To be argued by:
JONATHAN I. EDELSTEIN
Time Requested: 15 Minutes

Docket No. JCR-2018-00003

NEW YORK STATE COURT OF APPEALS

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

HON. TERRENCE C. O'CONNOR,

Petitioner,

A Judge of the Civil Court of the City of New York, Queens County.

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner HON. TERRENCE C. O'CONNOR, by the undersigned counsel, respectfully submits this Reply Brief in response to the Brief for Respondent dated August 8, 2018 ("Res. Brf.") and in further support of his request for review of a determination of the New York State Commission on Judicial Conduct removing him from office as a Judge of the Civil Court, Queens County.

POINT I

"ACTUAL NOTICE" OF THE HEARING DATE CANNOT SUBSTITUTE FOR THE SPECIFIC METHOD OF NOTIFICATION PRESCRIBED BY SECTION 44(4) OF THE JUDICIARY LAW (ANSWERING RESPONDENT'S POINT I)

This Court should first determine that the hearing in this case was a nullity because notice thereof was not served by certified mail in accordance with Section 44(4) of the Judiciary Law.

As a threshold matter, petitioner preserved a question of law with respect to this issue by objecting to any and all communication by email. (206). Although, as the Commission argues in its brief, petitioner's objection stated in part that "any further communication by me will be in writing," the previous sentence of the objection makes clear that he objected to all email communication in the case and was not merely giving notice that such communication would be made by him.[1]

[1] "I... do not wish to communicate by email" (206) means "I do not wish to

Thus, while this objection may not have been worded as precisely as it could have been, and although it might perhaps have been better (as the Commission argues) if petitioner's incoming counsel had renewed it, the fact remains that it put in issue the propriety of all email communications occurring after August 1, 2017, including the notice of hearing. Petitioner's subsequent letter which specifically referenced inadequate service (347) makes that clear. As such, the Commission's citation of Matter of Going, 97 N.Y.2d 121 (2001), in which no objection was made and the issue was raised for the first time before this Court, is inapposite.

Nor, contrary to the Commission's argument, did petitioner abandon his claim of improper service by failing to appear at a subsequent proceeding on October 6, 2017. As discussed in the main brief, this date too was noticed by email rather than by certified mail, thus falling under petitioner's earlier objection, and was made contingent upon Judge O'Connor assuming the burden of subpoenaing witnesses rather than restoring him to the status quo ante. Because the referee's proposed resolution was itself improperly served and did not make petitioner whole, he was not required to accept that resolution in order to maintain his objection to the manner in which the hearing notice was served. Again, this is not a case like Plantation House & Garden Prods. v. R-Three Invs., 285 A.D.2d 539 (2d Dept. 2001) and/or Acovangelo v. Brundage, 271 A.D.2d 885 (3d Dept. 2000),

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either send or receive communications by email." The word "communicate" denotes a two-way process.

cited by the Commission, in which the appellants were directed to make motions in a certain form in order to preserve their claims but never did so.

Turning to the merits, the Commission acknowledges that Section 44(4) requires notices of hearing dates to be served by mail, but argues that because notices of hearing are not jurisdictional, the failure to comply with the statutory requirement should have no consequences where the opposing party receives "actual notice" and/or is not prejudiced. But this is incorrect for at least two reasons.

First, as discussed in the main brief, improper service of even non-jurisdictional papers, such as the notices to arbitrate in Nationwide Mut. Ins. Co. v. Monroe, 75 A.D.2d 765, 766 (1st Dept. 1980) and Sleepy Hollow HDFC v. De Angelis, 51 A.D.2d 267, 270 (3d Dept. 1976), cannot be cured by actual knowledge. In an effort to distinguish these cases, respondent fastens on substantive errors contained in the notices of arbitration contained therein, but the courts found that even aside from such errors, improper service was an independent ground for relief. See Nationwide, 75 A.D.2d at 766 ("Since the expiration of the 20-day period prescribed by the statute terminates the right of the one against whom arbitration is sought to contest the right to arbitration, the notice must be properly served"). And, in both cases, even the admitted actual receipt of the defective notices was found insufficient to cure the defects in the form of

service. See id.; see also Sleepy Hollow, 51 A.D.2d at 270.

Second, and just as importantly, Section 44(4) of the Judiciary Law contains a "no prejudice" exception *for provision of discovery* but does not contain a similar exception for any of the other notices that the statute requires. Thus, as discussed in the main brief, the doctrine of *expression unius et exclusio alterius* requires that the statute be construed to *not* include a "no prejudice" exception for improper service of notices of hearing. See Kimmel v. State of New York, 29 N.Y.3d 386, 394 (2017).

In arguing to the contrary, the Commission construes both the statute and the doctrine too narrowly. Fastening on the word "timely" in the statute's discussion of discovery documents, the Commission argues that *expressio unius* would only apply to untimely, as opposed to improperly served, hearing notices. See Res. Brf. at 34-35. But the statutory language in question includes not only the word "timely" but the word "furnish." As such, the "no prejudice" clause for discovery documents applies to any irregularity in the furnishing of them, and precludes a similar no-prejudice exception for irregularities in the furnishing – i.e., service – of statutory notices.

Respondent further contends that *expressio unius* "must not be utilized to defeat the purpose of an enactment." See Res. Brf. at 35-37. But petitioner submits that enforcing the statutes that govern and limit the Commission's

activities, and requiring the Commission to comply with the very law that it enforces against judges, would not "defeat the purpose" of the statute. In contrast, it *would* defeat the purpose of the statute and undermine public confidence in the judicial disciplinary process if the Commission, which demands strict and meticulous compliance from judges, were itself entitled to ignore statutory provisions and excuse its own violations on the basis of "no harm no foul." "One who requires strict compliance by another or cut off that other's rights must himself be held to the fullest standards of practice." Nationwide, supra; Sleepy Hollow HDFC, supra. Hence, this Court should find that "actual notice" cannot substitute for the statutory form of service, and should vacate the determination and remand for further proceedings on the ground that the lack of such service rendered the hearing a nullity.

POINT II

THE HEARING SHOULD HAVE BEEN ADJOURNED TO ACCOMMODATE THE SCHEDULE OF JUDGE O'CONNOR'S COUNSEL (ANSWERING RESPONDENT'S POINT II)

Second, this Court should find that the referee erred in not granting a reasonable adjournment so that petitioner's incoming attorney could prepare for the hearing and meet his scheduling conflicts. As set forth in the main brief, petitioner submits that in the context of a two-year investigation, incoming attorney Cohen's request for a two-month adjournment due to an actual

engagement beginning on September 25 was reasonable and would not have materially impeded the proceedings.

Respondent contends that petitioner received multiple adjournments during the investigative stage of the proceedings. See Res. Brf. at 43. As respondent appears to concede, though, the investigative stage did not necessarily put petitioner on notice that he *needed* counsel, because at that stage, there was still a possibility that the Commission might not file formal charges.

To be sure – and as acknowledged in the main brief – the Commission did file formal charges on May 30, 2017. However, the hearing date was not noticed until August 2 (210) and discovery was not exchanged until August 25. (217-75). While it would no doubt have been better if petitioner had acted more expeditiously after May 30, it remains the case – as also discussed in the main brief – that until discovery was exchanged, he might reasonably have not understood the full depth of the Commission's case against him and thus not fully realized that he was in water too deep to defend himself without the aid of counsel. And, given the stakes involved – including a possible lifetime ban from holding judicial office – it was not unreasonable for petitioner to pick and choose among attorneys and to retain David Cohen on or about September 7 rather than going with the first attorney who was available.

Respondent argues that, in contrast to criminal cases, there is no right to

counsel in administrative proceedings, but as discussed in the main brief, courts have held that even administrative proceedings should be adjourned where (a) the petitioner has a potential meritorious defense, and (b) there is no prejudice to the public. See Leonard v. Kirby, 84 A.D.2d 538, 539 (2d Dept. 1981); Cenegal Manor, Inc. v. Casale, 251 A.D.2d 259 (3d Dept. 1998); United Deli Corp. v. New York State Liq. Auth., 2007 WL 171903, *2 (Sup. Ct., Kings Co. 2003).

The Commission argues that these cases are distinguishable, see Res. Brf. at 44-45, but its arguments to that effect are ultimately unconvincing. For one thing, the distinction respondent seeks to draw with respect to the Cenegal Manor case – that the attorney in that case had an actual engagement – is actually a point in common with this case, where attorney Cohen referenced a pre-existing trial commitment. Likewise, in United Deli Corp., it appeared that the party's representative required time in order to obtain the required authorization, which is not dissimilar from this case in which Cohen required time to prepare and get up to speed on the voluminous evidence.

But even more importantly, the Commission does not argue that it would have been *prejudiced* had the hearing been held in November or December 2017 rather than September – quite the contrary, in fact, as an adjournment followed by a counseled hearing would have obviated the extensive post-hearing procedural wrangling that occurred in this case – nor does the Commission deny that Judge

O'Connor had a potentially meritorious defense to at least some of the charges that counsel might have aided him in presenting. There was no urgent need for the Commission to hold the hearing in September and no threat to either the agency or the public if it were adjourned, which under the above-cited cases is ultimately the lynchpin of whether or not to grant an adjournment.

Ultimately, in the scheme of things, the adjournment requested by petitioner's incoming counsel was neither unreasonable nor, against the backdrop of a two-year investigation, excessively lengthy. Counsel provided a reason why he needed time to prepare as well as a reason (actual engagement) why he could not appear in late September or October. Moreover, given that an attorney was actually in the picture, the Commission could be assured that, if the hearing were adjourned to November or December, it would actually go forward with the rights of all parties being protected. For the Commission to rush the case to hearing under those circumstances represents, in the words of the Supreme Court, an erroneous "insistence upon expeditiousness" where, instead, solicitude for the fundamental rights of an accused judge was called for. See Ungar v. Sarafite, 376 U.S 575, 589 (1964). This Court should therefore vacate the Commission's determination and remand for further proceedings at which petitioner may be represented by counsel.

POINT III

THE CONDUCT UNDERLYING CHARGES II THROUGH IV CONSTITUTED AT MOST ERRORS OF LAW RATHER THAN JUDICIAL MISCONDUCT (ANSWERING RESPONDENT'S POINTS IV AND V)

Third, assuming *arguendo* that this Court finds that the hearing and determination were not procedurally flawed – which it should, see Points I and II – it should find, upon plenary review, that the allegations in Charges II through IV constitute at most errors of law or judgment rather than willful misconduct. See Matter of Richter, 409 N.Y.S.2d 1013, 1015 (Ct. Jud. 1977).

Turning first to the three groups of no-fault cases in which Judge O'Connor *sua sponte* awarded fees (Charge IV), petitioner reiterates that there is an unresolved issue of fact based on his written response in which he stated that "these matters were argued at the calendar call and [he] made the attorney who appeared for The Rybak Firm aware of [his] intention to award fees." (53). Notwithstanding the Commission's characterization of this response as hearsay, it is well settled that hearsay is admissible in administrative proceedings and that, indeed, an administrative decision may rest on hearsay alone. See Gray v. Adduci, 73 N.Y.2d 741, 742 (1988) ("Hearsay evidence can be the basis for an administrative determination"). Moreover, although the Commission's brief characterizes Judge O'Connor's statement as "self-serving," it used portions of that

very statement against him as admissions against interest (591-92), and hence, its current position that the statement lacks credibility rings hollow.

The Commission contends that, on plenary review, Judge O'Connor's statement nevertheless should be "disregarded" because it "cannot overcome the documentary and testimonial evidence presented at the hearing." See Res. Brf. at 55. But of course, the "testimonial evidence" came from an attorney whose appeals of four of the judgments and fee awards remained pending at the time of the hearing and who was thus obviously an interested witness.[2] As further detailed in the main brief, this lawyer's memory of the cases at issue was sketchy; indeed, he was not even certain that he actually appeared for the Rybak Firm in those cases. (435-37). Moreover, it is far from implausible, in the relatively informal environment of a Civil Court no-fault part, that oral argument relating to the fee award could have taken place off the record during calendar call. This Court

[2] The appeals were decided on November 3, 2017, with the fee awards being vacated but the judgments – which specified the frivolous conduct that formed the basis of the awards – otherwise affirmed. See Gentlecare Amb. Anesthesia Servs. (Obunike) v. Geico Ins. Co., 2017 WL 5194895 (App. Term 2017); Gentlecare Amb. Anesthesia Servs. (Cherenfant) v. Geico Ins. Co., 2017 WL 5194902 (App. Term 2017); Gentlecare Amb. Anesthesia Servs. (Louis) v. Geico Ins. Co., 2017 WL 5194903 (App. Term 2017); Gentlecare Amb. Anesthesia Servs. (Louis) v. Geico Ins. Co., 2017 WL 5194897 (App. Term 2017). Notably, in three of the other cases at issue, the appeal from the fee award was dismissed. See Active Care Medical Supply Corp. (Sade) v. Delos Ins. Co., 2017 WL 2173124 (App. Term 2017); Active Care Medical Supply Corp. (Akeller) v. Delos Ins. Co. 2017 WL 2173435 (App. Term 2017); Active Care Supply Corp. (James) v. Delos Ins. Co., 2017 WL 2173556 (App. Term 2017).

should, therefore, find insufficient basis to determine that Judge O'Connor in fact awarded fees without offering an opportunity to be heard.

But even if this Court were to disagree, any denial of an opportunity to be heard in these cases was mere error of law rather than judicial misconduct. Citing Matter of Jung, 11 N.Y.3d 365 (2008) and Matter of Feinberg, 5 N.Y.3d 206 (2005), the Commission argues that denial of an opportunity to be heard is "fundamental" error that it may permissibly punish, but in both Jung and Feinberg, far more was at stake than in the instant case.

In Jung, the judge *summarily found four defendants in default on family offense or child support petitions and sentenced them to months in jail* despite knowing that they were incarcerated elsewhere and could not appear in court that morning, and sentenced another defendant to six months although she was without counsel and was unable to read due to a learning disability. See Jung, 11 N.Y.3d at 367-72. This Court's characterization of the deprivation in Jung as "fundamental" specifically hinged on the liberty interests at issue. See id. at 373.[3] At no point did

[3] This Court also noted the particular sensitivity of Family Court proceedings in Matter of Esworthy, 77 N.Y.2d 280, 283 (1991), another case cited in the respondent's brief. This Court stated that Family Court is a place "where matters of the utmost sensitivity are often litigated by those who are unrepresented and unaware of their rights," and is hence a place where the impact of judicial arbitrariness is magnified. Needless to say, no similar considerations apply to commercial landlord-tenant and/or no-fault parts in Civil Court, where parties are amply represented by counsel and where the subject matter of the litigation is not "matters of the utmost sensitivity" but instead cold cash.

the Jung court suggest that a similar error would be equally "fundamental" where the matter at stake was a few hundred dollars in legal fees. Moreover, the Jung court also took note of the fact that four of the five incarcerations resulted from Judge Jung's unwritten rules and policies that were never communicated to the litigants, a factor that does not exist here. See id. at 374-75.

The Feinberg case did not concern the right to be heard at all, but instead involved corrupt assignment of cases to a crony. Judge Feinberg was the Kings County Surrogate, and during his tenure, he "appoint[ed] his friend and law school classmate Louis Rosenthal," who had also helped in his election campaign, "to [the] lucrative position" of counsel to the public administrator. Feinberg, 5 N.Y.3d at 211. Between 1997 and 2002, Judge Feinberg approved massive amounts of fees for Rosenthal, totaling more than eight million dollars, without ever requiring Rosenthal to document his legal services. See id. at 212-13. Not surprisingly, this Court found that Judge Feinberg's failure to consider the statutory factors before awarding fees to Rosenthal "over the course of five years and 475 proceedings" went beyond legal error to corrupt misconduct. Id. at 214-16.

Nothing in this case is similar to Jung or Feinberg. Judge O'Connor did not summarily throw absent and uncounseled parties into jail for months based on an unwritten policy of his part. Nor did Judge O'Connor award a friend eight million dollars in unscrutinized legal fees. Instead, in each of the three groups of cases

specified in Charge IV, he awarded between $250 and $1500 in fees, in cases where counsel for the party was present and able to object (but apparently failed to do so), based on failure to provide discovery, failure to appear for examination under oath, and/or attempted relitigation of a matter barred by res judicata. As the Commission does not dispute, these are appropriate grounds on which fees may be awarded as sanctions for frivolous conduct, see Viadenn Med. Supply Corp. v. USAA, 2017 WL 3495406 (App. Term 2017) (reducing amount of fees imposed as sanction by Judge O'Connor for failure to provide discovery, but holding that imposition of fees was not improper as such), and as the Commission also does not dispute, the reason given by a court for dismissing a complaint may also serve as the basis for an award of fees, see Liang v. Wei Ji, 155 A.D.3d 1018, 1020 (2d Dept. 2017). There is thus no reason to believe that, if the Rybak Firm had been given an opportunity to be heard, the award of fees would have been any different. These awards are precisely the sort of harmless error that this Court found in Richter, supra, did not rise to the level of misconduct.

The two "okay" cases (Charge II) are likewise nothing more than errors of law. As stated in the main brief, Judge O'Connor acknowledges that "okay" is not a leading question because it does not suggest what the answer to the next question should be. However, there is no serious dispute that, *at the time he made the rulings complained of*, he sincerely did believe that "okay" was an improper

attempt to lead the witness. There is no evidence that Judge O'Connor had any other motive for admonishing lawyers or ultimately striking the witnesses' testimony based on this issue, and indeed, as testified to by hearing witness Lepikh, petitioner was perfectly willing to let witnesses' testimony stand and take the issue no farther when attorneys obeyed his instructions not to use "okay." (478-79). In other words, Judge O'Connor was not using the "okay" issue as a bludgeon in the two cases in question, but instead sanctioned the attorneys based on a misguided but genuine belief that they were asking leading questions. He was wrong, but judges are wrong in court every day, and making errors of law in two cases during a period of five years does not amount to sanctionable misconduct.

And finally, any analysis of the three alleged cases of discourtesy (Charge III) must take into account the context in which Judge O'Connor's conduct occurred. As anyone who has spent a morning in Civil Court will confirm, the no-fault and commercial landlord-tenant parts are rough and tumble places where lawyers frequently push the envelope, engage in gamesmanship, and see how much they can get away with. The Socratic ideal of judging may involve patience and courtesy at all times, but such an ideal is impossible to maintain in Civil Court, or else the lawyers will run roughshod over the judges and effectively take control of the courtroom. Sometimes, in Civil Court, judges need to admonish lawyers, even sharply.

The cases underlying Charge III are precisely such occasions. In its brief, the Commission simply recites the things Judge O'Connor said without any context, as if he simply came out of nowhere and started screaming at lawyers for no reason. But as discussed in detail in the main brief, this is not so; instead, Judge O'Connor had ample reason to deliver each of the admonitions in question.

In the 57th Ave. Assocs. case, it is undisputed – certainly, the Commission's brief does not dispute – that counsel Michaelson attempted to file an unsigned, unverified answer on the date of trial, made a frivolous objection to relief that even he acknowledged at the hearing was routinely granted, and sought to call witnesses after the case had been closed. Clearly, any judge would find such acts worthy of admonition. It is further noted that, after admonishing Michaelson, Judge O'Connor did allow him to call his extra witness.

Likewise, in the Haberman case – concerning which attorney Chamboukas, the purported victim, declined to testify – it is similarly undisputed that (a) Judge O'Connor's comment about Chamboukas wasting time was prompted by her offer in evidence of irrelevant documents concerning other premises, and (b) his later admonition occurred at a point when Chamboukas had made speeches in front of her witness during direct examination and requested permission to put on a rebuttal case without indicating which witnesses she intended to call. Again, these are circumstances that a reasonable judge would deem worthy of admonition, and

Judge O'Connor's lack of animus is demonstrated by the fact that he ultimately ruled in favor of Chamboukas' client.

And in the Waldman case, it is undisputed that (a) Judge O'Connor's comment about attorney Lepikh engaging in delaying tactics was prompted by Lepikh doing exactly that in the form of serving a dispositive motion the day before trial; (b) there is every reason to believe that Lepikh was disingenuous in claiming to be unprepared, given that when he was ordered to go to trial, he had all the documents in hand and conducted a detailed and effective cross-examination of the petitioner; and (c) Judge O'Connor's "A in rudeness" comment occurred when Lepikh was not only using a cell phone without permission but was doing so while the judge was talking to him. Although the "A in rudeness" remark would have been better not said, any judge would be angry under the circumstances.

Ultimately, what Charge III amounts to is that on three occasions during his years in the bench, Judge O'Connor went overboard in admonishing lawyers who were pushing the envelope and richly deserved to be admonished. If this Court were to remove from office every Civil Court judge who ever yelled at a lawyer under such circumstances, the benches of that court would be empty. Notwithstanding the Commission's efforts to decontextualize Judge O'Connor's remarks and to use emotional words such as "screaming," the fact remains that these are isolated statements made under considerable provocation and do not rise

to a sanctionable level.

In sum, this Court, upon exercising plenary review, should find that Charges II, III and IV do not rise to the level of judicial misconduct, vacate and dismiss those charges, and reassess a penalty of admonition or at most censure based on Charge I alone.[4]

POINT IV

THE DRASTIC SANCTION OF REMOVAL WAS UNWARRANTED AND SHOULD BE REDUCED TO AN ADMONITION OR CENSURE (ANSWERING RESPONDENT'S POINTS III AND VI)

Finally, assuming *arguendo* that this Court sustains some or all of Charges II through IV, it should find that, even in combination with Charge I, they do not merit the extraordinary sanction of removal. As a threshold matter, even the Commission does not suggest that removal is warranted based on the conduct underlying Charges II through IV, arguing only that this case "became a removal... on March 29, 2017" due to petitioner's failure to appear and testify at an investigative hearing. See Res. Brf. at 57. And this *de facto* concession is rightly made. As detailed in the main brief, even if Charges II through IV rise to the level of misconduct (which they do not), they represent a few isolated incidents during years on the bench, and there is not even a suggestion of venality or dishonorable

[4] Even the Commission does not argue that Charge I warrants removal independently of the conduct alleged in Charges II through IV.

motive regarding any of them. As such, they are at most examples of "poor judgment" that do not warrant the "drastic sanction" of removal. See Matter of Skinner, 91 N.Y.2d 142 (1997); Matter of Cunningham, 57 N.Y.2d 270, 275 (1982), and are not "truly egregious" even under the higher standard of conduct to which judges are held, see Matter of Cohen, 74 N.Y.2d 272, 278 (1989).

Indeed, even the Commission's contention that Charges II through IV warrant "serious public discipline," see Res. Brf. at 56, 58, is based on inapposite case law. This case is a far cry from Matter of Esworthy, 77 N.Y.2d 280 (1991), cited by the Commission, in which the following occurred:

> While on the Bench, petitioner frequently addressed parties and their attorneys in an intemperate manner, often indicating that he presumed unproven allegations to be true, and on two occasions he used racially charged language that was highly insulting to certain ethnic groups. In case after case, he neglected to inform litigants appearing before him of their constitutional and statutory rights, including their right to counsel, and instead exerted undue pressure on these parties to make damning admissions, sometimes by threatening incarceration or other consequences which he had no authority to impose. Petitioner even sentenced one person to six months in jail based solely upon an ex parte letter.

Id. at 282 (citations omitted). Moreover, the conduct in Esworthy occurred in Family Court, "where matters of the utmost sensitivity are often litigated by those who are unrepresented and unaware of their rights." Id. at 283. Nothing even remotely similar happened in this case – there is no indication whatsoever that

Judge O'Connor used racial epithets, threatened or imposed incarceration, presumed unproven allegations to be true, and/or pressured unrepresented Family Court litigants "in case after case."

Likewise, the cases of Matter of Simon, 28 N.Y.3d 35 (2016), in which the judge used ethnic slurs, engaged in a physical altercation with a student, and improperly threatened village employees with contempt so often that it "became a joke"; Matter of Duckman, 92 N.Y.2d 141 (1998), in which there were "363 specifications" against the judge which included not only the repeated use of disparaging nicknames and sexual harassment but improperly-motivated dismissals of criminal charges which endangered the public, none of which Judge O'Connor was ever even alleged to have done;[5] Jung, supra, in which the judge repeatedly threw unrepresented litigants in jail for months without a hearing; and Feinberg, supra, in which the judge corruptly awarded eight million dollars in legal fees to a crony, bear no resemblance whatsoever to a case like this one in which, at most, Judge O'Connor went overboard on isolated occasions in admonishing attorneys who deserved admonition and cut procedural corners a few times in awarding fees that were otherwise properly awarded.

Indeed, as discussed in the main brief, the conduct alleged in Charges II through IV, especially once the mitigating factors discussed above are taken into

[5] This Court considered Judge Duckman's racially and sexually charged remarks to be particularly inappropriate. See Duckman, 92 N.Y.2d at 152 n.4.

account, is arguably worthy only of an admonition and not even a censure. See Matter of Rice, 1998 Ann. Rep. 155 (CJC 1997). If such conduct is sufficiently severe to merit censure, it is only just so.

That leaves Charge I – failure to cooperate – and under these circumstances, contrary to the Commission's argument, any failure to cooperate in this case is not enough to elevate an admonition case or even a censure case to a removal case. As discussed in the main brief, petitioner does not deny that the Commission is statutorily authorized to require a judge's testimony,[6] and also does not deny that he handled the investigation poorly.[7] In essence, he reverted to the status of pro se litigant. But this – which itself is an example of "poor judgment," see Skinner,

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[6] Although, as discussed in Point I, the same statute also requires the Commission to serve notification of hearing dates by certified mail, and the Commission claims the right to violate this provision without consequence.

[7] Nevertheless, two of the Commission's observations regarding the investigation merit further discussion beyond that reflected in the main brief. First, the Commission argues that when petitioner first advised it of the name of his then-counsel, he did so in a manner "clearly designed to be returned undelivered." See Res. Brf. at 47. But the envelope petitioner sent was addressed to, *inter alia*, "State of New York" at 61 Broadway, and although four state agencies have offices at this address, there was no proof offered at the hearing that Judge O'Connor *knew* that more than one state agency was located in the building. It is also undisputed that, when the letter was returned, Judge O'Connor provided a further response in a correctly addressed envelope. Likewise, the Commission's contention that petitioner has "never explained... what 'investigation' the attorney could have made" regarding the allegations at issue, see id. at 48, ignores the obvious fact that petitioner's attorney could have interviewed other witnesses present in the courtroom when the alleged acts occurred and obtained evidence of the provocations that the Commission has done its best to elide.

supra; Cunningham, supra, does not merit removal from the bench.

It is noteworthy that the Commission's citation of noncooperation as an aggravating factor relies primarily upon decisions of its own which have never been reviewed by this Court. See Res. Brf. at 45-46. This Court has "take[n] note of" failure to cooperate, see Cooley v. State Commission on Judicial Conduct, 53 N.Y.2d 64, 66 (1981), and has indicated that a judge's *dishonesty* before the Commission in conjunction with noncooperation is a significant aggravating factor, see Matter of Mason, 100 N.Y.2d 56, 60 (2003), but has never held that noncooperation can warrant removal where the underlying conduct does not.

Petitioner further notes that the cases cited in the Commission's brief involve either *total* noncooperation or, in Mason, noncooperation plus dishonest and evasive testimony. Here, in contrast, although Judge O'Connor did not testify, he provided a three-page written response that was sufficiently detailed for the Commission to use it against him at the hearing as an admission against interest. The Commission's use of the answer in its own case in chief is powerful indication that the statement "did not... reflect dishonesty or evasiveness," Skinner, 91 N.Y.2d at 144. As such, Judge O'Connor did not impede the Commission's investigation to the same degree as in the cases it cites in its brief, and indeed, if he had appeared and given sworn testimony, he would have said essentially the same things he had already said in his written statement.

Moreover, this Court's decision in Matter of Kiley, 74 N.Y.2d 364 (1989), speaks powerfully against the use of the investigative process as an aggravating factor. It is true – and indeed, petitioner stated as much in the main brief – that in Kiley, the aggravating factor in question was lack of candor rather than failure to cooperate. But as the Kiley court made clear, those are two sides of the same coin:

> *Judges facing misconduct investigations are in the unenviable position of having to choose between speaking with Commission representatives and refusing to speak. If they choose the latter course, they risk being charged with "failure to cooperate" as an aggravating factor for the imposed sanction.* On the other hand, if they cooperate by speaking to Commission investigators or testifying at their own hearings, they run the risk of provoking "lack of candor" charges based upon inadvertent factual misstatements, testimonial inconsistencies or even poor judgment in responding to searching, unanticipated questions...

Id. at 370-71 (emphasis added). As such, this Court emphasized the need to "minimize the risk that *the investigative process itself* will be used to generate more serious sanctions," see id. at 371 (emphasis added), and the reference to "the investigative process" counsels caution in using *any* aspect of the investigation to aggravate the penalty. Such would not only present judges under investigation with the Hobson's choice portrayed in Kiley but would also risk elevating the Commission's self-importance and/or injured *amour propre* over its fundamental purpose of weighing judges' on-the-bench conduct.

This is particularly so since, as the Commission does not deny, see Res. Brf.

at 60,[8] a judge's failure to testify or present evidence permits the Commission to draw an adverse inference, meaning that noncooperation is its own punishment. See Matter of Reedy, 64 N.Y.2d 299 (1985). In this case, as discussed in the main brief, Judge O'Connor lost the opportunity to explain the circumstances surrounding the disputed fee awards (including whether the Rybak Firm was in fact given an opportunity to be heard) as well as the chance to provide context for the alleged discourtesy underlying Count III.

Petitioner thus submits that, where the underlying judicial conduct does not justify removal, noncooperation should not elevate the penalty to that level. At minimum, noncooperation should only support an aggravated penalty in cases where the underlying conduct is very close to warranting that penalty. For instance, if there were a hypothetical scale of egregiousness on which misconduct amounting to 80 points or more warranted removal, then noncooperation might justify that penalty where the underlying conduct rated 75 or 79. But in this case, Judge O'Connor's underlying conduct was a 40 or 50. It was not so close to

[8] The Commission's reference to the lack of a right to remain silent in judicial misconduct proceedings is part of an argument that such proceedings are not precisely equivalent to criminal cases. See Res. Brf. at 60. Petitioner certainly agrees that the analogy is not precise. But everything is a matter of degree. Misconduct proceedings, like criminal cases, are adversarial, and while judges do not face incarceration, they do face public disgrace, loss of livelihood, and a lifetime ban from holding judicial office again. Petitioner submits that there is a sufficient amount at stake in judicial misconduct proceedings, combined with their adversarial nature, to counsel against using noncooperation as the basis for anything more than an adverse evidentiary inference.

removal – indeed, not nearly so – for any alleged noncooperation to push it over the line.

Petitioner notes, as discussed in the main brief, that even the Commission does not take the position that noncooperation automatically warrants removal. In Matter of McAndrews, 2014 Ann. Rep. 157 (CJC 2013) and Matter of Burstein, 1994 Ann. Rep. 57 (CJC 1993), both cited in the Commission's underlying papers (but not cited in its brief to this Court), the Commission viewed the judges' failure to testify or submit written responses as an aggravating factor, but nevertheless found that the penalty should be censure (McAndrews) or admonition (Burstein) rather than removal. The same result should obtain here.

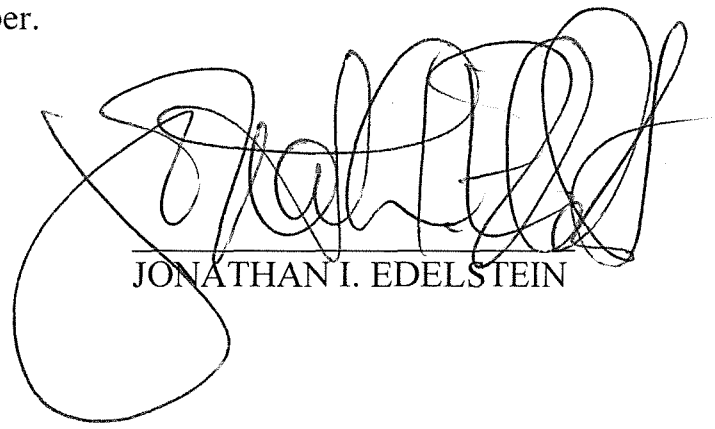
Finally, for the reasons stated in the main brief, this Court should reject the Commission's perfunctory argument (see Res. Brf. at 61) that Judge O'Connor's prior censure is a sufficient aggravating factor to elevate the penalty to removal. As the Commission does not dispute, the prior censure related to petitioner's conduct *as a lawyer* rather than as a judge, and its only overlap with his tenure on the bench was his failure to wind up certain pre-existing guardianship matters quickly enough. See Matter of O'Connor, 2014 Ann. Rep. 174 (CJC 2013). Judge O'Connor *was not* alleged to have engaged in any venal or improper conduct with respect to the guardianships, nor was he alleged to have committed discourtesy or to have awarded fees improperly. Thus, the prior censure indicates neither a

propensity to commit judicial misconduct (as opposed to dilatory conduct involving matters taken on before becoming a judge) nor a warning putting him on notice of the need for "heightened sensitivity" to behavior such as alleged in this case. Therefore, on plenary review, this Court should find that a sanction of admonition or censure, rather than removal, is warranted.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should reject the Commission's determination to the extent set forth above, remand for a new hearing or else impose a lesser sanction, and grant such other and further relief to the petitioner as it may deem just and proper.

Dated: New York, NY
August 22, 2018



JONATHAN I. EDELSTEIN

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 510.13(c)(i) that the foregoing reply brief was prepared on a computer.

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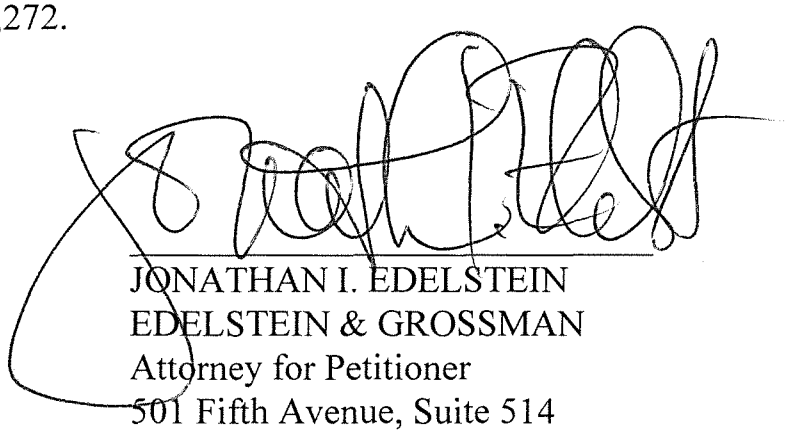

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