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

DETERMINATION

RICHARD H. MILLER, II,

a Judge of the Family Court,
Broome County.

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THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Jodie Corngold
Honorable John A. Falk
Taa Grays, Esq.
Honorable Leslie G. Leach
Honorable Angela M. Mazzarelli
Honorable Robert J. Miller
Marvin Ray Raskin, Esq.
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (Cathleen Cenci and S. Peter Pedrotty, Of Counsel), for the Commission

DerOhannesian and DerOhannesian (by Paul DerOhannesian, II) and Scalise & Hamilton, PC (by Deborah A. Scalise) for respondent

Respondent, Richard H. Miller, II, a Judge of the Family Court, Broome County,

was served with a Formal Written Complaint dated July 9, 2018, containing four charges. Charge I of the Formal Written Complaint alleged that respondent engaged in a pattern of inappropriate behavior toward certain staff members of the Broome County Family Court including unwelcome comments of a sexual nature. Charge II alleged that respondent lent the prestige of judicial office to advance his private interests and failed to conduct his extra-judicial activities so as to minimize the risk of conflict with his judicial obligations in that he asked his court secretary and court attorney to perform services unrelated to their official duties. Charge III alleged that while a full-time judge respondent improperly engaged in the practice of law. Charge IV alleged that respondent failed to file timely and accurate disclosure reports of his income from his extra-judicial activities to the Ethics Commission for the Unified Court System ("UCS"), the Internal Revenue Service, the New York State Department of Taxation and Finance and the clerk of the Broome County Family Court as required. Respondent filed a Verified Answer dated August 8, 2018.

By Order dated September 18, 2018, the Commission designated Robert A. Barrer, Esq. as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 7-11, 2019 in Binghamton, New York and on February 12, 2019 in Albany, New York. The referee filed a report dated June 20, 2019 in which he sustained portions of Charges I and II, found Charge III not proved and sustained Charge IV of the Formal Written Complaint.

The parties submitted briefs to the Commission with respect to the referee's report and the issue of sanctions. The Commission recommended that the referee's findings and conclusions be confirmed in part and disaffirmed in part. Respondent recommended that the referee's findings and conclusions be confirmed. Commission counsel recommended the sanction of removal; respondent's counsel argued that a sanction no greater than censure be imposed. The Commission heard oral argument on October 17, 2019 and thereafter considered the record of the proceedings and made the following findings of fact.

1. Respondent has been a Judge of the Family Court, Broome County since January 1, 2015. His current term expires on December 31, 2024. He served as a Justice of the Union Town Court, Broome County from 1996 to 2014 and as a Justice of the Johnson City Village Court, Broome County from 2002 to 2014. Respondent was admitted to the practice of law in New York in 1994.

As to Charge I of the Formal Written Complaint:

2. In August 2016, Rebecca Vroman became a court assistant in Broome County Family Court assigned to respondent's courtroom. Ms. Vroman's responsibilities included assisting respondent with emergency petitions.

3. Debbi Singer was the chief clerk of the Broome County Family Court until she retired in June 2018. Chief clerk Singer was Ms. Vroman's supervisor.

4. On February 6, 2017, respondent was assigned as emergency intake judge. Ms. Vroman assisted him in the courtroom that day.

5. On February 6, 2017, several emergency petitions came in during the afternoon court session. Respondent testified that he had a physical therapy appointment that day.

6. Ms. Vroman testified that on February 6, 2017 respondent, "started telling me to go faster, that I was going too slow. He had some place he needed to be at 4:00, so we needed to get out of there, and he just – you know, it just kept going on and on and on."

7. Ms. Vroman testified that respondent, "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."

8. Ms. Vroman, who was very upset about respondent's behavior toward her, immediately reported the incident to the deputy chief clerk. Chief clerk Singer testified that Ms. Vroman also complained to her that respondent "had berated her in the courtroom, screaming and yelling at her . . . she felt very demeaned by it and she wrote a letter about it." Ms. Vroman detailed respondent's conduct in writing to Ms. Singer on February 8, 2017.

9. After respondent learned that Ms. Vroman had complained about his discourteous and demeaning behavior, on March 1, 2017 respondent made a written complaint about Ms. Vroman to chief clerk Singer.

10. Ms. Singer replied to respondent by letter dated March 10, 2017. She investigated respondent's complaints about Ms. Vroman and determined that they were largely unfounded. Ms. Singer considered respondent's complaint against Ms. Vroman to

be retaliatory because of the timing of his letter and because a majority of respondent's complaints regarding Ms. Vroman had no merit.

11. During the hearing before the referee, respondent read a statement in which he stated that he was "troubled and sorry that Ms. Vroman is still upset" about the incident.

12. Ms. Vroman testified that respondent never apologized to her for his conduct.

13. In May 2017 and again in June 2017, respondent made inappropriate comments to Ms. Singer, then the chief clerk of the Broome County Family Court.

14. Ms. Singer described a comment respondent made to her after a court luncheon in May 2017 where employees brought dishes to share as follows:

> After the luncheon, the judge stopped in my office to say he really liked the dish that I made and he said, "If I knew you could also cook, I would have gone for the widow." I happen to be a widow.

When respondent made this unwelcome remark to her, Ms. Singer was "surprised, shocked, and disgusted." She testified that she "diverted by talking about the recipe that I had made." Ms. Singer did not find respondent's comment humorous.

15. In early June, respondent was in Ms. Singer's office and she began to use a fan because she was having a hot flash. Ms. Singer testified that, as she usually did when someone was in her office and she had a hot flash, she apologized to respondent and explained that she was having a hot flash. After Ms. Singer mentioned the hot flash to respondent, he replied, "It's nice to know I still have that effect on you."

16. Also in June 2017, respondent made another inappropriate remark to Ms. Singer, this time about her appearance. Ms. Singer described respondent's comment as follows:

> I was standing in the middle of my office doing something, my door was open, he walked by, he-- 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."

Ms. Singer was again "shocked and disgusted" by respondent's unwelcome comments.

17. In July 2017, respondent was transferred out of the Broome County Family Court.

18. When asked during the hearing before the referee whether he made these comments to Ms. Singer, respondent initially denied making them. Later in the hearing, respondent read a statement in which he stated,

> 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.

As to Charge II of the Formal Written Complaint:

19. When respondent became a Family Court judge, he appointed Rachelle Gallagher, who had worked for him since 2005, as his court secretary.

20. Respondent admitted that on November 6, 2015, while in her office at the Broome County Family Court, Ms. Gallagher typed a letter for him to Thomas Hayes, the executor of an estate that respondent had worked on prior to becoming a full-time judge.

According to respondent, at lunch on November 6, 2015, he had picked up mail that included checks for work performed on *Estate of Roger L. Funk.* Respondent testified that at the end of that day he noticed that the checks were unsigned.

21. Respondent knew that his former law office secretary, Donna Filip, was out of town on November 6, 2015 when he realized that the checks issued by Mr. Hayes were unsigned. According to respondent, after he stated that the checks were unsigned and needed to go back to the executor for signature, Ms. Gallagher offered to type a letter.

22. The letter Ms. Gallagher prepared was written as if it were from Ms. Filip, respondent's former law office secretary. The letter indicated that checks 102 through 104 were received but were unsigned. The letter Ms. Gallagher prepared requested that the enclosed checks be signed and returned to Ms. Filip. Respondent testified that after Ms. Gallagher typed the letter at the courthouse, he took the letter back to his former law office. According to respondent, a letter to Mr. Hayes was sent from that office.

23. Respondent admitted that it was improper for Ms. Gallagher to have prepared the November 6, 2015 letter to Mr. Hayes.

As to Charge III of the Formal Written Complaint:

The charge is not sustained and is therefore dismissed.

As to Charge IV of the Formal Written Complaint:

24. In 2015, respondent received a total of $27,388 for legal work he had performed prior to becoming a full-time judge. This amount included $16,203.48

respondent was paid in connection with his work on *Estate of Deborah Brigham* and $11,184.60 respondent was paid for work on *Estate of Roger L. Funk.*[1]

25. Respondent had an interest in two properties, one on North Street and the other on Oakdale Road, and received rental income from both properties. The tenant for the North Street property issued a $500 rent check each month payable to respondent. Respondent cashed the checks. For the Oakdale Road property, respondent received $800 per month.

26. In 2015, respondent received a total of $7,400 in rental income from the two properties. In 2016 and again in 2017, each year respondent received a total of $15,600 in rental income from the two properties.

27. In 2015, respondent's total extra-judicial income was $34,788 from rent and legal fees from his prior law practice. In 2016 and again in 2017, respondent's total extra-judicial income each year was $15,600 in rental income.

Annual Reports to Clerk of the Broome County Family Court

28. Respondent acknowledged that he did not file any report with the Broome County Family Court clerk disclosing extra-judicial income for the years 2015, 2016 and 2017. Such reports are required pursuant to Section 100.4(H)(2) of the Rules Governing Judicial Conduct ("Rules"). Respondent testified he was unaware of the requirement in the Rules.

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[1] Two of the three checks for work on *Estate of Deborah Brigham* were dated November 24, 2015. The checks related to respondent's work on *Estate of Roger L. Funk* were dated December 1, 2015.

29. By email dated April 13, 2016, all judges in the 6th Judicial District were reminded of the filing requirements in the Rule. Respondent testified that he did not see this email at the time.

30. Former chief clerk Singer testified that Broome County Family Court judges were required to file an annual report of extra-judicial income with her. From January 2015, when respondent became a Family Court judge, through Ms. Singer's retirement in June 2018, she did not receive any such reports from respondent. She did receive reports of extra-judicial income from the other Broome County Family Court judges.

31. During his investigative appearance on November 28, 2017, respondent testified that he was unaware of the provision in the Rules which required that he file an annual report of extra-judicial income with the clerk of the court.

32. On May 7, 2018, the Commission sent respondent an inquiry letter in which he was asked about his financial disclosures. This letter quoted Section 100.4(H)(2) of the Rules which requires judges to file an annual report with the clerk of the court reporting extra-judicial income.

33. On May 30, 2018, respondent's attorney sent a letter in response to the Commission's May 7 inquiry letter which stated that respondent became aware of the filing requirement with the Broome County Family court clerk "in the course of this investigation." On May 30, 2018, respondent indicated that he read and adopted the contents of this letter.

34. Eight months later, on January 31, 2019, after the first five days of the hearing before the referee in this matter, respondent filed a report of his extra-judicial

income for the years 2015 through 2018 with the Broome County Family Court clerk. His report included income from the practice of law and rental income. Respondent introduced a copy of this report on the last day of the hearing before the referee on February 12, 2019. Respondent testified that this filing was made after a fellow judge sent a reminder to all 6th Judicial District Family Court judges on January 11, 2019 about the requirement to file such an annual statement.

2015 and 2016 Federal and New York State Tax Returns

35. Respondent did not accurately disclose all his income on his 2015 and 2016 federal and New York state income tax returns. For 2015, respondent failed to include on his federal and state tax returns $27,388 in income he received from the practice of law, which he had earned before becoming a full-time judge.

36. In addition, for both 2015 and 2016, respondent failed to include the rental income from the two properties on his tax returns. With respect to the Oakdale Road property, on his original tax returns, respondent claimed expenses for the property but no income. He did not include any reference to the North Street property on his original returns.

37. Respondent amended his 2015 and 2016 federal and New York state income tax returns. He filed the amended returns on or about August 2, 2017.

38. Respondent included as income the $27,388 that he received for his prior legal work on his amended 2015 tax returns. As a result, respondent owed additional federal and state taxes for that year.

39. Respondent included his rental income on his amended 2015 and 2016 tax returns. According to respondent's accountant, respondent's failure to include his rental income on his 2015 and 2016 returns did not increase his tax liability because there were off-setting expenses associated with respondent's rental properties.

2015 UCS Ethics Commission Financial Disclosure Form

40. Respondent, who was a part-time judge in 2014, included income from the practice of law on his 2014 UCS Ethics Commission Financial Disclosure Form ("FDF") which was filed in May 2015.

41. On his 2015 FDF, respondent failed to include his income from legal work. Respondent's 2015 FDF was filed on May 13, 2016. He did not include the $27,388 in legal fees he received for work he performed prior to becoming a full-time judge.

42. On or about November 16, 2017, shortly before his investigative appearance, respondent filed an amended 2015 FDF which included the income he had received from his former law practice.

43. During his November 28, 2017 investigative appearance, when questioned about whether he reported as income on his FDF the compensation he had received for work on *Estate of Roger L. Funk*, respondent testified, "I listed the bank accounts and they were deposited into a bank account." He made a similar statement when asked about the income he received for work on *Estate of Deborah Brigham* when he testified, "I disclosed it as being in the bank accounts, but I didn't specifically insert a line as to income. . .."

44. During his investigative appearance, respondent testified that he had amended his 2015 FDF to include the payments from work on both estates as income.

45. At the hearing before the referee, respondent testified that when he filed his 2015 FDF, he thought that he had cashed the *Estate of Roger L. Funk* and *Estate of Deborah Brigham* checks in 2016 which would have made them reportable on his 2016 FDF.

46. Respondent did not include the income from his prior law practice on his 2016 FDF which was filed on May 10, 2017.

47. Respondent was previously censured by the Commission. In 2002, an eight-day hearing was held before a referee on four charges against respondent. Shortly after the referee issued a report, the Administrator and respondent entered into a Stipulation agreeing that the Commission should issue its decision based upon the referee's findings and jointly recommending that respondent be censured. The Commission's determination found that each of the four charges, which were based on respondent's misconduct involving thirteen cases, were proved. On December 30, 2002, the Commission issued a determination finding that respondent should be censured.

48. On November 16, 2015, the Commission issued a letter of dismissal and caution to respondent based upon his use of misleading campaign materials.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(3), 100.3(C)(1), 100.4(I), and 100.4(H)(2) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I, II and IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions and respondent's misconduct is established.

All judges are required to act in a manner to preserve the integrity of the judiciary. (Rules §100.1) The Rules require judges to "be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. . .." (Rules §100.3(B)(3)) In his interactions with two female court employees at the courthouse, respondent failed to meet this high standard. After a courthouse luncheon in May 2017, respondent stopped in the chief clerk's office, told Ms. Singer that he liked the dish she had prepared and stated, "If I knew you could also cook, I would have gone for the widow." Ms. Singer is a widow. The following month, when Ms. Singer apologized for using a fan while having a hot flash, respondent stated, "It's nice to know I still have that effect on you." That same month, respondent again stepped into Ms. Singer's office and made the extremely inappropriate and sexist remarks: "You look really hot in that outfit. You should always wear that outfit." Such sexist comments by a judge to a court employee are shocking and unacceptable. Indeed, Ms. Singer testified that she was "disgusted" by respondent's offensive commentary about her appearance and by his statement that he would have "gone for" her if he had known that she was a good cook. In addition to his highly inappropriate comments to the chief clerk, respondent also berated and demeaned a female court assistant. Respondent's conduct was improper and violated his ethical responsibilities.

Compounding his misconduct, respondent appears to be under the misapprehension that the women he denigrated and to whom he made the sexist

comments had an obligation to tell him that they did not approve of his comments.[2] To the contrary, it was incumbent upon respondent to not make sexist comments to a court employee. Similarly, it was also his responsibility to avoid behaving discourteously toward court employees. Twenty years ago, the Commission held that, "[r]emarks of a personal and sexual nature to a subordinate are especially egregious, even if the woman does not protest and even if the judge makes no explicit threats concerning job security." *Matter of Dye*, 1999 NYSCJC Annual Report 93, 94 (citation omitted). In 1985, the Commission held that,

> The cajoling of women about their appearance or their temperament has come to signify differential treatment on the basis of sex. A sensitized and enlightened society has come to realize that such treatment is irrational and unjust and has abandoned the teasing once tolerated and now considered demeaning and offensive. Comments such as those of respondent are no longer considered complimentary or amusing, especially in a professional setting.

Matter of Doolittle, 1986 NYSCJC Annual Report 87, 88.

As an experienced lawyer as well as an experienced jurist, respondent should have been cognizant that stepping into Ms. Singer's office to declare his opinions that she looked "really hot" and "should always wear that outfit" was improper and that such sexually charged remarks have no place in a courthouse. It should also have been clear to respondent that such observations by a judge to a court employee were especially

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[2] Respondent testified during the hearing before the referee, "All [Ms. Singer] 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." In addition to minimizing his responsibility for his own conduct, respondent's testimony was also inaccurate since after Ms. Vroman complained about his behavior, respondent's response was not to apologize, but to file a complaint against Ms. Vroman.

inappropriate given the imbalance of power in their respective positions.

Section 100.2(C) of the Rules provides, "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. . .." When he allowed his court secretary to prepare a letter regarding unsigned checks for his prior legal work, respondent violated this Rule. The letter Ms. Gallagher prepared was part of respondent's effort to obtain payment for legal work that he had performed prior to becoming a full-time judge.[3] The letter related to respondent's former private practice of law and had nothing to do with the work of the Family Court. As such, it was inappropriate for respondent to allow Ms. Gallagher to prepare this letter. *See*, *Matter of Ruhlmann,* 2010 NYSCJC Annual Report 213, 220 ("Routinely using court staff for extra-judicial purposes is improper regardless of whether the employee consents or performs such tasks without protest."); *See*, *Matter of Brigantti-Hughes,* 2014 NYSCJC Annual Report 78, 88 ("Tasks of a personal nature remain a judge's personal responsibilities and should not be discharged using public resources.").

Section 100.3(C)(1) of the Rules provides: "[a] judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration . . .." Section 100.4(H)(2) of the Rules provides:

> A full-time judge shall 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. . . . The judge's report shall be made at least annually and shall be filed as a public document

[3] This letter was written as if it were from respondent's former law firm secretary, not respondent, which may have been designed to conceal respondent's involvement.

> in the office of the clerk of the court on which the judge serves or other office designated by law.

Respondent failed to properly report his income from his extra-judicial activities thereby violating the Rules.

For the years 2015, 2016 and 2017, respondent failed to file an annual report of his extra-judicial income with the Broome County Family Court clerk as Section 100.4(H)(2) of the Rules required. Respondent claimed that he was unaware that the Rules required him to report his extra-judicial income to the clerk. It is well-settled that any such ignorance is no excuse. "Ignorance and lack of competence do not excuse violations of ethical standards. As a Judge, petitioner had an obligation to learn about and obey the Rules Governing Judicial Conduct." *Matter of VonderHeide*, 72 N.Y. 2d 658, 660 (1988) (citation omitted); *Matter of Edwards*, 2008 NYSCJC Annual Report 119, 121 (citations omitted) (". . . every judge has an obligation to learn and abide by the Rules Governing Judicial Conduct") Since respondent had been previously censured for violating the Rules, he should have been fully familiar with the Rules and should have taken the utmost care to abide by the Rules.

Moreover, respondent admitted that he learned of the annual filing requirement with the clerk's office during the Commission's investigation. In November 2017, respondent was questioned about his failure to make annual filings with the clerk's office. By May 2018, he admitted in writing that he had learned of the filing requirement. Nevertheless, respondent chose not to make any filing with the clerk's office until eight

months later after the hearing before the referee had commenced. Such conduct was emblematic of respondent's overall inattention to his ethical responsibilities.

With respect to his 2015 FDF, although respondent had included income from legal fees on his 2014 FDF, respondent failed to report approximately $27,000 in legal fees on his 2015 FDF. When asked about the omission, respondent gave varying implausible reasons. Initially, respondent claimed that he had reported on the 2015 FDF the bank accounts into which the checks for his legal fees were deposited. This claim was nonsensical since the income was not specifically reported on the FDF as required. Respondent testified at the hearing before the referee that when he filed his 2015 FDF in May 2016, he thought that he had cashed the legal fee checks in 2016 which would have made them reportable on his 2016 FDF. Demonstrating that this claim was also baseless, when respondent filed his 2016 FDF in May 2017, he again did not report the legal fees.[4]

The public has an interest in the timely disclosure of a judge's extra-judicial income on both the annual report with the clerk's office and the FDF. As the Court of Appeals has held, the information provided on a judge's financial disclosure form "is available to the public and, among other things, enables lawyers and litigants to determine whether to request a judge's recusal." *Matter of Alessandro*, 13 N.Y.3d 238, 249 (2009) Accordingly, "[j]udges must complete their financial disclosure forms with diligence, making every effort to provide complete and accurate information." *Id. Matter of Dier,* 1996 NYSCJC Annual Report 79 (failure to disclose income on a UCS Ethics

[4] Shortly before his investigative appearance, in November 2017 respondent filed an amended 2015 FDF which disclosed the legal fees.

Commission financial disclosure statement was misconduct); *Matter of Russell*, 2001 NYSCJC Annual Report 121, 122 ("financial disclosure by judges serves an important public function" and repeatedly filing untimely FDFs with the UCS Ethics Commission constituted misconduct); *Matter of McAndrews*, 2014 NYSCJC Annual Report 157, 162 (respondent's failure to file timely FDFs with the UCS Ethics Commission "is inconsistent with his ethical obligation to diligently discharge his administrative duties.").

It is also undisputed that respondent failed to disclose his income from the practice of law and rental income from two properties on his federal and state income tax returns.[5] Respondent's failure to include his income from the practice of law on his 2015 income tax returns diminished his taxable income for that year. Such conduct is improper and violated the Rules. *Matter of Ramich*, 2003 NYSCJC Annual Report 154, 159 (failure to include income on tax return and failure to report such income to the chief court clerk was misconduct).

Respondent, who took the bench in 1996, is an experienced judge who should be fully familiar with the Rules. The Commission's 2002 determination censuring respondent found that he had violated several Rules in his conduct involving thirteen different cases. *Matter of Miller*, 2003 NYSCJC Annual Report 140. For example, the Commission found that respondent presided "over one case in which he had an attorney-client relationship with the defendant and another case in which the defendant was the spouse of a client. . . ." *Id.* at 141. The Commission also found that in one matter,

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[5] In August 2017, respondent filed amended tax returns which included the income from the practice of law and the rental income.

"[r]espondent's conduct . . . was especially egregious: by vacating a default judgment against his client's spouse based solely on his client's *ex parte*, unsworn communication, respondent created an appearance of partiality and favoritism." *Id.* In 2002, the Commission found, "[i]n its totality, respondent's conduct showed insensitivity and inattention to his ethical responsibilities and, in particular, to the special ethical obligations of judges who are permitted to practice law." *Id.* at 142. Based upon respondent's misconduct, in 2002 the Commission imposed a censure, the strongest available discipline short of removal. In 2015, respondent received a letter of Dismissal and Caution in which the Commission cautioned him to adhere to the Rules.

Given his prior experiences with the Commission, respondent should have been particularly attentive to his ethical responsibilities. Instead, the evidence here demonstrated that respondent again disregarded his ethical obligations and engaged in three separate types of misconduct. The most serious was respondent's pattern of sexual comments to a court employee including telling her that she looked "really hot" and "should always wear that outfit." Earlier, respondent told the same court employee, a widow, that if he had known she could cook he "would have gone for the widow." He also commented that, "It's nice to know I still have that effect on you" after she apologized for using a fan while having a hot flash. No woman should be treated in that manner, especially in a courthouse by a judge. Understandably, the court employee was shocked and disgusted by respondent's sexual comments to her. In a further example of respondent's discourteous behavior, he berated and demeaned another female court employee. In addition, respondent violated the Rules when he acted to further his

personal interests by having his court secretary write a personal letter as if it were from his former law firm secretary.

Respondent engaged in a third category of misconduct when he failed to disclose his extra-judicial income in several ways. He failed to file annual disclosures with the clerk of the Broome County Family Court as Section 100.4(H)(2) of the Rules required. He failed to disclose extra-judicial income on his 2015 Financial Disclosure Form filed with the UCS Ethics Commission even though he had included such income on the FDF he had filed the previous year. In addition, he failed to properly report his income on his federal and state income tax returns which reduced his taxable income for 2015. Respondent engaged in a pattern of placing his personal interests before his ethical obligations to comply with the Rules and his responsibilities as a judge.

In addition to the several ways in which respondent violated his ethical obligations, the evidence also showed that respondent has not taken responsibility for his actions. As noted above, when he became aware of Ms. Vroman's complaint about his discourteous behavior, respondent's response was to file a written complaint against her. The Broome County Family Court chief clerk, to whom respondent's complaint about Ms. Vroman was made, viewed respondent's complaint as retaliatory. Furthermore, once respondent indisputably knew of the Rule which mandated that he file an annual report of extra-judicial income with the court clerk, he did not immediately file his reports for the years in question. Instead, he waited eight months and only filed the reports after the hearing before the referee had begun. In addition, when questioned regarding why he

failed to include his income from legal fees on his 2015 FDF, respondent gave shifting and implausible reasons for his failure.

While there was some indication in the record that respondent is an effective judge, our mandate is to protect the integrity of the courts. It is not to evaluate the effectiveness of a judge. In addition to other serious misconduct, respondent made highly inappropriate sexist comments to a female court employee. Under these circumstances, if respondent were to be censured again and allowed to remain on the bench, we believe public confidence in the courts and the judicial disciplinary process would be undermined. This is particularly true of the litigants and attorneys who would appear before respondent in Broome County Family Court "where matters of the utmost sensitivity are often litigated. . .." *See*, *Matter of Esworthy*, 77 N.Y.2d 280, 283 (1991).

Given respondent's three categories of current misconduct, his apparent failure to learn from his previous discipline, his failure to take responsibility for his actions and the unfortunate message another censure would send to the public, we believe that respondent should be removed from the bench to protect the integrity of the courts. We are mindful that "removal, the ultimate sanction, should not be imposed for misconduct that amounts simply to poor judgment or even extremely poor judgment, but should be reserved for truly egregious circumstances." *Matter of Mazzei*, 81 N.Y.2d 568, 572 (1993) (citations omitted) Here, through his pattern of conduct, respondent violated the Rules in numerous ways which exhibited his continued disregard for the Rules and his obligations as a judge. Most troubling were respondent's unwanted sexual comments to a female court employee. Respondent's inappropriate sexual comments shocked and

disgusted the court employee. He also berated and demeaned another female court employee. He had his court secretary prepare a letter in order to serve his personal interests. He failed to publicly disclose income from his legal work and rental income on the financial reports he was required to complete as a judge which deprived the public of information to which it was entitled. He also failed to report income on his federal and state income tax returns. Respondent's current inattention to his ethical obligations coupled with his prior censure for violating the Rules, has compelled us to conclude that removal from the bench is the appropriate sanction for his misconduct.

Our colleagues dissent on the issue of sanction in part because they seem to credit the referee's finding that respondent may have intended the comments to the chief clerk to be humorous. We find it implausible that respondent – a longtime judge with prior run-ins with this Commission, a family man by his own account, a coach and volunteer – would think telling his chief clerk that she was "really hot" and "should always wear that outfit" was humorous. Nor is it appropriate to state "It's nice to know I still have that effect on you" when one is explaining the use of a fan in response to a momentary flash. Indeed, we voted to remove respondent not only for the reasons previously stated, but also because when he appeared before us respondent still seemed to not fully accept responsibility for these comments. Obviously not every comment made about a clerk's appearance would be misconduct and even if misconduct, a removable offense. But these are particular statements using particular words that have particular meanings – and in our view, warrant removal given the additional misconduct described above and respondent's prior censure.

The Court of Appeals has held that, "the purpose of judicial disciplinary proceedings is 'not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents'." *Matter of Reeves,* 63 N.Y.2d 105, 111 (1984) (citations omitted) Respondent's actions demonstrated his disregard for his ethical responsibilities and he is unfit for judicial office.

By reason of the foregoing, the Commission determines that the appropriate disposition is removal.

Mr. Belluck, Ms. Corngold, Judge Falk, Ms. Grays, Judge Leach, Judge Mazzarelli, and Ms. Yeboah concur.

Mr. Harding and Judge Miller dissent as to the sanction.

Judge Miller files an opinion concurring in part and dissenting in part which Mr. Harding joins.

Mr. Raskin was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: February 14, 2020

Celia A. Zahner, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

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.

OPINION BY JUDGE ROBERT J. MILLER CONCURRING IN PART AND DISSENTING IN PART, WHICH MR. HARDING JOINS

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I concur with the majority determination as to misconduct, but I must respectfully dissent as to the sanction. Given the nature of respondent's misconduct, the sanction of removal is contrary to the findings of the referee and contrary to long-established precedent of the Commission. I believe censure is the appropriate sanction.

The primary focus of the charges against respondent, and the hearing before the referee, relate to very serious allegations made by respondent's Court Attorney and Court Secretary.[1] In support of those allegations, the Commission called the Court Attorney, the Court Secretary, and two additional witnesses. Respondent testified on his own behalf and called witnesses to testify about the allegations made against him. After conducting a six-day hearing, the referee issued a report in which he found that both the

[1] The allegations made by the Court Attorney and Court Secretary were found in portions of Charges I, II and III of the complaint. These allegations included that respondent sexually harassed the Court Secretary, threatened the Court Attorney and Court Secretary with physical harm, and asked them to perform work unrelated to their official duties including prohibited political activity. The Court Attorney also alleged during the hearing that respondent required him to attend the Donald Trump inauguration in 2017.

Court Attorney and the Court Secretary lacked credibility. He also concluded that they each had a motive for lying about these matters due to a pending lawsuit they had brought against the Unified Court System. The referee further found that their troubling allegations against respondent were not proved. In the presentation before the Commission, counsel for the Commission did not seek to overturn the referee's credibility findings regarding the Court Attorney and Court Secretary, or the finding that their allegations were not established. I believe that the serious allegations these individuals made which were not proved cast a pall over the entire proceeding against respondent. Accordingly, in my view, it is critical to focus solely on those acts of misconduct that were established by the evidence. The appropriate sanction for the proven misconduct is censure.

I concur with the majority's finding that respondent engaged in three categories of misconduct. The first involved one instance of respondent asking his Court Secretary to write a single page letter in a matter unrelated to the business of the Family Court. Such misconduct would normally result in a private letter of caution or admonition.

The second category of misconduct included respondent's crude and vulgar remarks to the Chief Clerk and one instance of respondent being discourteous to a court assistant. The referee found that, while respondent's statements to the Chief Clerk were improper, "I accept and credit Respondent's testimony that he had no intent to harm anyone with comments that may well have been intended to be humorous . . .." The record supports the referee's conclusion that respondent's inappropriate statements to the Chief Clerk constituted an extremely poor attempt at humor. Although such remarks

must not be condoned or tolerated, Commission precedent demonstrates that censure or admonition have been held to be appropriate punishments for significantly worse conduct. *See, e.g. Matter of Caplicki, Jr.*, 2008 NYSCJC Annual Report 103 (after a prior censure, judge was censured for repeating statements a defendant made about his attorney's appearance including that she was "cute" and had a "nice butt", asking other defendants whether they agreed with the remarks and recounting the statements to other attorneys); *Matter of Dye*, 1999 NYSCJC Annual Report 93 (judge censured for numerous inappropriate comments to his secretary including, "that she had attractive legs; . . . that her clothes inspired his sexual feelings; . . . that he had a strong interest in sex and that he wanted to have sex with her"); *Matter of Doolittle*, 1986 NYSCJC Annual Report 87 (judge admonished for making "numerous improper comments to female attorneys, referring to their appearance and physical attributes.")

The third category of respondent's misconduct was his failure to file annual financial disclosure reports with the clerk's office, and his failure to properly report certain income on his Financial Disclosure Form ("FDF") filed with the Ethics Commission for the Unified Court System and on his federal and state income tax returns. Respondent, who admitted that he did not file the annual reports with the clerk's office, filed them before the conclusion of the hearing before the referee. He filed amended federal and state tax returns and an amended FDF prior to the date of his investigative appearance and the issuance of the complaint in this matter. The referee found the timing of respondent's amendments to be a mitigating factor.

Although this is not the respondent's first matter before this Commission, his prior censure occurred 18 years ago in 2002. The misconduct found in that case was unrelated to the type of conduct at issue here. In 2015, respondent received a letter of dismissal and caution related to an issue with his campaign advertising. If respondent's current misconduct had been similar, then removal might be an appropriate punishment as it would reveal a continuing course of conduct. However, neither of his prior matters with the Commission indicate that removal is appropriate for respondent's current wrongdoing.

Respondent, who has been a judge since 1996, was elected to the Family Court in 2014 for a term ending in 2024. The evidence before the Commission supports the conclusion that he is a hardworking judge. In addition, witnesses testified at the hearing before the referee that respondent treated all who appeared before him, both men and women, with respect. The referee's finding regarding respondent's intent is significant, and casts further doubt on the majority's decision to depart from this Commission's past precedent.

Based upon the foregoing, I believe that the draconian sanction of removal of an elected judge is not warranted in this case. I believe censure is appropriate for the established misconduct.

February 14, 2020

The Honorable Robert J. Miller, Member
New York State
Commission on Judicial Conduct