller began to question her work product and ethic, Ms. Gallagher enhanced her allegations as time went on. (T749-58; T764-65). Even so, Ms. Gallagher failed to provide specific dates, times and places about the allegations that she has now made against Judge Miller before two state agencies and in the Federal Civil action. (T541-86).

Ms. Gallagher admitted that she and Judge Miller had known each other socially for approximately 16 or 17 years, that she was married to his former friend and that Judge Miller not only attended but conducted the wedding in 2002. (T542-43, T636-38). She also admitted that they worked well together and that he hired her as his Clerk in the Johnson City Village Court where they worked together from February 2005 through the end of December 2014. The two worked together for more than 9 years in the Johnson City Village Court as well as on Judge Miller's campaign for Family Court, yet Ms. Gallagher never claimed or filed a report that claimed that Judge Miller engaged in any misconduct or misbehavior. (T648-49, T651). However, when questioned about a June 2014 incident when she received a counseling memo due to her creation of an offensive and hostile work environment concerning a co-worker, Kim Cunningham, in the Johnson City Village Court, she attempted to rewrite history alleging years later that both she and Judge Miller were subjects of the investigation – a claim that was refuted by Judge Miller and other witnesses. (T692-693, T1327-1329).

During the hearing, Ms. Gallagher claimed that once she and Judge Miller began to work together in the Broome County Family Court, Judge Miller was different and began to harass her and that his harassment continued “more than fifty (50) times from January 2015 through July 2017. (T549-574, T650-53, T738-747). She could not cite any specific date as to when such conduct began but claimed that she repeatedly discussed the issues with Mr. Kachadourian and Ms. Singer; the latter conversations supposedly began “towards the end of 2015.” (T653-59).

There was no evidence produced indicating any contemporaneous reports from her and/or Mr. Kachadourian to Ms. Singer. Rather, Ms. Gallagher's notes were inconsistent. She admitted that her handwritten notes had less entries than her typewritten notes which were drafted for her interviews with the JCC. (T740; T751; T778-86). And, Ms. Singer's notes do not reference many of the allegations or give specific dates as to when Ms. Gallagher reported the alleged incidents.

Among her unsubstantiated allegations were:

- conversations of a sexual nature that she overheard Judge Miller having while on the telephone in his chambers office when Mr. Penna visited; including conversations about Ms. L [REDACTED]'s breasts and physical relationship with Mr. Iannone along with claims that during the conversations, the Judge requested photos or videos, but admitting that she never saw any photos or videos. (T701-11). Mr. Penna and Judge Miller denied these events. (T922-29; T1395-96; T1481-82). Perhaps most important, although a photograph of a nude torso which purportedly depicted Ms. L [REDACTED], no physical or credible evidence was produced that connected Judge Miller to the photo and when Ms. L [REDACTED] viewed the photograph she was unable to say with certainty that it was her (unlike Mr. Kachadourian who said he could identify her due to "very thin frame and she does have large breasts and you know, it just-- you could recognize who it was..." (T40);
- that Judge Miller asked her to bring Ms. L [REDACTED] to his chambers during a visit from Mr. Penna and that after Ms. L [REDACTED] left, she overheard them talk about her large breasts; but Ms. Gallagher gratuitously claimed

that she stayed around because she did not want Ms. L█████ to be uncomfortable; but then stayed to listen in on the conversation?, which by the way was not in Ms. Singer's report. (T702-09).

- that Judge Miller showed her a piece of paper with a drawing of fruit and when she opened it depicted “naked women.” (T564; T694). Judge Miller denied that this ever happened. Nor was there any drawing or other photograph depicting “naked women” introduced into evidence.
- that like Mr. Kachadourian, she had concerns about her personal safety due to statements she alleged were made by Judge Miller and/or his friends: Jerry Penna, David English; Marty Shaw; James Stilloe; and David Iannone.<sup>8</sup> (T570-73). Judge Miller denied these allegations. Likewise, Mr. Penna, Mr. English and Mr. Stilloe denied these allegations. (T922-29, T1395-96, T1481-82);
- Ms. Gallagher also alleged that she feared for her safety due to information that she received from Court Administrators of threats allegedly made by Ms. L█████ and Mr. Iannone. (T573-75, T588-90, T746, T748). However, she admitted that she had no first-hand knowledge of the threats and at the time the threats purportedly occurred, Judge Miller was reassigned to another building and there is no evidence

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<sup>8</sup>As set forth at footnote 4 above, The Commission's request to introduce the prior criminal records of several persons was objected to and denied. However, they were allowed to question witnesses who appeared as to their criminal records which were not only unrelated and collateral to the instant matter, but long attenuated. Accordingly, the records were inconsequential and irrelevant; they did not indicate a current propensity for violence or that the witnesses actually engaged in the alleged behavior.

that Judge Miller had any connection to the alleged threats or that he asked anyone to make any threat at all. (T617-20; T699-700);

- Late last year, Ms. Gallagher again claimed that she feared for her safety when an attorney unrelated to this matter, walked by her and “looked” at her. (T747-48). However, at the time that the threats purportedly occurred, Judge Miller was reassigned to another building and there is no evidence that Judge Miller had any connection to the alleged threats or that he asked anyone to make any threat at all. (T1392). The incident as reported by Ms. Gallagher was also refuted by OCA security officer Sgt. Ronald Kreb. (T1198-1201);
- That when she became his personal secretary in Family Court, Judge Miller asked her and Mr. Kachadourian to engage in political activities including, *inter alia*, keeping lists of staff and people he met, registered voters; make the office a campaign office; to assist with Richard Balles’ campaign for Mayor of Johnson City and Artan Serjanej, Esq.’s campaign for Broome County Family Court and to collect signatures on their behalf. (T727-30, T735-36, T764-65). There was no independent corroboration that Ms. Gallagher kept a list; presumably if she kept the list(s) at work, she had access to her computer to produce them, yet not one “list” was ever produced or introduced into evidence because Ms. Gallagher claims that she “looked but could not find them.” (T177, T728-30, T734-39). And, Ms. Gallagher claims that Mr. Kachadourian told her they were not allowed to collect signatures or to engage in political activity. (T729).

Judge Miller also denied these allegations. (T1450); see also supra Part IX).

- That Judge Miller made telephone calls to his former law office assistant and visited her requesting that she bring him files but that she “didn’t see that stuff”; that he had her and Mr. Kachadourian make copies of files “off-site”; had her type a letter about a case with respect to checks that he received in November 2015, using the name of his former assistant Donna Filip to a former client in regard to the checks. (T653-56, Comm. 2V, 2W). Notably, she did not attest to the specific substance of the “daily” calls and could not say what the files stated or whether their substance related to Judge Miller’s former practice. Moreover, not one file jacket or document related to a file was introduced despite Ms. Gallagher’s claim that she and Mr. Kachadourian made copies outside of chambers. Thus, if they were engaged in wrongdoing at the request of Judge Miller (we do not concede any misconduct by such a request) it would seem that they would refuse to do what he asked or at the very least would have made copies to protect their interests (which they apparently did given the documents introduced by the Commission via their testimony). Indeed, they advised the Commission of where to find the box of documents that Judge Miller was collecting to amend his tax returns and annual Financial Disclosure Forms. (T655-56; T728-29). Moreover, both Judge Miller and Mr. Serjanej averred that Mr. Serjanej was his lawyer as well as the lawyer for his family so that the calls, the files and any visits to his former

law office related to the Judge's personal matters. (T1035). And as set forth above, Mr. Kachadourian stated that after his first visit, he only sat in the lobby perusing a magazine and therefore was not privy to what if anything Judge Miller and/or Mr. Serjanej discussed. (T221; T1110-11). As to the letter with the checks, Judge Miller explained that it never went out. (T1401; Comm. 2V, 2W)

Likewise, for the first time at the hearing, Ms. Gallagher asserted additional details which were not disclosed to the Commission or the OCA IG. (T541-786) For instance, Ms. Gallagher stated that:

- Judge Miller stated that he "would not go to see Judge Connerton unless she was going to satisfy his needs", but on cross admitted that she did not include that information in her statement to the OCA IG (T749);
- Judge Miller stated that he "wouldn't speak to the chief clerk of the family court unless she had sexual relations with him", but on cross admitted that when questioned by the IG in July she stated "No, I did not say anything." (T751); when a similar question was posed as to her August 2017 testimony under oath, Ms. Gallagher replied "It wasn't asked and wasn't brought up. I know I was under oath but it wasn't a topic -." (T751);
- that Donna Filip "came to chambers all the time" and "called the office all the time", but on cross admitted that she did not tell the IG or the Commission during her August 2017 testimony that Ms. Filip came to or called the office all the time. (T753-54);

- that Judge Miller asked for a picture or video of D [REDACTED] L [REDACTED], but on cross admitted “ No, I just described the conversations as graphic. I did not.” (T754-56);
- that Judge Miller called Lisa Wodjat “a dirty whore”, but on cross admitted that she had not told the IG or the Commission about the comment stating in pertinent part “...These were conversations that he has with me . I’m not sure if I told... I don’t believe I got into those details with... I don’t believe so... Statement? No, it was just based on what he told us<sup>9</sup>. So, no statement.” (T756-57); and
- when questioned about Mr. Serjanej’s campaign on direct, she calmed that Judge Miller talked to her about him running for office but on cross she stated that she “left it as campaign office” when she was interviewed by the OCA IG. (T764-65).

## **II. Mark Kachadourian and Rachelle Gallagher Knew Their Work Performance Threatened Their Jobs.**

Judge Miller testified that both Mark Kachadourian and Rachelle Gallagher “had work performance issues” and “had the knowledge they would be terminated based on their lack of work.” (T1373). Both Mr. Kachadourian and Ms. Gallagher had financial problems and could not afford the loss of a job. (T1374). Judge Miller sums up what happened: both Gallagher and Kachadourian “had work performance issues that were a problem and I think they had the knowledge that they would be terminated based on their lack of work.” (T1373).

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<sup>9</sup> Ms. Gallagher states what he told “us” and that she told Chief Clerk Singer about the comment, but she is the sole witness that alleges that Judge Miller made the comment.

### **A. Rachelle Gallagher's Job Performance**

Ms. Gallagher worked with Judge Miller from 2005 to 2014 and never filed a complaint against Judge Miller; nor did she ever complain to her husband about Judge Miller' conduct or behavior. (T543-545, T649-651, T648). Judge Miller performed her wedding ceremony and was her and her husband's attorney. (T 542-543, T636-37). Ms. Gallagher and her husband socialized with Judge Miller. (T725). She desperately wanted and needed to be Judge Miller's secretary when he became judge. What happened on January 1, 2015? Did Judge Miller change? Or did Ms. Gallagher's job and duties change such that she was unable to perform her job and duties?

Prior to Judge Miller selecting Ms. Gallagher to be his secretary, she expressed concern to Mr. Stilloe that she would not be picked for the position. Mr. Stilloe testified that Ms. Gallagher at a post-election victory party for Judge Miller said, "If he's taking that F-ing Lisa<sup>10</sup> instead of me, I'm going to be pissed." (T863-64). In November-December 2014, Ms. Gallagher acknowledges she spoke to other people including an attorney friend, Carole Cassidy, about her concern that she would not get the job with Judge Miller. (T640-42).

Judge Miller hired Ms. Gallagher because she needed the job and because when he left the position of Village Justice, Ms. Gallagher knew that she was going to be terminated.<sup>11</sup> (T1312). Mr. Kachadourian agreed that Gallagher's need for the job was a factor in her hiring by Judge Miller. (T151).

Judge Miller testified about his discussions with Ms. Gallagher expressing dissatisfaction with her work, such as documenting phone calls and record keeping, beginning in 2015:

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<sup>10</sup> Referring to Lisa Wodjat, another court clerk from the Town of Union that Judge Miller was considering for the position. (T553, T647-48).

<sup>11</sup> Ms. Gallagher testified she received counseling with respect to a hostile work environment complaint by Kim Cunningham on Johnson City Court. (T691, T693).

Yes, I did and I did-- addressed with her directly and I also addressed with Mark Kachadourian. It was keeping up with the workload. Keeping up-- It was a busy court. Keeping up with everything. Those messages are important. If I needed a message or someone was calling me, it wasn't just to tell me it was a nice day. These-- Ninety- some percent of those calls are work related calls that we need to address, whether it be a pending file or anything going on within the court system itself. I also spoke to her about the record keeping, the files. I needed those files. I tracked those files, that's how I rendered my decisions. I'd go back, whatever notes I kept, I kept them within that file. So, I could go back-- I'd know the date, the time, and I'd write down significant issues. We were dealing with children. I would find out if the child-- what grade the child was in, what sports they were in, what activities they may have done. So, depending on if I had to deal with JDs or PINS, I'd have clues down for me to discuss with them. "How are things going? I know you had an issue in math class." I'd want to be most specific as I could with them, so that they understood that I was concerned about what was going on in their life. That I wanted them to succeed and that's what I used that platform from as being a judge, to encourage them to resolve these issues.

(T 1364).

Judge Miller would tell Ms. Gallagher she needed to improve her job performance. (T1462). Judge Miller expressed his displeasure with Ms. Gallagher's work. (T1463). Ms. Gallagher acknowledges that Judge Miller addressed her failure to properly prepare files for court. (T665). Judge Miller testified he had these discussions with Ms. Gallagher a number of times. (T1364). In 2015 when he first assumed his judicial position, Judge Miller allowed a period of adjustment before he expressed his concerns to and about Ms. Gallagher. (T1365). Ms. Gallagher had no experience as a secretary to a judge prior to working for Judge Miller and had to learn to perform new tasks. (T633-644). Her work in Johnson City Court had been as a court clerk. (T633). Judge Miller continued to express his concerns in 2016, but the intensity of those expressed concerns increased in the first part of 2017 when Judge Miller was going through physical therapy. (T1365). These concerns included the scheduling of cases.

And I'm asking her, "How is the calendar getting backed up this way?" So, this was like a daily event that I'm having the same conversation every day. I said to her, "I gave you all my physical therapy appointments, how am I getting scheduled?" There was an issue of me getting double-booked, that the court clerk was double-booking me, so I had time periods where I have two cases scheduled at the same time. There's no way humanly possible you're going to see, you know, two sets of attorneys and you know, at minimum, four to six litigants at the same time.

(T1365).

In early June 2017, and while Ms. Gallagher was away, Mr. Kachadourian recalls Judge Miller expressing that he should have fired Ms. Gallagher during an incident over preparing a file for court. (T31). Gallagher's failure to perform duties was on display in early June 2017 when she left for a trip the week of June 5-9, 2017, she failed to prepare any files for Judge Miller after he had been away for several days. (T1356-57). Neither Gallagher nor Kachadourian prepared any files while he was away. (T1356-57). Judge Miller was provided no notice by Gallagher and Kachadourian that files would not be ready for his cases that week. (T1357).

Richard Balles is the Godfather of Ms. Gallagher's son [REDACTED] and until 2017, had a "very close" friendship with Rachelle Gallagher and was in contact with her "three to four times a month, at least." (T660, T966). The relationship was close enough that Ms. Gallagher and her husband were invited to his daughter Nicole Balles' wedding on April 29, 2017. (T967). In December 2016 Rachelle Gallagher had a conversation with Mr. Balles in which she expressed her concern "that she may be replaced in her position." (T968). On the eve of 2017, Ms. Gallagher verbalized she knew that her job and income (\$56,000)<sup>12</sup> were in jeopardy. Mr. Kachadourian likewise acknowledges that Judge Miller talked about terminating Rachelle Gallagher beginning "at the end of 2015," and in 2016 and 2017 as well. (T148-49).

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<sup>12</sup> Ms. Gallagher's income was \$47,976 when she began working for Judge Miller as his secretary and approximately \$56,000 at the time of her testimony. (T652).

## **B. Mark Kachadourian's Job Performance**

Mr. Kachadourian had a contract for legal services with Tioga County that paid him \$110,000 in 2013. (T120). The contract was not renewed for 2014. (T120). Judge Miller hired Mr. Kachadourian to commence January 2, 2015, when Judge Miller assumed the position of Family Court Judge. (T26). Since and before Judge Miller has been reassigned from his position in Family Court Mr. Kachadourian has applied for four legal and court positions without success. (T131).

One issue concerning Mr. Kachadourian's performance was that he was not present to assist Judge Miller when he was assigned emergency petitions by preparing memos or research for the cases. (T1353-54) For example on February 6, 2017, when Judge Miller was hearing nine (9) emergency petitions in addition to fourteen (14) regularly assigned cases, Mr. Kachadourian was absent without notice or discussion. See supra Part VI.

Judge Miller had concerns about Mr. Kachadourian's inability to generate decisions and opinions. And, Mr. Kachadourian struggled to recall any decisions he wrote for the judge and could not name either of the two (2) cases or even give specific facts regarding either matter. (T153-54). Nor does Kachadourian have any record of opinions or decision he wrote for Judge Miller. (T242-243). Judge Miller testified that Mr. Kachadourian wrote only two decisions from January 2015 to June 2017. (T1337) In both of those situations Mr. Kachadourian's tardiness implicated standards and goals. (T1337).

Judge Miller testified that in 2016 he had the following discussions with Mr. Kachadourian concerning his job performance:

Yeah, I told him-- The big issue I had was about standards and goals. I wanted them at zero. There's no reason that that shouldn't be-- They shouldn't be at zero with all three of us working there. Mark had been an experienced attorney for almost 30-some years

and I had 20-plus years of experience. There was no reason I felt that we should be having issues other than a zero at every month for standards and goals. And that's what the goal was and they knew that from the get-go when I started because I had to deal with standards and goals always.

(T1366).

Clerk Rebecca Vroman verified in her testimony that she would contact Judge Miller's law clerk (Mr. Kachadourian) that standards and goals was approaching on a case. (T341). Judge Miller recalls one memo received in January 2017 from Rebecca Vroman on one of the cases Mr. Kachadourian was supposed to complete a decision. (T1337; Respondent LL). Mr. Kachadourian failed to follow up on the clerk's email. (T1340). Judge Miller addressed his displeasure with Mr. Kachadourian. (T1340).

And, in 2017 Judge Miller addressed his displeasure with Mr. Kachadourian:

I did, more specifically with these two cases that came up with these decisions and I'm asking Mark, "Why are we getting memos from the court clerk about standards and goals time when you should know when you have that case, specific what the standards and goals are, these are basic things that every attorney that practices law has to deal with issues of standards and goals."

(T1366-67).

Mr. Kachadourian was unable to perform the most basic of a law clerk/court attorney's task, writing decision and opinions for his judge. Judge Miller told him he was not meeting expectations. Mr. Kachadourian knew that Judge Miller was ready and willing to terminate his employees. He knew he was unable to get employment elsewhere, and most likely correctly predicted his applications for other court positions would be rejected.

### **C. Kachadourian and Gallagher Filed a Federal Lawsuit Seeking Monetary Damages**

Ms. Kachadourian and Ms. Gallagher not only socialize with each other but share a

legal relationship as plaintiffs in a Federal lawsuit filed in December 2018 against Judge Miller and the N.Y.S. Office of Court Administration. (T74, T98) (*Gallagher v. NYS Office of Court Administration et al.*, 2:18-cv-01476, N.D.N.Y.). The lawsuit seeks among other things monetary damages. Ms. Gallagher and Mr. Kachadourian are represented by the same law firm whom they contacted at the “end of June-July 2017.” (T162-63). A complainant’s financial interest relating to the subject matter of a proceeding relates to the witnesses’ bias, motive and interest. People v. McFarley, 31 A.D.3d 1166 (4th Dep’t 2006). A complainant’s lawsuit is a basis to find motive on the part of a complaining witness. People v. Wallert, 98 A.D.2d 47 (1st Dep’t 1983); see also, People v. Stein, 10 A.D.3d 406 (2d Dep’t 2004).

Mr. Kachadourian and Ms. Gallagher are close socially and legally. For their interview with the Commission, they admittedly drove together from Binghamton to Albany on July 7, 2017 and for an interview with Inspector General and August 8, 2017 for testimony to the Commission. (T612-13; T626). Ms. Gallagher and Mr. Kachadourian provided interviews to the Commission on January 3, 2018, and April 20, 2018, in the presence of each other. (T168-171; 238). Ms. Gallagher acknowledges her and her family’s social relationship with Mr. Kachadourian. (T725). Likewise, Mr. Kachadourian acknowledges that he and his family socialize, have meals and attend events with the Gallaghers. (T135-37).<sup>13</sup>

#### **D. Gallagher and Kachadourian Join Forces to Keep Their Jobs**

Both Ms. Gallagher and Mr. Kachadourian knew their future was dim with Judge Miller. Moreover, they are the only two eyewitnesses who claim to have observed and were present for many of the allegations against Judge Miller. Thus, it is reasonable to infer that Mr. Kachadourian concluded that his best hope would be to join forces with Ms. Gallagher to remove

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<sup>13</sup> However, Mr. Kachadourian testified before the Commission in his deposition that he had “no personal relationship” with Ms. Gallagher “outside of work.” (T214-15).

their employer, Judge Miller who has the discretion to hire or fire them – they serve at his pleasure – and while he was at it, to attempt to profit from his situation in a lawsuit. Accordingly, the best hope for both Ms. Gallagher and Mr. Kachadourian would be to join forces to remove the Judge to whom they were assigned before he removed them and try to profit from their situation.

### **III. Mark Kachadourian's Allegations are Refuted by Multiple Witnesses**

Most of the events related by Mr. Kachadourian involving Judge Miller did not involve a third party to permit an assessment of his claims. However, when Mr. Kachadourian did refer to a third person, several of those witnesses disputed and denied his allegations. Several witnesses, apart from Judge Miller, testified to the falsity of Mr. Kachadourian and Ms. Gallagher's statements and accusations. David Behal's compelling testimony refuting Mr. Kachadourian's assertions is detailed in Point VIII(B). With respect to three allegations in Charge I, Mr. Kachadourian managed to score a lying trifecta when Messrs. Stilloe, Shaw and Penna<sup>14</sup> squarely discredited his testimony.

According to ¶9 of the Complaint:

In or about early 2015, on an occasion when he was away from the courthouse, Respondent, using his cell phone, telephoned Mr. Kachadourian. Respondent, who at the time was with James Stilloe, gave the phone to Mr. Stilloe, who then stated to Mr. Kachadourian that if he or Ms. Gallagher were ever to betray Respondent, they would have to answer to Mr. Stilloe.

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<sup>14</sup> In addition, as set forth above, when relating information about the photograph of the naked torso, Mr. Kachadourian claimed that the photograph which he identified as Ms. L██████████ was shown to him by Judge Miller in chambers and on Judge Miller's cellular telephone. However, Ms. L██████████ could not say for sure if it was her in the photograph and explained that Mr. Iannone admitted to her that he took a photograph but showed it to Mr. Kachadourian at a restaurant using his own cellular telephone. See infra Part I.

In his testimony, Mr. Kachadourian struggled to recall this incident and the name of the person who was involved.<sup>15</sup> (T49-50). Only when prompted with the name James Stilloe by the Commission’s attorney, could Mr. Kachadourian connect Mr. Stilloe to this claim. (T52-53). Further reflecting upon Mark Kachadourian’s credibility he added for the first time in his hearing testimony an allegation of a direct threat made by Mr. Stilloe against him at Stilloe’s “place of employment or somewhere else.” (T202-03). The allegation is not detailed in the Commission’s complaint. Kachadourian claimed to have just remembered the encounter while he was testifying. (T203). He concedes he never disclosed such an incident to the Inspector General, Commission on Judicial Conduct nor in his federal lawsuit against the Office of Court Administration and Judge Miller. (T203-204). James Stilloe appeared in person; he clearly and credibly testified that at no time, place, setting, nor during any telephone call did he make the statement Mr. Kachadourian attributes to him. (T867).

Mr. Kachadourian also made a claim that Marty Shaw, “just out of Attica” was an “enforcer” for Judge Miller. (T52) The Complaint (¶10) also ominously references Mr. Shaw as an “enforcer” with a criminal record. Martin Shaw testified in this proceeding. Mr. Shaw testified he is a master electrician for the Village of Endicott, sharing space for 21 years with the police department’s SWAT team. (T909-910). Mr. Shaw testified that since he was released 34 years ago for his crime he has had “no problems with the law.” (T911). (When Mr. Kachadourian says Mr. Shaw was “just out of Attica” he apparently means 34 years ago.) Contrary to the impression and testimony he gave at the hearing, Mr. Kachadourian admitted he

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<sup>15</sup> Mr. Kachadourian added an additional detail that Mr. Stilloe was in Oakdale Mall when he made the call. (T53). In fact, Stilloe noted he had never been in the Oakdale Mall with Judge Miller. (T869). Nor is there any way for Mr. Kachadourian as a recipient to know where any caller is located when it is originated – he was not and cannot be both the recipient and the originator of a call.

told the Inspector General that he did not believe Mr. Stilloe was any threat to his physical safety, a statement to which he had previously sworn to be the truth. (T205-06).

Mr. Shaw has led an exemplary life and worked with the Village and its police department for 21 years without incident. Likewise, Mr. Shaw and Judge Miller credibly testified that Judge Miller never made any threats against Ms. Gallagher or Mr. Kachadourian and never asked Mr. Shaw about being an enforcer. (T912-13, T1392).

Mr. Kachadourian's assault on members of the community continued with his testimony (paralleling ¶16 of the Complaint) that he heard insurance broker Jerry Penna state in a conversation with Judge Miller he had "cement boots" and that if Ms. Gallagher or Mr. Kachadourian ever betrayed the judge he has cement boots in their size and they would be found at the bottom of the river. (T54). Mr. Kachadourian also asserted he overheard Judge Miller and Mr. Penna discussing sexual matters and D [REDACTED] L [REDACTED].<sup>16</sup> (T36; T41-43). Presumably this is in support of ¶15 of the Commission's Complaint. Mr. Kachadourian sprinkled some other sordid details of the conversation he overheard including supposed sexual details, comments about Asian women and the presence of an unidentified maintenance worker during the conversation as well as a claim about "unsavory characters" in the building where Mr. Penna operates his insurance brokerage business. (T42, T206-07). No maintenance worker was produced as a witness or ever identified. Mr. Kachadourian admits he never mentioned or described to the Commission investigators nor during his

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<sup>16</sup> Ms. Gallagher refers to overhearing a comment about Ms. L [REDACTED] while Mr. Penna was present but makes no reference to Mr. Kachadourian being present. (T516-564).

Commission testimony nor at any time prior to his hearing testimony anything about the alleged Asian women comment.<sup>17</sup> (T208-11).

Mr. Penna testified that he is 70 years-old and has been an insurance broker in the Southern Tier of New York for 46 years since his honorable discharge from the Army. (T922-923). Mr. Penna confirmed that he never made any comment about “cement boots” or “shoes” in the size of Ms. Gallagher or Mr. Kachadourian. (T929). Mr. Penna testified that he had no discussion of a sexual nature in Judge Miller’s chambers and specifically did not discuss Ms. L ██████ or any other individuals. (T928-29).

Mr. Kachadourian had also told investigators that Penna’s business was in a building with “unsavory characters.” (T206-07). When asked specifically the basis of that description, Mr. Kachadourian stumbled, mumbled, and refused to support his statement, even when asked to explain by the Referee. (T207-08). Mr. Kachadourian, caught in a flagrant false accusation could not support his gratuitous insult because there is no support for the description. Mr. Penna testified his business is in a “professional building” with professional tenants. (T923-25). There is simply no basis for Mr. Kachadourian’s claim. It is a reflection of Kachadourian propensity to fabricate and exaggerate.

Unfortunately, Mr. Kachadourian maligns not only Judge Miller, but also other hard-working and innocent members of the community. Mr. Kachadourian’s unrestrained willingness to stain the reputation of third parties is clear. Also clear is Mr. Kachadourian’s lack of credibility when tested not only on cross-examination, but also by the testimony of the witnesses he implicates, all of whom testified credibly and did not malign Mr.

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<sup>17</sup> Under the guise of a Victorian prudishness Kachadourian explained his withholding of this detail. (T210). Such reservation was not exhibited in other claims Kachadourian made against Judge Miller to the Commission.

Kachadourian. As with Mr. Behal's testimony, there was no substantive challenge to Mr. Stilloe's, Mr. Shaw's or Mr. Penna's testimony on cross-examination. Their demeanor and presence spoke the truth. Accordingly, their testimony credibly refuted and raised grave and serious questions about the credibility and reliability of Mr. Kachadourian and/or Ms. Gallagher and the stories which they told to Commission counsel. Indeed, accepting the incredible testimony of Mr. Kachadourian and/or Ms. Gallagher by sustaining the charges relating to their testimony against Judge Miller would not only be contrary to the credible evidence, but would endorse testimony that would cause further harm to these hard-working and innocent members of the community.

#### **IV. Rachelle Gallagher's Reputation is One of a History of Selfishness, Deceit and Manipulation**

##### **A. The Legal Standard**

An accused person may present evidence of a witness' bad reputation for truthfulness and veracity to impeach the witness' credibility. The referee cited People v. Fernandez, 19 N.Y.3d 70 (2011), in support of Respondent's right to present such testimony. (T1011-1012). ("We have long held that 'a party has a right to call a witness to testify that a key opposing witness, who gave substantive evidence and was not called for purposes of impeachment, has a bad reputation in the community or truth and veracity.' Id. at 76 (citing People v. Pavao, 59 N.Y.2d 282, 290 (1983)); see also, People v. Hanley, 5 N.Y.3d 108, 112 (2005) ("The purpose of this rule is to "ensure[] that the jury is afforded a full picture of the witnesses presented, allowing it to give the proper weight to the testimony of such witnesses.").

##### **B. Rachelle Gallagher's Reputation for Honesty and Truthfulness**

Sandra Conklin worked with Rachelle Gallagher in the Village of Johnson City and had been friends with Ms. Gallagher and known her for twenty-five years. (T999, T1013). Ms.

Conklin's opinion of Ms. Gallagher's reputation for truthfulness and honesty was also based on conversations with individuals in the legal community and Broome County residents. (T1013, T1019-1020). Ms. Gallagher's reputation was that she was "untruthful." (T1013, T1020).

Lisa Wojdat knew Rachelle Gallagher as a court clerk and worked with her and other adjoining town or village court clerks. (T1081-1082). Ms. Wodjat also discussed Ms. Gallagher's reputation with "people outside the court community." (T1089). Ms. Wojdat testified that the opinion of Ms. Gallagher's reputation was "manipulator, liar, troublemaker, evil." (T1090).

Diane Marusich was a Village of Johnson City trustee where Ms. Gallagher worked as a court clerk. (T1211). Ms. Marusich was also assigned by the Village Board as liaison with Village court employees. (T1212-1213). Ms. Marusich also had occasion to speak to Town of Union court employees because that court was co-located in the same building as the Village of Johnson City court. (T1213). In these various capacities she knew Ms. Gallagher as the "longest-serving clerk in the village court" and interacted with other court clerks. (T1219-1220). Based on the discussions of people in the court and village, Ms. Marusich testified: "The reputation in the community regarding Rachelle Gallagher's truthfulness and credibility is that she's not credible, she's not truthful. She will deflect and place blame upon others for actions that she, herself, was responsible for and did not make." (T1225).

The reputations of Judge Miller and Rachelle Gallagher stand in stark contrast. As the Court of Appeals declared, reputation of an accuser, not just an accused is crucial so that a fact-finder "is afforded a full picture of the witnesses presented, allowing it to give the proper weight to the testimony of such witnesses." Hanley, 5 N.Y.3d at 112. Ms. Gallagher's reputation especially weighed against the unchallenged and unrebutted testimony of Judge Miller's reputation are critical and pivotal in a proceeding impacting career, not just as a judge but also an

attorney, and overall reputation in the community. Ms. Gallagher's reputation as an untruthful person casts a dark shadow on her allegations, especially considering the testimony in support of Judge Miller's reputation for truthfulness, honesty, judicial temperament and sexual propriety.

**V. Judge Miller's Reputations for Honesty, Credibility, Judicial Temperament and Sexual Propriety Support his Testimony and Contradict the Allegations Against Him**

In criminal cases in New York, character testimony may "make it unlikely" that an accused committed the crime charged and "evidence of good character may give rise to a reasonable doubt where, without it, none would exist." NY CJI 2d [NY], Character Evidence. See also, People v. Aharonowicz, 71 N.Y.2d 678 (1988). As noted by the Court of Appeals in People v. Bouton, 50 N.Y.2d 130, 139 (1980):

Perhaps the most impressive measure of the respect the law accords the community's ability to judge character is that the reputation of an accused for traits which, in the common experience of mankind, would tend to make it unlikely that he committed a particular offense may in and of itself give rise to a reasonable doubt of guilt where none would otherwise exist.

Id. at 139.

Certainly, the value of character testimony is equally important in a judicial conduct proceeding in which the credibility of the accusers and witnesses must be weighed. In addition, this proceeding raises questions of judicial temperament and judicial propriety. The reputation testimony of six-character witnesses on behalf of Judge Miller withstood cross-examination and is unrebutted.

**A. Character and Reputation Testimony of Witnesses Who Testified and the Foundation for Their Testimonies as well as Witness Observations**

The breadth of those testifying to Judge Miller's traits run the gamut from court clerks, a village official, a police officer, a court officer and an attorney who has spent her career

practicing in Broome County and its Family Court. Judge Miller has lived in Broome County his entire life. He has worked as a lawyer for decades and a judge in the local courts and Family Court since 2002. (T1300-1302). The individuals who testified to Judge Miller's character and reputation relating to several traits were:

- Jolene Payne, Endicott City Police Officer and former employee of attorney Richard Miller (T799-809);
- Diane Marusich, former Johnson City Village Trustee assigned to public safety including employees of village court and public servant (T1211-25);
- Lisa Wodjat, former Court Clerk in the Town of Union Court, Town of Dickinson and Village of Endicott Court (T1074-99);
- Sandra Conklin, Court Clerk, Johnson City (T997-1021);
- D [REDACTED] L [REDACTED] Family Court Clerk (T287-89);
- Kate Fitzgerald, Esq., prominent Broome County Family Court Attorney (T977-94);
- Sgt. Ronald Kreb, N.Y.S. Office of Court Administration court officer who has worked in the Broome County Family Court (T1196-1209).

#### **B. Reputation for Honesty and Truthfulness**

Diane Marusich, testified that Judge Miller's reputation was one of "honesty," "professionalism," "approachable," "patient," and "a man to be trusted." (T1216). Sandra Conklin testified that Judge Miller's reputation is, "He's a good family man. He's trustworthy." (T1002). Lisa Wodjat, who knows Judge Miller from working as a court clerk as well as through the community testified that Judge Miller's reputation was that he was "honorable, fair, respectable" and that she never heard a negative word that he was less than honest and trustworthy. (T1083). Police Officer Jolene Payne, a former employee of Judge Miller, testified that people in the community, including law enforcement such as New York State Troopers,

clients and attorneys have an opinion of Judge Miller as “[A] good man. He’s—I have never heard anybody say anything negative about him. He’s—He’s honest, he’s trustworthy, nice—nice man.” (T801; T804; 806). Even after Gallagher’s and Kachadourian’s allegations became public with the filing of their federal lawsuit weeks before the hearing, Office Payne testified that his reputation in the community did not change. (T809).

### C. Reputation for Judicial Temperament

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, 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).

#### **D. Reputation for Sexual Propriety**

Ms. Fitzgerald has also had occasion to discuss Judge Miller’s reputation for sexual propriety in the Family Court as well as the legal community, particularly since the publicity surrounding the filing of Ms. Gallagher’s and Mr. Kachadourian’s federal lawsuit against Judge Miller focused on the topic of Judge’s Miller’s reputation.<sup>18</sup> (T982-983). While ordinarily one’s sexual propriety may not be a topic of community discussion, in this case the publicity generated by Gallagher’s and Kachadourian’s actions generated the foundation for compelling testimony concerning Judge Miller’s reputation, including testimony from female witnesses. Officer Payne averred that with respect to the accusations “never heard anybody say anything remotely close to Judge Miller being that way.” (T807). Attorney Fitzgerald testified that within the Family Court and legal community, Judge Miller has a good reputation for sexual propriety and in her

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<sup>18</sup> Witnesses also testified to widespread knowledge of accusations against Judge Miller from the publicity surrounding the investigation by the Commission. See e.g. Jerry Penna testimony (T934-36; T951-52) (“Alleged charges against Richard Miller is a subject of conversation. . . . Matter of fact it became public on television . . . numerous times. . . .[T]his is [not] a confidential natter in Broome County. . . .[It] is widely discussed.” “And news reports referred to investigations of Judge Miller as a judge? Yes, and also the talk of the community.”). Ms. Gallagher acknowledges the day after her interview with the Commission in Albany in August 2017 newspaper and television reports of allegations against Judge Miller appeared in Binghamton news outlets. (T626-29).

discussions “with women attorneys, but a few men attorneys, and I have not heard anyone say anything that would give credibility to what we’ve read in the papers, accusations against him.” (T984; T988). Indeed, Ms. Fitzgerald averred that individuals have spontaneously approached Ms. Fitzgerald to discuss his reputation and consistently rendered the same opinion. (T985-86; T993-94).

## **VI. Judge Miller’s February 6, 2017 Calendar, Emergency Petitions and Rebecca Vroman**

As Broome County Family Court Judge, Judge Miller would have a rotating assignment to hear emergency petitions. These emergency petitions could involve a family offense petition, a request for an order of protection or emergency custody request. (T324). 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). This meant 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 “non-stop court activity” with no adjournments or breaks “because it was so busy” according to court assistant Rebecca Vroman. (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) 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).

Because security must leave by 4:30 P.M., court proceedings are to 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).

Proceedings in Broome Family Court are recorded by audio. (T347). In addition, the courtroom has a camera monitoring system, monitored by someone outside the courtroom, with recording capabilities. (T1201).

The Commission’s complaint alleges that “On or about February 6, 2017 after a court session, Respondent loudly and angrily admonished Ms. Vroman for scheduling emergency petitions that required Respondent to work past 4:00 P.M. that day, notwithstanding that he was the assigned emergency intake judge and had not notified Ms. Vroman that he intended to leave early.” Complaint ¶18.

At the hearing Ms. Vroman said:

When I was – When we had finished the one case and I was emailing the court officers on the second floor to let them know to send in the last emergency that had come in to be heard, he yelled at me and told me I was going too slow and that I needed to move faster and he just was being very rude and disrespectful and condescending and demeaning and just very belligerent to me.

(T327).

When asked “[w]hat was he doing as he was yelling at you?” she answered, “He was standing up and just yelling at me.” (T327). Ms. Vroman did not respond because she was so “flabbergasted by the way he was talking to me because it was the first time, he had ever treated me that way and I was just taken aback by it all.” (T327-28).

Ms. Vroman repeated in her testimony that Judge Miller’s comments were “in between cases.” (T328). There was no testimony from any other witness as to the interaction between Judge Miller and Ms. Vroman as to her allegation that Judge Miller was “standing up and yelling at” Ms. Vroman.

Nowhere in the record does Ms. Vroman describe or define what she means by “rude and disrespectful and condescending and demeaning and just very belligerent” or “yelling.” No words were attributed to Judge Miller by Ms. Vroman. Without description one is left to speculate exactly what transpired and what was meant. What does it mean to yell? Merriam-Webster defines yell as “to utter a loud cry, scream, or shout” as in “We saw people yelling for help.” Was Judge Miller yelling, as in for help? The Cambridge English dictionary defines yell as “to shout words or make a loud noise, often when you want to get someone’s attention.” Perhaps Judge Miller was seeking to draw attention to the crush of cases to be heard and resolved in a short and limited time period. While Ms. Vroman may have felt this was “rude” or “disrespectful” and have been “flabbergasted” at the “first time” Judge Miller expressed himself in such an excited fashion, the comment does not rise to “inappropriate behavior.” And, those feelings may have been spawned by Judge Miller’s letter to Chief Clerk Singer addressing his concerns in family court because Ms. Singer admittedly addressed some of Judge Miller’s concerns (such as she was falling asleep in the courtroom) with Ms. Vroman and thereby validated them, which in turn, may have caused additional animosity by Ms.

Vroman toward Judge Miller during the investigation as well as her testimony in these proceedings. (T394-97, Resp. V).

The Commission failed to present any audio or video recording of the February 6, 2017 afternoon court proceedings. Thus, there is no audio or video evidence to support this allegation. No witness, such as a court security testified to any interactions between Judge Miller and Rebecca Vroman. Sgt. Ronald Kreb, OCA court security, Kate Fitzgerald Esq., 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. (See infra Part V.C.).

Judge Miller testified about February 6, 2017:

It was getting late in the day. I think after 4:00 we actually got the last two petitions. We had to be out of that courtroom by 4:30 and there was a court officer in the courtroom with us, too. I did not, loud [sic] and angrily, admonish Ms. Vroman. What I did is asked her if she could move along because we had to get them done before 4:30, meaning some of the typing and input could be done afterwards as to being done immediately right when we were in the courtroom. And that's what occurred with that.

(T1397-98).

Whether "after a court session" or "in between cases," there was little time for Judge Miller to make any comment during a very busy and hectic court session. Judge Miller certainly needed and wanted to complete all the assigned afternoon emergency and regular cases, 16 in total, in two and one-half hours by 4:30 P.M. Any comment by Judge Miller was brief and fleeting.

Judge Miller noted:

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. 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).

Ms. Vroman agreed that whatever transpired on February 6, 2017 did not impede her and Judge Miller's ability for the two them to thereafter get the job done.<sup>19</sup> (T352).

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<sup>19</sup> When Judge Miller returned to Family Court after a vacation in July 2017, he notes that Ms. Vroman and he worked together to fill the gap left by the absence of Ms. Gallagher and Mr. Kachadourian. (T1359)

## **VII. The Allegations of Statements made by Judge Miller to and about Broome County Family Court Clerk Debra Singer Do Not constitute Judicial Misconduct**

As one of four Family Court Judges, Judge Miller regularly interacted with Broome County Family Chief Court Clerk Debbi Singer, who retired in June of 2018. During direct examination Ms. Singer stated that she knew Judge Miller “for decades” as “he practiced law in family court prior to becoming a judge” in “January 2015”. (T359). In response to an inquiry from Commission Counsel to “describe her working relationship with him after he became a judge?” Ms. Singer averred that “It was good. He would come down and discuss things with me and he was, you know, quite open about that, you know, stopping by and saying hello.” (T360).

Mr. Kachadourian knew Ms. Singer because he had worked with her late husband.<sup>20</sup>

Nonetheless, when Ms. Singer was interviewed by both the Judicial Conduct Commission and the OCA Inspector General, she mentioned that Judge Miller made three comments to or about her that made her feel uncomfortable in her office and one that Rachelle Gallagher claimed he repeated to her. However, although she claims that she discussed the statements with her Supervisor Gregory Gates at the District Office, there is no evidence corroborating that she contemporaneously reported Judge Miller’s comments to anyone else notwithstanding the fact that she worked on a daily basis with OCA Administrators, as well as the Administrative Judge for the Family Court. Mr. Gates is the first person Ms. Singer contacted with respect to any complaint by Gallagher or Kachadourian. (T383). Ms. Singer states she contacted Mr. Gates in “mid-2017.” (T382). Nor did she make any written report or avail herself of the OCA Work Safe Program (which provides a process for OCA employees to report sexual

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<sup>20</sup> We note that Ms. Singer also admitted to a long friendship with Mr. Kachadourian, who had offices in the same building as her husband - “We go way back ... My late husband, excuse me, was an attorney, and they had offices in the same building, so I have probably known him for 30 years.” (T358). See also, T122.

harassment claims which she admittedly was aware of and had received training in). (T383-386, T399-402).

Specifically, ¶¶ 23 and 24 of the Commission's Complaint allege as follows:

23. In or about May 2017, after a luncheon at the courthouse to which staff had brought food, Respondent commented to Chief Clerk Debbi Singer, whose husband is deceased, that he would have "gone for the widow" if he had known Ms. Singer could cook.

24. In or about June 2017, on separate occasions, Respondent commented to Chief Clerk Debbi Singer that he was "glad he had that effect on her" when she said something about having a hot flash, and that she looked "really hot" in the outfit she was wearing.

In her testimony, Ms. Singer asserted that Judge Miller made the comments directly to her during brief conversations in her office and that no one was around. (T366-371, T399)

As to the "would have gone for the widow" comment, the full comment was "If I knew you could also cook, I would have gone for the widow"; that was made in reference to a dish that Ms. Singer made for a "pass around luncheon in May 2017"; that she "took it to mean that he would have made a pass or something"; that she "diverted by talking about a recipe" but admitted that the Judge's demeanor was "Just normal..." Laughing, happy" and that she did not find it funny." (T367-368).

Regarding the "really hot comments," Ms. Singer claimed that during a discussion in her office in or about June 2017, she had a hot flash, took out her fan and state "I apologize, I'm having a hot flash." Her comment appeared to be spontaneous and was not in any way prompted by Judge Miller. As to the first comment "really hot" comment, Ms. Singer testified that in response to her comment, Judge Miller went back to his chambers. On direct, Ms. Singer also attempted to testify as to what Judge Miller may have said to Rachelle Gallagher after the hot flash incident, and what Ms. Gallagher reported to her, an objection was initially sustained. Ms. Singer clearly stated "no" when asked if Judge Miller made any comment in response to her "hot

flash” comment. (T369). It was not until redirect with prompting from Commission Counsel after seeing her hand written notes (Respondent’s U for identification) that Ms. Singer recalled that Judge Miller replied, “It’s nice to know I still have that effect on you.” (T403). A second attempt to elicit testimony from Ms. Singer as to what Judge Miller stated to Ms. Gallagher was allowed, but from the transcribed colloquy, that Commission Counsel worked around the hearsay objection and in later colloquy as to the Reports to OCA, it appears that any confusion as to what Ms. Gallagher said would be addressed when she testified. (T404-05).

Two days later Ms. Gallagher testified at the hearing. Although her testimony was quite long and gave graphic descriptions of alleged comments of a sexually suggestive nature by Judge Miller, Ms. Gallagher was never asked and did not testify with respect to the allegation that Judge Miller repeated the earlier comment allegedly made to Ms. Singer to the effect “It’s nice to know I still have that effect on you”. (T568-786). However, Ms. Gallagher was repeatedly asked whether Ms. Singer had made notes or reports with regard to the allegations she (Ms. Gallagher had made) against Judge Miller and could not say in certainty that Ms. Singer had made any notes or Reports when she spoke with her about any of the allegations. (T751, T757-58).

The allegation with respect to the June incident, namely that Judge Miller made a comment about Ms. Singer to Ms. Gallagher is questionable and reflects their lack of credibility because of the impossibility of it occurring. Ms. Singer claims she made her “hot flash” comment to Judge Miller on June 5, 2017, and Judge Miller then went to Ms. Gallagher and made the alleged comment. (T401-02). However, Ms. Gallagher admitted, from her recollection and review of her time and attendance records presented to her that she was away and took leave

the week of June 5-9, 2017, and not in the family court building<sup>21</sup>. (T723-25). It simply could not have happened as alleged. This impossibility reflects not only upon the credibility of Ms. Gallagher but also Ms. Singer's.

As to the third comment, Ms. Singer claimed that there was another incident that occurred when her “door was opened” and that as Judge Miller “walked by, he stopped – he stepped in and said to me “You look really hot in that outfit. You should always wear that outfit.” (T370). She claimed that although she was “shocked and disgusted,” she did not respond or tell the judge that the remarks were inappropriate but “let it ride”. (T370-71). She also asserted that she spoke to Greg Gates about the comment<sup>22</sup> in the following colloquy: “Q. When you advised Mr. Gates of your concerns about – of the concerns about Judge Miller, did you ever tell him about these incidents as well? That you personally experienced? A. I – We had many conversations and I’m sure I did mention my own experiences.” (T371).

Although Ms. Singer claims that she made personal notes about the above referenced comments, during cross examination she was unable to specifically identify the date of the incidents, apart from June 5, 2017.<sup>23</sup> (T399-402). Moreover, when asked “Other than your notes, do you have any formal record or report that you filed with the Office of Court Administration

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<sup>21</sup> Mark Kachadourian testified that Ms. Gallagher was in Clemson, South Carolina in June 2017. (T230).

<sup>22</sup> She initially testified that she spoke to Mr. Gates about her concerns relating to Judge Miller’s Conduct in or around July or June 2017. However, she stated “The nature of these concerns were reports that I had been getting from Rachelle and Mark regarding Judge Miller’s interaction with them”... “Sexual harassment and even a death threat is what they reported to me”. (T361). In the colloquy over the next six pages, Ms. Singer describes her reports to Mr. Gates based on the various claims that Ms. Gallagher and Mr. Kachadourian “reported” to her, and there was no mention of any report to Mr. Gates about what Judge Miller may have said to her. (T386).

<sup>23</sup> The impossibility of the June 5, 2017 allegation reflects the importance of specific allegations as to date and content in establishing and questioning the reliability and validity of allegations such as those set forth in Charge I.

about either Marie Lawrence, Rachelle Gallagher, Mark Kachadourian or Judge Miller?" Ms. Singer responded, "A written report? ... Not to my knowledge." (T402).

Judge Miller also testified and was specifically asked both during his direct examination about the alleged comments to Ms. Singer as set forth in paragraphs 23 and 24 above, averring as follows:

Q. How about paragraph 24?

A. No, it did not.

Q. Paragraph 25? Did that occur?

A. Yes, that occurred.

(T1399). No questions as to this issue were posed during cross-examination. However, Judge Miller also made a personal statement in which he stated in pertinent part:

...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.

(T1428).

Based on the evidence adduced, Ms. Singer felt that she had a good working relationship with Judge Miller. She did not provide any specifics as to what or when she discussed with Mr. Gates. Perhaps more important, she did not feel that Judge Miller's comments to her warranted a response, a rebuke or a report of any kind to OCA or any other authority. Although Judge Miller admittedly made one of the comments, he had no specific recollection as to the others. It is

readily apparent, that Judge Miller made isolated comments in an informal private or semi-private setting which were of a limited nature; he did not use vulgar language and the comment as to looking hot was ill advised but apparently made in jest (even Ms. Singer states that he was laughing when he made the statement in response to her statement about a hot flash).

As to whether these comments rise to the level to support a violation of Charge I, it is respectfully submitted that he did not in any way make such comments with the intent to demean, harass, insult or offend Ms. Singer. Although the Commission has imposed discipline in certain cases for inappropriate comments made by a judge, the context of the comment is important. Charges have been sustained depending on the nature of the comments that were made; the number of times the comments were made; and the length of time over which the comments were made. Based on the facts, the published precedent is distinguishable, so Judge Miller's conduct did not violate the Rules of Judicial Conduct. See e.g. Matter of Edmund V. Caplicki, Jr., Determination of the Commission on Judicial Conduct, September 26, 2007 (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 (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 (Over a two year period, Judge boasted 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); Matter of Warren M. Doolittle, Determination of the Commission on Judicial Conduct, June 13, 1985 (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 (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).

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).

### **VIII. Judge Miller Did Not Engage in The Practice of Law or Convey the Impression That He Was Still Engaged in The Practice of Law as A Full-Time Judge**

As for the Third Charge, the Commission alleges that Judge Miller practiced law after becoming a judge with respect to two Estates: the *Estate of Antoinette Saraceno* and the *Estate of Jerry J. Behal, Jr.* (Complaint, ¶34). The allegations will be discussed in turn.

**A. Judge Miller’s Conduct with Respect to the *Estate of Antoinette Saraceno* was Proper and did Not Constitute the Practice of Law**

The Complaint alleges the following: “In or about October 2016, Respondent told the wife of the executor of the *Estate of Antoinette Saraceno* that he would finish the remaining work on the estate and thereafter, in a telephone conversation with the Chief Clerk of the Tioga County Surrogate’s Court, Respondent requested that the court allow the estate to be closed by motion instead of a formal accounting.” (Complaint, ¶34). As discussed below, the proof establishes that while Judge Miller had telephone conversations with the Executor’s wife and the Tioga County Surrogate’s Court Clerk concerning this estate, he did not state or imply “that he would finish the remaining work on the estate” and did not request that the estate be closed by motion.

Antoinette Saraceno died in October 2010 and Preliminary letters were issued to Frank Saraceno, Sr., in April 2011. (Complaint ¶35; Admitted by Resp.). In 2011, approximately four years prior to becoming Family Court Judge, all funds were distributed to beneficiaries in the *Estate of Saraceno (Saraceno Estate)*. (T481; Resp. X). Estate administration expenses, including legal fees to Richard Miller, Esq. were paid on April 6, 2012. (T481-82; T1621; Resp. X).

By 2015, Mr. Saraceno, the Executor of the Saraceno Estate, was confined to a nursing home and had physical and short-term memory issues. (Comm. 5A). By letter dated August 2, 2016, the Tioga County Surrogate’s Court informed Mr. Saraceno that a two-year report was required in the *Estate of Saraceno*. (T424; T474; Comm. 5MM). Mr. Saraceno’s wife, Barbara Saraceno, opened her husband’s mail while he was in the nursing home and responded to the Court’s inquiries. (T475).

A similar correspondence relating to the two-year report was ostensibly sent on August 2, 2016, to Richard Miller, Esq., the attorney of record according to the Surrogate's Court files. (Complaint, ¶40). While at first Court Clerk Deborah Stone testified the letter was mailed, a careful review of the Surrogate records during the hearing revealed that it was instead emailed to [REDACTED] [@aol.com](mailto:@aol.com). (T424, T447, T448-1449; Comm. 5A; Comm. 5MM). More significantly, Clerk Stone admitted that there was no documentation or verification that anyone, let alone Judge Miller, had opened the email from Surrogate's Court.<sup>24</sup> (T 463-464; Comm. 5VV). Judge Miller recalls learning about issues with the Saraceno Estate two to three months later, sometime around and before the end of October 2016. (T1402). Judge Miller's statement is consistent with court records indicating that another email sent to Judge Miller seven months later, on March 12, 2017, was marked in court records as unread by the recipient. (T464-466). Thus, while Ms. Stone may very well have emailed the August 2 letter to Judge Miller, there is no proof that Judge Miller was aware of or accessed the email.

Mrs. Saraceno testified that she spoke to both Judge Miller and the Court Clerk in August 2016. (T475). She informed the Court Clerk that she had contacted Judge Miller to inquire about the estate. (T475). According to Mrs. Saraceno, Judge Miller "said that he was going to get someone-- It was going to be taken care of and not to worry about it." (T475). Although Judge Miller does not question the truthfulness of Mrs. Saraceno's statement (for indeed, his response that "he was going to get someone" to take care of the estate is very much in line with what he told Mrs. Saraceno in October 2016), he does not recall learning about any issues with the estate until sometime around October 2016. (T1402).

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<sup>24</sup> As discussed below, several individuals, including his secretary while he was a practicing attorney, had access to and utilized that email address. See T1136, T1155, T1166, T1176, T1179.

According to the Surrogate Court records, Mrs. Saraceno contacted the Tioga Surrogate’s Court on August 15, 2016, and informed a Surrogate’s Court employee (Kiyoko “Kiki” Matsuhashi) that: 1) she was told by Respondent’s former office assistant, Donna Filip, that “Richard Miller is a judge now and no longer practicing;” 2) her husband, the Executor, is in a nursing home; and, 3) one beneficiary is refusing to accept a piano but that all other distributions seem to be complete. (T428, T451; Comm. 5A). By letter dated August 16, 2016, Ms. Matsuhashi advised Mr. Saraceno, that “The Court has been informed that Richard H. Miller II, Esq. no longer represents this estate.” (Comm. 5NN). In short, as documented in the August 15, 2016 Surrogate’s Court Sticky Note (Comm. 5A) and the August 16, 2016 Surrogate’s Court letter (Comm. 5NN), Judge Miller repeatedly informed both Mrs. Saraceno as well as the Court that he was no longer practicing—the exact opposite of any impression that he was engaged in the practice of law.

While the allegation against Judge Miller is that in October 2016, he told Mrs. Saraceno he personally “would be finishing up the estate,” (Complaint, ¶43) Ms. Saraceno did not testify that Judge Miller made such a statement. Rather, her recollection was that Judge Miller said, “Okay, this-- this was-- would be taken care of.” (T476). By that Judge Miller meant that Attorney Serjanej “would file whatever paperwork needed to be filed on behalf of the executor of that estate to make sure it was concluded.” (T1404). Judge Miller’s October 2016 statement (that the estate “would be taken care of”) is strikingly similar to the statement Mrs. Saraceno believes Judge Miller made in August 2016 (“that he was going to get someone-- It was going to be taken care of”). (T475-476). In any case, Judge Miller did not imply that he personally would be the one to do any legal work to close the estate. Furthermore, contrary to the Complaint’s allegations, Mrs. Saraceno never testified that on or about December 16, 2016, or at any time,

that Judge Miller “advised her that *he* would finish the estate.” (Complaint, ¶44, emphasis added).

Judge Miller had two calls with the Tioga Surrogate’s Court concerning the *Saraceno Estate*, on October 12 and 14, 2016, respectively. October 12, 2016 was the first time Clerk Stone had direct contact with Judge Miller. (T454). During that telephone call, Judge Miller informed Ms. Stone that he was a judge, and as such, was not permitted to practice law; that another attorney would be handling the case; and “didn’t ask anything to be done.” (T1402-1403). Ms. Stone similarly testified that she told the Commission investigator that Judge Miller told her that he could not handle the estate. (T452-54). Judge Miller did not ask for anything to be done, including requesting that the estate be closed by motion instead of a formal accounting. (T1403, T1448). October 14, 2016 is the last time Ms. Stone ever spoke to Judge Miller. (T458). During that telephone call, Judge Miller reaffirmed that he could not handle the Saraceno Estate and that Attorney Serjanej would be finishing up the estate. (T1403).

Ultimately, Attorney Serjanej assisted Mrs. Saraceno, whose husband was ill and dying, in supplying the information to the Surrogate’s Court to close the Saraceno Estate. (T1037-1041; T1108-1111). Clerk Stone agrees that since October 12, 2016, Judge Miller never called or wrote the Tioga County Surrogate’s Court. (T455). Clerk Stone further testified that she has no information that Judge Miller prepared any legal document submitted to the Tioga’s County Surrogate’s Court with respect to the *Estate of Saraceno* after he became judge on January 1, 2015. (T455-456). Finally, Clerk Stone has no information that Judge Miller assisted in the preparation of any legal document submitted to Surrogate’s Court with respect to the *Estate of Saraceno* after he became judge. (T456).

The foregoing falls far short of the practice of law. Judge Miller simply responded to Clerk Stone (and possibly Mrs. Saraceno, although he does not recall the conversation) to inform her(them) that he was a Family Court Judge; that he would not be handling estate, and relayed what he believed the status as well as the history of the estate. (T1402-1403). He provided Clerk Stone with historical information and stated that “another attorney would be handling the file.” (T1448). Nor did Judge Miller request that the Saraceno Estate be closed by formal accounting (T1448). As discussed below, see supra Part VIII.C., such ministerial acts do not amount to the practice of law.

**B. Judge Miller’s Conduct with Respect to the *Estate of Jerry J. Behal, Jr.* was Proper and did Not Constitute the Practice of Law**

Turning to the second Estate the *Estate of Jerry J. Behal, Jr. (the Behal Estate)*, the Complaint alleges that “In or about May 2017, Respondent met in his Family Court chambers with the executor of the *Estate of Jerry J. Behal, Jr.*) reviewed the estate’s accounts, went to his former law office, reviewed the estate file and sought to enlist the efforts of his court attorney, Mark Kachadourian, in completing the estate accounting.” (Complaint, ¶34). The evidence demonstrates that after he took the bench on January 1, 2015, Judge Miller had no involvement in the *Behal Estate* and did not seek Mr. Kachadourian’s assistance with respect to the *Behal Estate*.

David Behal, the Judge’s childhood friend, was the Executor of the *Estate of Jerry Behal, Jr.* Respondent, before he became a judge, filed a Petition for probate in 2011 on behalf of Mr. Behal and the will was admitted to probate that year. (Complaint, ¶46; Admitted by Resp.). After his election to Family Court, Judge-elect Miller explained that he could no longer practice law and he and Mr. Behal discussed that attorney Artan Serjanej would take over as attorney for the Estate. (T1322). Mr. Behal and Attorney Serjanej signed a consent to change attorney on March

2, 2015, and March 20, 2015, respectively. (T1046, T1052, T1118; Resp. CC). Attorney Serjanej filed a Notice of Appearance on November 23, 2015. (T1042; Comm. 4CC).

Prior to Judge Miller becoming a Judge, Mr. Behal testified that he received only one email from the email address associated with Judge Miller's office, [REDACTED]@aol.com. That email, dated May 15, 2013, was in fact from Judge Miller's secretary at the time, Jolene [Payne]. (T1136; R HH). Mr. Behal testified that Judge Miller's office assistant, Donna Filip, had told Mr. Behal she had access to the [REDACTED]@aol.com account. (T1155). When Respondent became a judge, Ms. Filip worked with Attorney Serjanej. (T1035).

Ms. Filip had instructed Mr. Behal to utilize the [REDACTED]@aol.com account and another address when emailing her and Attorney Serjanej. (T1176).<sup>25</sup> According to Mr. Behal, he would email Attorney Serjanej and Ms. Filip at that email address (T1166). Mr. Behal exchanged emails with Ms. Filip concerning Estate expenses and the Estate account on March 1, 2017, April 1, 2017, and April 28, 2017. (Resp. GG).<sup>26</sup> While the [REDACTED]@aol.com address appears on these emails, Judge Miller never saw or responded to these emails. (T1439).

Mr. Behal's search of his emails in preparation for his testimony uncovered a May 9, 2017 email from Ms. Filip (who was now working for Attorney Serjanej) requesting that Mr. Behal meet with Attorney Serjanej at their office on Thursday May 11, 2017, with respect to

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<sup>25</sup> Mr. Behal informed the Commission investigator that Ms. Filip had access to more than one email. (T1179).

<sup>26</sup> These emails were included in emails introduced into evidence by the Commission. (Comm. 4III). The emails were not produced from Mr. Behal's internet provider. (T1122-27). They appear to have been printed by accessing an AOL account (presumably Judge Miller's AOL account). However, the Commission did not request and Judge Miller did not provide the emails to the Commission. Nor did the Commission request that Mr. Behal to conduct any search for records, produce emails or otherwise ask Mr. Behal about his documents and recollection concerning the Behal estate. (T1128). The May 15, 2013 and May 9, 2017 emails were located by Mr. Behal after his independent search for documents related to his communications with Attorneys Miller and Serjanej and he produced them to the undersigned during the preparation for this hearing. (T1133-36, T1165-85).

calculations relating to the accounting. (T1126). The Commission's exhibit to emails omits this email. (Comm. 4III).

On May 10, 2017, Mr. Behal drove from his home in Virginia to Binghamton, New York, where his mother resides. (T1137). Mr. Behal confirmed that he then met with Attorney Serjanej and Ms. Filip at their office as planned to discuss the estate. (T1137; T1161). Judge Miller did not attend that meeting. (T1138).

Mr. Behal testified that the following day, he traveled to Family Court to meet with Judge Miller for either lunch or dinner. (T1138). Mr. Kachadourian met Mr. Behal at security because Judge Miller was in court. (T1138). The two of them (Messrs. Kachadourian and Behal) happened to run into Attorney Serjanej by the courthouse metal detector. (T1138-1139). It was likely Attorney Serjanej's presence that prompted Mr. Kachadourian to ask Mr. Behal "How are things going with the estate?" (T1139). Attorney Serjanej was not present for this question and the resulting conversation. (T1139-1140). Mr. Behal replied that "one of the beneficiaries had a problem with the accounting." (T1139). Mr. Behal asked if Mr. Kachadourian knew anything "about estate taxes," prompting Mr. Kachadourian to access Judge Miller's secretary's computer. (T1141). Mr. Kachadourian explained that there were estate forms that Mr. Behal needed to fill out. (T1142). Mr. Kachadourian proceeded to log into Judge Miller's "RHM AOL account," to send the documents. (T1142). However, Mr. Kachadourian was unable to download the forms and printed them out instead. (T1142-1144). Of the forms Mr. Kachadourian printed for Mr. Behal, one was dated May 12, 2017, which corroborates Mr. Behal's testimony (T1147, Resp. II). Mr. Behal testified that Judge Miller was in court during this entire exchange between Mr. Behal and Mr. Kachadourian. (T1145). Judge Miller similarly testified that upon returning to his

chambers after court concluded, he observed Mr. Kachadourian and Mr. Behal at his secretary's desk and computer. (T1378-79).

On May 25, 2017, Mr. Behal returned to Binghamton for a funeral and signed the Behal Estate accounting before Attorney Serjanej at his office. (T1148-1149; Comm. 4PP). Attorney Serjanej is not aware of any meetings between Mr. Behal and Judge Miller in his office after January 2015. (T1056). Attorney Serjanej and Mr. Behal testified that the two of them (he and Mr. Behal) prepared the accounting and no one else. (T1052-1154, T1150-51).

Notably, Mr. Behal testified that at no point after January 1, 2015, the date Judge Miller took the bench, did Judge Miller provide Mr. Behal with any legal advice with respect to the estate or perform any work associated with preparing the accounting. (T1150). Contrary to the Complaint's allegations, Judge Miller did not meet Mr. Behal in his Court Chambers in May 2017 and did not travel with Mr. Behal "to his former law office" to "review the estate's accounts." Nor did he, or anyone, ask or for that matter need Mr. Kachadourian's assistance "in completing the estate accounting." Indeed, no client, attorney or even a judge would have any reason to seek the assistance of Mr. Kachadourian, who admits he had no knowledge, skill or background in estates, completing estates or estate accountings. (T177).

Finally, Judge Miller's brief conversation with Attorney Robert Wedlake in October 2016 does not amount to the practice of law in any way regarding the Behal Estate or in any other way for that matter. Attorney Wedlake, the attorney for a legatee of the estate, became involved in the *Estate of Behal* in August 2016, and filed a notice of appearance in the fall of 2016. (T489). Attorney Wedlake interacted with Attorney Serjanej and his office on estate matters and not Judge Miller. (T503-504). Attorney Wedlake's only contact with Judge Miller regarding the estate occurred in October 2016. When speaking with Judge Miller about another unrelated

matter involving a property owned by the Judge, Attorney Wedlake spontaneously and without any prompting by Judge Miller changed the subject and inquired as to factual information about the Behal Estate in order to advise his client. (T506-507; T1324). Attorney Wedlake explained that he was “looking for facts” and not “legal opinions” from Judge Miller. (T514). Attorney Wedlake felt his inquiry was an appropriate inquiry to a judge relating to a matter the judge handled prior to becoming a judge when he was an attorney to obtain factual information in connection with the estate proceeding. (T515). Attorney Wedlake testified that:

- 1) Judge Miller did not say he was going to perform any legal work on the estate (T516)
- 2) he never had the impression Judge Miller was going to perform legal work on the estate (T516); and,
- 3) he has no knowledge or information that Judge Miller performed any work or legal service on the Behal estate (T516-17).

Testimony from Attorney Serjanej and Executor David Behal, provided consistent, corroborated, and credible testimony that Judge Miller acted properly and never engaged in the practice of law or provided legal services in connection with the *Estate of Behal* after becoming Judge. Furthermore, as discussed below, Judge Miller’s brief conversation with Attorney Wedlake in which he responded to factual estate-related inquiries does not amount to the practice of law.

#### **C. A Judge is Permitted to Respond to Inquiries Relating to Matters He Handled as a Private Attorney**

The New York State Advisory Committee on Judicial Ethics provides guidance in interpreting the Rules Governing Judicial Conduct. Numerous Advisory Committee Ethical *Opinions* (cited hereinafter as “*Opinion*”) make clear that “a judge may perform ministerial acts

that are related to the judge's prior law practice." Opinion 10-139, Advisory Committee on Judicial Ethics (January 7, 2011). Such ministerial acts include: 1) receiving fees from a Sheriff's Office, retaining the attorney's fees, and paying the balance to the client; Opinion 10-139, Advisory Committee on Judicial Ethics (January 7, 2011); 2) executing new documents to replace documents drafted and signed while the judge was a referee; Opinion 03-37, Advisory Committee on Judicial Ethics (April 15, 2003); 3) executing an application for a certificate of deposit necessary to effectuate the results of a determination the judge made while serving as a referee; Opinion 06-57, Advisory Committee on Judicial Ethics (April 26, 2006); 4) providing an affidavit detailing the services rendered, the dates rendered, and the amount of time expended, concerning an estate that the judge handled a practicing attorney; Opinion 04-67, Advisory Committee on Judicial Ethics (June 3, 2004); and, 5) providing a declaration about the facts and circumstances involved in an employment agreement the judge negotiated while in private practice; Opinion 91-137, Advisory Committee on Judicial Ethics (October 31, 2009).

The foregoing makes clear that not only can a judge respond to inquiries concerning work he performed as a practicing attorney, but also that he can also create and execute documents regarding the work he performed as a practicing attorney.

#### **D. A Judge Can Be Paid for Work Earned Before Taking the Bench**

Several *Opinions*, including the following, make clear that a full-time judge may collect fees for work earned as a practicing attorney before taking the judge: Opinion 95-12, Advisory Committee on Judicial Ethics (March 9, 1995) ("a judge may collect fees owed to him or her in connection with legal services performed prior to his or her assumption of judicial office"); Opinion 97-09, Advisory Committee on Judicial Ethics (January 23, 1997) ("A full-time judge may not practice law. . . . [but] may remain a shareholder of the professional corporation . . .

solely for purpose of winding up its affairs. . . . The winding up of affairs would include the collection of fees earned and the payment of debts that accrued prior to the judge's appointment."); Opinion 89-134, Advisory Committee on Judicial Ethics (December 5, 1989) ("While a judge must avoid impropriety and the appearance of impropriety, there is no prohibition against a judge collecting legal fees which were earned before leaving practice.").

#### **E. The Definition of "Practice of Law"**

Respondent has been unable to locate a universal definition of the "practice of law."<sup>27</sup> However, in general, the practice of law refers to 1) an individual who offers legal advice; and/or 2) an individual who appears as an attorney before a court, agency, etc. For example, for attorney registration purposes, "the 'practice of law' shall mean the giving of legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in either the public or private sector in the State of New York or elsewhere; it shall include the appearance as an attorney before any court or administrative agency." 22 NYCRR § 118.1(g). The Third Department, when disciplining an attorney, may direct the attorney to "refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another; and [the attorney] is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to

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<sup>27</sup> On August 14, 2018 the ABA Task Force on the Model Definition of the Practice of Law issued acknowledged that many attempts had been made to define the practice of law and thereby issued a Challenge Statement "To determine the best approach for the Association to address whether to create a model definition of the practice of law that would support the goal to provide the public with better access to legal services, be in concert with governmental concerns about anticompetitive restraints, and provide a basis for effective enforcement of unauthorized practice of law statutes".

[https://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_definition.html](https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition.html).

the law or its application, or any advice in relation thereto.” Matter of Castillo, 145 A.D.3d 1177, 1179 (3d Dep’t 2016).

Based on the facts of this proceeding and the law, Judge Miller did not engage in the practice of law.

## **IX. Judge Miller Did Not Importune His Staff to Engage in Prohibited Political Activity**

### **A. The Allegation and Testimony Concerning the Allegation**

In the Specifications to Charge II, the Complaint alleges:

Beginning in 2016, Respondent told Ms. Gallagher and Mr. Kachadourian that he wanted his chambers to be a campaign office, and for them to keep a list of names for use in future political campaigns.

In 2017, Respondent importuned Ms. Gallagher to collect signatures on designating petitions for Richard Balles, Respondent’s brother-in-law, who was then a candidate for mayor of Johnson City, notwithstanding that the court staff are prohibited from engaging in such political activity pursuant to 22 NYCRR 50.2(c).

Complaint, ¶¶30-31.

Mr. Kachadourian claims he was asked to maintain a list of individuals for future campaigns, but Mr. Kachadourian says he never kept any such list. (T57). Ms. Gallagher did not produce any such list. (T727-728). Mr. Kachadourian claimed that Judge Miller asked Ms. Gallagher to collect petition signatures for his brother-in-law Richard Balles, a mayoral candidate in Johnson City. (T57). Ms. Gallagher was a close acquaintance of Mr. Balles.<sup>28</sup> Balles is also the godfather of Rachelle Gallagher’s son [REDACTED]. (T660). Ms. Gallagher says she and Kachadourian were asked to work on Balles’ campaign. (T592-593). Mr. Kachadourian however

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<sup>28</sup> Ms., Gallagher attended the wedding of Richard Balles’ daughter, Nicole, on April 29, 2017. (T712). Ms. Gallagher was acquainted with the Balles family. (T721). Mr. Balles described a “very close” relationship with the Gallaghers until 2017 and would have contact with them three to four times a month. (T966).

testified he was not asked to do anything for the Balles campaign. (T58). Mr. Kachadourian explained, when pressed by the referee, that Judge Miller did not specify that Gallagher was to collect petitions during office hours. (T58). Ms. Gallagher admits that she did not collect any petition signatures. (T594).

Judge Miller testified that he never directed Ms. Gallagher or Mr. Kachadourian to perform any activity of a political nature in chambers, maintain any list of political affiliations nor did he ask that either do anything for the campaign of Richard Balles. (T1399-1400).

#### **B. The Law and Ethics Regarding Court Employees' Political Activities**

The New York State Advisory Committee on Judicial Ethics has also provided guidance in interpreting the Rules Governing Judicial Conduct (22 NYCRR Part 100) relating to judges and their staff in connection with political activities. In interpreting 100.5(C) of the Rules Governing Judicial Conduct, which are cross-referenced in Rule 50.2 which deals with political activities of court employees, the Committee was asked to define "permissible political activity of the judge's Principal Law Clerk, a personal appointee of the judge." The Advisory Committee held:

The Committee is of the opinion that the following activities cited in the judge's letter are not prohibited: (1) carrying nominating or designating petitions for candidates seeking election to judicial or non-judicial office; (2) engaging in such activity while on annual leave; (3) privately reviewing designating petitions under the Election Law as to form, content and legal sufficiency, and drafting such petitions, but not as counsel.

Opinion 03-111, Advisory Committee on Judicial Ethics (August 13, 2004).

In another opinion, the Advisory Committee approved of a law clerk participating in a close-relative's campaign by walking in parades, appearing in family photos, making calls during non-work hours, attending organizational meetings and political functions. Opinion 03-111,

Advisory Committee on Judicial Ethics (August 13, 2004). The Opinion noted that it had previously ruled that only political activities specifically prohibited by 22 NYCRR 100.5(C)(1)-(4) are off limits in the absence of a special circumstance. Id.

While Ms. Gallagher claims she did not collect petition signatures because Mr. Kachadourian instructed her that they were not allowed to engage in such political activity (T594), the Advisory Committee's Opinions hold otherwise.

### C. Conclusion

Apart from Judge Miller's strong denial that he ever requested that Gallagher or Kachadourian engage in political activity, there is no documentary proof supporting the proposition that Ms. Gallagher collected petitions or that Ms. Gallagher or Mr. Kachadourian created any political list. (T177). There is no testimony that either was asked to perform any political activity during work hours. Mr. Kachadourian further disputes and contradicts Ms. Gallagher's assertion that Kachadourian was asked to work on the Balles campaign. Assuming, without accepting that Judge Miller discussed political activity with Gallagher or Kachadourian, they never engaged in any such activity, and the activity was neither improper nor prohibited activity.

### X. **Judge Miller Began the Process of Filing Corrected New York State Financial Disclosure Forms and Tax Returns Reflecting His Outside Income Soon After Filing His 2016 Returns on April 15, 2017, and Before any Inquiry by the Inspector General or Commission on Judicial Conduct**

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

Court as required.” (Complaint, ¶63). We note that the report to the Clerk of the Broome County Family Court is conceded and will be addressed at Item XI below. As to the other filings, Judge Miller neither intentionally delayed nor omitted information from them.

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).<sup>29</sup> 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). This month and one-half time period, which would be approximately the end of May, or early June, is well before either the Inspector

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<sup>29</sup> 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).

General questioned him about his income and tax returns on July 14, 2017.<sup>30</sup> 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 they 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:

1. As to his tax returns for tax years 2015 and 2016, Judge Miller:
  - timely filed Federal and New York State joint tax returns with the 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 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

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<sup>30</sup> 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. The OCA Inspector General questioned Judge Miller for the first time on July 14, 2017. (T1371).

information necessary to amend his 2015 and 2016 returns .(T1251-53; T1268; T1408-1418);

- had begun to collect and assemble the records placing them in boxes in his office until he could meet with his accountant, but that 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);
  - met with his accountant and amended the tax returns (T1260; T1382-1385, T1408-1418; Comm. 9B, 9C, 9E, 9G, 9H, 9J) ; and
  - advised the Commission that he had done so prior to the filing of the instant charges (T. 1418; Comm. 10A).
2. As to the disclosure reports of his income from extra-judicial activities to the Ethics Commission for the Unified Court System pursuant to 22 NYCRR 100.4(I) (FDF), Judge Miller timely filed the FDF Reports. However Judge Miller relied on the advice of his accountant in that he did not derive income from the rental properties (they operated at a loss) as well as the fact that he donated the proceeds of his earnings for conducting weddings to his church and did not declare such income on his tax returns because he did not claim them as a deduction. (T1261-1263). Accountant Dean testified that the transactions Judge Miller had with respect to wedding ceremonies did not constitute reportable income. (T1263). Judge Miller relied on his accountant's advice and opinion that he did not derive income with respect to the wedding ceremonies. (T1384, T1416-1418).

Based on the undisputed evidence, Judge Miller had a valid excuse for his inaccurate filings in that he spoke with and relied on 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 the very documents he needed. Once he had the documents, he 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<sup>31</sup> 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 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 case were sanctioned for repeated and additional substantial misconduct, including failure to cooperate with the Commission's investigation and intentionally omitting material information in their FDF. See e.g., Matter of McAndrews, Determination of the Commission on Judicial Conduct, June 18, 2013, (2014 Annual Report 157) (judge failed to timely file a

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<sup>31</sup> 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.

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) (Judge accepted a total of \$250,000 in "disguised contributions" and failed to report the contributions FDF as required with the Unified Court System's Ethics Commission and also skirted the Election Law); Matter of Joseph S. Alessandro, 13 N.Y.3d 238 (2009); (Judge Joseph S. Alessandro accepted a \$ 250,000 loan from his campaign manager (CM), which he did not repay; repeatedly assured her and her attorney that he would obtain financing to repay the loan; and after taking office, persuaded the CM's attorney to procure an affidavit from her, which she used against her in a foreclosure suit she filed to recover the loan; his evasiveness created a strong inference that he was dishonest in dealing with the CM and her attorney and his failure to disclose the CM mortgage in his financial disclosure statement and mortgage applications was consistent with an ongoing pattern of shirking his obligation to repay the CM. Judge Francis M. Alessandro 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"); Matter of John J. Elliott, Determination of the Commission on Judicial Conduct, November 18, 2002 (2003 Annual Report 107) (Judge failed to file his financial disclosure statements in a timely manner in three of the preceding five years); Matter of Robert T. Russell, Jr., Determination of the

Commission on Judicial Conduct, October 31, 2001 (2001 Annual Report 121) (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) (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).

Respectfully, the uncontested evidence is that Judge Miller had a valid excuse for the delinquency, he has fully cooperated with the investigation and made and filed his changes as soon as he was able to do so. Thus, the facts relating to this Charge demonstrate that it should not be sustained.

**XI. Judge Miller Concedes that He Was Not Aware of the Filing Requirement with the Court Clerk but He Has Now Done So**

Judge Miller testified that he was unaware of 22 NYCRR 100.4(H)(2) which required that as a full-time judge he had to "annually" file "a report with the date, place and nature of any activity for which the judge received compensation in excess of \$150, and the name of the payor and the amount of compensation so received" with the "clerk of the court on which the judge serves." (T1411-1412, T1416, T1417-1418, T1469). Judge Miller admittedly filed the Reports after this hearing commenced. (T1469). He apologized for belatedly doing so and explained that he believed that filing the FDF met his yearly filing obligations; and that although he and/or Ms. Gallagher and Mr. Kachadourian may have received emails to remind him about the local filings, he did not regularly check or review his emails and that neither Ms. Gallagher or Mr.

Kachadourian had advised him of this obligation. (T1470, T1472-73, T1487). We note that Judge Miller was not as full-time Judge prior to January 1, 2015, so he was not required to file his first Report until the year 2016. Likewise, the annual reports for 2016 should have been filed in 2017 and the annual report for 2017 should have been filed in 2018. Judge Miller is now up to date with respect to this requirement. (T1470, T1472-73, T1487; Resp. PP).

Judge Miller also acknowledged and apologized for his mistakes about this report averring in pertinent part:

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.

(T1430).

We note that there is an Observation in the Commission's 2019 Annual Report at p. 21 which states in pertinent part: "Full-time judges are also obliged under the Rules to report extra-judicial compensation annually to the clerk of the courts on which they sit. 22 NYCRR 100.4(H)(2)." Although, our research did not find any published cases which specifically

reference this rule, the Judicial Advisory Committee Opinions had referenced this reporting requirement where the inquiring judges sought advice about the propriety of earning outside income from various sources. See e.g. Opinion 10-24, Advisory Committee on Judicial Ethics (January 27-28, 2010); Opinion 13-29, Advisory Committee on Judicial Ethics (March 14, 2013); Opinion 18-93, Advisory Committee on Judicial Ethics (June 21, 2018); Opinion 17-01, Advisory Committee on Judicial Ethics (March 15, 2017); Opinion 14-67, Advisory Committee on Judicial Ethics (April 24, 2014); Opinion 10-84, Advisory Committee on Judicial Ethics (June 10, 2010). Accordingly, Judge Miller concedes that he should have been aware of this rule.

## **CONCLUSION**

Respectfully, for the foregoing reasons, we urge the Special Referee to issue a Report finding that the testimony of the witnesses called by Judge Miller, as well as Judge Miller's testimony entirely credible, and that with respect to the charges, a finding be made that the Commission has failed to sustain its burden of proving violations of the Rules. Or, in the alternative, if the Special Referee should issue a Report finding that a technical violation occurred in one or either matter, no inappropriate conduct took place, so that any rule violation was unintentional.

### **I. Charge I**

With respect to Charge I, it is respectfully submitted that the Commission failed to prove that Judge Miller engaged in inappropriate behavior toward certain staff members of the Broome County Family Court, making unwelcome comments of a sexual nature to and about them, and threatening their physical safety and wellbeing. As the underlying facts were not proven, there was inadequate evidence to prove that Judge Miller failed to:

- uphold the integrity and independence of the judiciary by failing to maintain

high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules;

- failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules;
- failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to court staff, in violation of Section 100.3(B)(3) of the Rules; and
- failed to conduct the judge's extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that he failed to conduct his extra-judicial activities so that they do not detract from the dignity of judicial office, in violation of Section 100.4(A)(2) of the Rules.

Specifically, the Commission did not meet its burden due to, *inter alia*,

- The lack of credible testimony by the two main witnesses Mark Kachadourian and Rachelle Gallagher, who repeatedly failed to provide any substantive specific dates and times or other reliable corroborative or demonstrative documentation with respect to the allegations that he engaged in inappropriate behavior toward certain staff members of the Broome County Family Court in which Judge Miller made unwelcome comments of a sexual nature, or threatened their physical safety or well-being or was anything other than patient, dignified and courteous to court staff. The two admitted that they were aware that Judge Miller was not happy

with their work and that they had civilly sued Judge Miller as well as OCA<sup>32</sup>.

- The lack of corroborative testimony by the Commission’s other witnesses in this regard, who could neither specifically attest that they has observed and therefore could not, in any way, corroborate either Mr. Kachadourian’s or Ms. Gallagher’s hearsay allegations that Judge Miller made unwelcome comments of a sexual nature, or threatened their physical safety or well-being or was anything other than patient, dignified and courteous to court staff.
- The lack of corroborative documentary and contemporaneous evidence by the Commission’s other witnesses in this regard, who could neither specifically corroborate either Mr. Kachadourian’s or Ms. Gallagher’s allegations that Judge Miller made unwelcome comments of a sexual nature, or was anything other than patient, dignified and courteous to court staff. Notably, the Court Staff who claimed that they did not feel safe or were uncomfortable as to Judge Miller’s remarks, did not promptly and contemporaneously avail themselves of the OCA Work Safe Program which they were aware of due to having received training in the program. And the Commission’s witnesses admitted that they worked well or had a good working relationship with Judge Miller. As to Ms. Vroman’s allegation that Judge Miller was rude and yelled at her on the afternoon of February 6, 2017, there is no independent evidence – no court officer or recording was presented – concerning the allegation that Judge Miller was “yelling” but it appears that tensions were high due to an extra busy calendar with emergency petitions added to an already busy day as well as a lack of staff. It is

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<sup>32</sup>While the Federal Civil action is not evidence *per se* to the independent findings of the Special Referee, the statements of the witnesses in that action and any inconsistencies in the statements were proper on cross-examination to assess their credibility.

reasonable to infer from the evidence presented that there appeared to be a mutual misapprehension in which the Judge thought Ms. Vroman was aware that he had to leave for physical therapy, but no one communicated that information to Ms. Vroman or other court staff.

- As to the testimony of threats, the asserted threatening comments by Judge Miller and or his friends were repeatedly denied not only by Judge Miller but by witness after witness. And, Ms. Gallagher and Mr. Kachadourian's testimony as to threats at the Family Court after Judge Miller was reassigned to a different building were never connected to Judge Miller in any way.

Based on the foregoing, Charge I should be dismissed in its entirety.

## **II. Charge II**

With respect to Charge II, it is respectfully submitted that the Commission failed to failed to prove that Judge Miller lent the prestige of judicial office to advance his own private interests and/or the interests of others, and failed to conduct his extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that, on multiple occasions, he importuned chambers staff to perform services unrelated to their official duties. As the underlying facts were not proven, there was inadequate evidence to prove that Judge Miller failed to:

- uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules;
- failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules, and lent the prestige of judicial office to advance

his own private interests and the private interest of another, in violation of Section 100.2(C) of the Rules;

- failed to conduct the judge's extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that he failed to conduct his extra-judicial activities so that they do not detract from the dignity of judicial office, in violation of Section 100.4(A)(2) of the Rules; and
- failed to refrain from inappropriate political activity, in that he failed to refrain from directly or indirectly engaging in political activity and failed to require that his personal appointees refrain from engaging in prohibited political activity, in violation of Sections 100.5(A)(1) and 100.5(C)(4) of the Rules.

Specifically, the Commission did not meet its burden due to, *inter alia*,

- The lack of credible testimony by the two main witnesses Mark Kachadourian and Rachelle Gallagher, who repeatedly failed to provide any substantive specific dates and times or other reliable corroborative or demonstrative documentation with respect to the allegations that he lent the prestige of judicial office to advance his own private interests and/or the interests of others, and failed to conduct his extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that, on multiple occasions, he importuned chambers staff to perform services unrelated to their official duties.
- Indeed, the Commission's witnesses as well as Judge Miller's witnesses, did not corroborate Mr. Kachadourian or Ms. Gallagher's allegations.
- Nor was there any independent documentary evidence produced that supported Mr. Kachadourian's or Ms. Gallagher's claims. Interestingly, they were left to work in their respective offices and had access to their desks and computers as

well as Judge Miller's office and computer, yet there was no evidence produced of any list(s) or a photo that was purportedly taken in chambers for one of the "campaigns" for Mr. Balles.

Based on the foregoing, Charge II should be dismissed in its entirety.

### **III. Charge III**

With respect to Charge III, it is respectfully submitted that the Commission failed to prove that Judge Miller engaged in the practice of law and/or conveyed the impression that he was still engaged in the practice of law as a full-time judge, with respect to two Estate matters that he handled in private practice prior to becoming a full-time judge.

As the underlying facts were not proven, there was inadequate evidence to prove that Judge Miller failed to:

- uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules;
- failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules, and lent the prestige of judicial office to advance his own private interests and the private interest of another, in violation of Section 100.2(C) of the Rules;
- failed to conduct the judge's extra-judicial activities so as to minimize the risk of conflict with judicial obligations, in that he failed to conduct his extra-judicial activities so that they do not detract from the dignity of judicial office

and are not incompatible with judicial office, in violation of Sections 100.4(A)(2) and 100.4(A)(3) of the Rules, and

- engaged in the practice of law as a full-time judge, in violation of Section 100.4(G) of the Rules.

Specifically, the Commission did not meet its burden due to, *inter alia*,

- The lack of credible testimony by the two main witnesses Mark Kachadourian and Rachelle Gallagher, who repeatedly failed to provide any substantive specific dates and times or other reliable corroborative or demonstrative documentation with respect to the allegations that Judge Miller engaged in the practice of law and/or conveyed the impression that he was still engaged in the practice of law as a full-time judge, with respect to two Estate matters that he handled in private practice prior to becoming a full-time judge.
- Indeed, the Commission's witnesses with regard to both Estates, as well as Judge Miller's witnesses, did not corroborate Mr. Kachadourian's or Ms. Gallagher's allegations.
- Nor was there any independent documentary evidence produced that supported Mr. Kachadourian's or Ms. Gallagher's claims. Indeed, Mr. Kachadourian claimed that he protested on one occasion early on about Judge Miller worked on matters at his former office and that he helped with an accounting on the Behal Estate at the request of Judge Miller. As to the former, his admitted that after that one occasion in which he protested, he remained in the lobby reading a magazine, so he did not see or hear what Judge Miller and Mr. Serjanej were saying or doing. And as to the latter, Mr.

Behal credibly testified that he asked Mr. Kachadourian a question while the judge was on the bench and Mr. Kachadourian unilaterally decided to help him using the Judge's computer in chambers and signing on with the password, he obviously had to access Judge Miller's AOL account. Moreover, Ms. Gallagher was told that Judge Miller was going or had been to Mr. Serjanej's office (the judge's former office) and had seen him with files but she did not know what the files said.

#### **IV. Charge IV**

With respect to Charge IV, it is respectfully submitted that the Commission failed in part and Judge Miller conceded part of Charge IV. Respectfully, the uncontested evidence is that Judge Miller had a valid excuse for the delinquency and he made and filed his changes as soon as he was able to do so with regard to his tax returns and his FDF filing with the Ethics Commission for the Unified Court System, but Judge Miller concedes that he did not file his local reports with the Clerk of the Broome County Family Court.

As the underlying facts were conceded and thereby proven with respect to the allegation that Judge Miller did not timely file his in that he failed to annually report the date, place and nature of any activity for which the judge received compensation in excess of \$150, and the name of the payor and the amount of compensation so received, in violation of Section 100.4(H)(2) of the Rules, this part of Charge IV should be sustained.

As the underlying facts were not proven with respect to the allegations that Judge Miller failed to disclose income on his tax returns and FDF forms as required by 22 NYCRR Part 40, in violation of Section 100.4(I) of the Rules, the foregoing part of Charge IV should be dismissed.

Based on the foregoing, Charge IV should only be sustained with regard to Section 100.4(H)(2) of the Rules.

**V. Considerations as to Alternative Findings**

In the event the Special Referee finds that a technical violation occurred, it is respectfully submitted that the Special Referee issue a finding that same was committed without intention. Such is based on your assessment of the credible uncontested evidence adduced, including but not limited to the Judge's testimony, as well as testimony of the fourteen witnesses including lawyers, court staff, and legal community members, as well as professionals and executives in the community at large, who uniformly testified on his behalf, averring to Judge Miller's reputation for honesty, trustworthiness, and good character; as well as his commitment and dedication as a Judge and in his community service endeavors.

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*Respectfully submitted,*



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