To Be Argued By
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Time Requested: 15 Minutes

JCR-2020-00003

Court of Appeals of the State of New York

In the Matter of the Request of
RICHARD H. MILLER, II,
a Judge of the Family Court,
Broome County,

Petitioner,

For Review of a Determination of the
NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

BRIEF FOR RESPONDENT STATE COMMISSION ON JUDICIAL CONDUCT

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PRELIMINARY STATEMENT

This brief is respectfully submitted by Counsel to the Commission on Judicial Conduct ("Commission") in support of the Commission's February 14, 2020, determination that the Honorable Richard H. Miller, II ("Petitioner") has committed judicial misconduct and should be removed from office, and in response to Petitioner's brief, dated May 4, 2020.

INTRODUCTION

Petitioner's serious acts of misconduct, aggravated by his evasive explanations and prior disciplinary record, warrant his removal from office.

Petitioner became a full-time judge on January 1, 2015, following his election to the Broome County Family Court, having previously served as a part-time judge of town or city courts since 1994. Near the end of 2015, Petitioner received more than $27,000 in payments for work he had performed as a lawyer before becoming a full-time judge. Additionally, over the course of his first three years in office, he earned almost $40,000 in rental income from tenants of various properties he owned. Petitioner failed to disclose any of that extra-judicial income on his 2015 or 2016 federal or state income tax returns, on his 2015 Financial Disclosure Form ("FDF") to the Ethics Commission of the Unified Court System, or on any annual disclosure reports to the clerk of his court pursuant to Section 100.4(H)(2) of the Rules Governing Judicial Conduct ("Rules"). Petitioner

ultimately filed amended tax returns and FDFs only after the Commission began investigating his finances, and he did not file any annual disclosure reports for 2015, 2016, or 2017 until midway through his hearing before the Referee in this matter. Upon being questioned at the hearing about his failure to make appropriate disclosures or timely amendments, Petitioner gave answers that the Commission found were "shifting," "implausible," "nonsensical," and "baseless."

Separately, during his tenure as a full-time judge, Petitioner made sexist and otherwise demeaning remarks to two female court employees. On three separate occasions, Petitioner told the chief clerk of his court that she looked "hot" in a certain outfit and should "always wear it"; that he was glad he had an arousing effect on her; and that he would have "gone for" her had he known she could cook. Separately, Petitioner screamed at a female court employee in open court for impeding his unannounced plan to leave early by not moving quickly enough through a stack of emergency petitions, and he retaliated against her when she complained. Rather than apologize to either woman for his behavior, at his disciplinary hearing Petitioner put the onus on them to inform him that his remarks were offensive.

Finally, in 2015 when he received unsigned checks intended as payment for legal work performed prior to becoming a full-time judge, Petitioner sought to secure signed copies of the checks by having his judicial secretary write a letter to

the sender, during work hours in chambers. Petitioner had his secretary write the letter not in her own name, but as if she were the secretary for Petitioner's former private firm.

The Commission determined that Petitioner's behavior warranted removal, in that his varied and repeated misconduct revealed "a pattern of placing his personal interests before his ethical obligations . . . and responsibilities as a judge." Petitioner's ever-changing explanations for his financial misconduct, and his failure to apologize to the women he demeaned, illustrated a failure "to take responsibility for his actions." And his recent misdeeds, after a prior censure and caution, demonstrated Petitioner's continuing insensitivity to the ethical obligations of a judge. In sum, Petitioner's misconduct compelled the Commission to protect the integrity of the courts by determining to remove him from office.

PROCEDURAL HISTORY

A. The Formal Written Complaint

Pursuant to Judiciary Law §44(4), the Commission authorized a Formal Written Complaint, dated July 9, 2018, containing four charges.

Charge I alleged that Petitioner engaged in a pattern of inappropriate behavior toward staff members of the Broome County Family Court by, *inter alia*, making unwelcome comments of a sexual nature and threatening their physical

safety and wellbeing (R37).[1] On various occasions beginning in 2015, Petitioner was alleged to have commented in chambers – in front of both Rachelle Gallagher, his secretary, and Mark Kachadourian, his court attorney – that his sexual needs were not being met and that Gallagher should be satisfying those needs. Petitioner allegedly engaged in a host of other sexually charged behavior in front of Kachadourian and Gallagher, including: (1) showing them photographs and/or drawings of nude women; (2) having graphic sexual discussions in chambers using his telephone's speaker function, some of which involved female courthouse employees; (3) identifying a particular courthouse employee and telling Kachadourian that he wanted to have sex with her "while she was bent over a desk"; and (4) telling Gallagher that he wanted her to perform sexual favors for a particular New York State senator in order to curry the senator's favor (R37-40). Petitioner further was alleged to have threatened Kachadourian and Gallagher that, were they to cross him, they would "answer to" various friends of Petitioner who had criminal records, and might end up with "cement boots" at "the bottom of the river" (R37-39).

The complaint separately alleged that Petitioner made unwelcome sexual comments to Debbi Singer, the chief clerk of the Broome County Family Court, including: (1) that she "looked hot" in a certain outfit; (2) that he would have

[1] Citations preceded by R and PB are to the Record on Review and Petitioner's Brief, respectively.

"gone for" her had he known that she was a good cook; and (3) after Singer made an apologetic comment about a "hot flash," that he was "glad he had that effect on her" (R40). Finally, Petitioner was alleged to have berated Rebecca Vroman, a court clerk assigned to his courtroom, for scheduling emergency petitions that required Petitioner to work past 4:00 PM on a given day (R39).

Charge II alleged that Petitioner lent the prestige of judicial office to advance his own private interests in that he repeatedly importuned chambers staff to perform services unrelated to their official duties, including prohibited political activity (R41). In particular, Petitioner was alleged to have directed Gallagher to type a letter that would enable him to be paid for work he had previously done on an estate case as an attorney, and to sign the letter using the name of his former private-practice secretary (R42). The complaint further alleged that Petitioner asked Gallagher and/or Kachadourian to keep a list of names in his chambers for use in future political campaigns; to collect signatures for his brother-in-law's mayoral campaign; and to help him prepare an accounting in an estate case he had previously handled as an attorney (R42).

Charge III alleged that, in connection with two still-pending estate cases Petitioner had worked on before becoming a judge (*Estate of Antoinette Saraceno* and *Estate of Jerry J. Behal, Jr.*), Petitioner engaged in the practice of law and/or conveyed the impression that he was engaged in the practice of law (R43-44). As

to *Saraceno*, it was alleged that, upon receiving notification in 2016 that he was required to make a filing because the estate had not been fully distributed, Petitioner called the chief clerk of the court in which the matter was pending and asked if the estate could be closed by motion (R45-46). As to *Behal*, the complaint alleged that, in May 2017, Petitioner worked on the matter in his chambers, asked Kachadourian to help him prepare the estate accounting, and continued to work on the accounting at his former law office (R47-49).

Charge IV alleged that Petitioner 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 (R50). In particular, it was alleged that in November and December 2015, Petitioner received over $27,000 in payment for legal work he had performed before becoming a judge, and that from 2015 through 2017, he received almost $40,000 in income from tenants of two different rental properties in which he had an ownership interest (R50-53). Nonetheless, the complaint alleged that Petitioner: (1) filed federal and New York State income tax returns for 2015 and 2016 that did not disclose any of the extra-judicial income he earned during those years, and did not file amended tax returns until August 2017, after he was questioned about the matter by the Office of the Inspector General for the Unified Court System

("Inspector General") (R50-52); (2) filed an FDF with the Ethics Commission for the Unified Court System in May 2016, for the 2015 calendar year, that did not disclose the legal fees he had received that year, and then amended it to include the legal fees only after the Commission had inquired into the matter (R50-51); and (3) failed to file any report of outside income with the clerk of his court for the years of 2015, 2016, or 2017, despite the requirement in Section 100.4(H)(2) of the Rules (R52-53).

B. Petitioner's Answer

Petitioner filed a Verified Answer to the Formal Written Complaint, dated August 8, 2018. Petitioner denied all of the substantive factual allegations as to Charge I, and he denied nearly all of the substantive factual allegations as to Charge II (R117-19). With respect to Charge III, Petitioner admitted the allegations relating to the procedural history of both cases pre-dating his becoming a Family Court Judge, but asserted a lack of knowledge and information sufficient to form a belief as to the truth of, or outright denied, the substantive factual allegations concerning most of the events occurring thereafter (R119-21).

As to Charge IV, Petitioner admitted that, in 2015, he received payments for legal work he performed in the two specified estate cases. However, he asserted that he lacked knowledge and information sufficient to form a belief as to the truth of the allegations that his 2015 FDF failed to disclose the income he received for

those cases and other matters, and that he did not amend his 2015 FDF to include this income until after he was notified by the Commission about his failure to do so (R121-22). Additionally, Petitioner admitted collecting rental payments as to one property that he owned, but he denied collecting rental payments as to two other properties (R122). Petitioner denied allegations that he failed to report the income he had received from the prior practice of law and/or rental income he had received on this 2015 and 2016 federal and state income tax returns, and he denied that he amended those returns to include omitted income after he was questioned by the Office of the Inspector General (R122). Finally, Petitioner asserted that he lacked knowledge and information sufficient to form a belief as to the allegation that he failed to file required reports of outside income with the clerk of the court (R122-23).

C. The Hearing

By Order dated September 18, 2018, the Commission designated Robert A. Barrer, Esq., as Referee to hear testimony in this matter and report proposed findings of fact and conclusions of law. The hearing was held in Binghamton, New York, on January 7-11, 2019, and in Albany, New York, on February 12, 2019. Counsel for the Commission called nine witnesses and introduced 112 exhibits. Petitioner called 13 witnesses, testified on his own behalf, and introduced 16 exhibits. Six items were marked as exhibits of the Referee.

D. The Referee's Report

The Referee issued a Report dated June 20, 2019. With respect to Charge I, the Referee concluded that Petitioner violated Rules 100.1 and 100.3(B)(3) by making inappropriate and unwelcome comments to Broome County Family Court Chief Clerk Debbi Singer, and by speaking unprofessionally in open court to Court Assistant Rebecca Vroman (R2798-2801, R2816). The Referee found that the remaining allegations were not sufficiently proven after concluding that Mark Kachadourian and Rachelle Gallagher lacked credibility (R2787-2801).

With respect to Charge II, the Referee concluded that Petitioner violated Rule 100.2(C) by asking Gallagher to type a letter regarding an estate case related to his former private law practice (R2801-02, R2817). The Referee did not sustain the remaining allegations of Charge II, based on his finding that Kachadourian and Gallagher lacked credibility (R2802-03).

The Referee did not sustain the allegations of Charge III. Although he found that Petitioner asked the Tioga County Surrogate's Court Clerk "whether the Court would accept a motion instead of an accounting to close the [*Saraceno*] Estate," the Referee concluded that such conduct did not constitute the improper practice of law (R2804-08, 2817). The Referee also concluded that Petitioner did not engage in the improper practice of law in relation to the *Behal* estate (R2808-11, R2817).

With respect to Charge IV, the Referee found that Petitioner violated Rules 100.2(A), 100.3(C)(1), and 100.4(H)(2), and 100.4(I) by failing to file accurate disclosure reports of his income from extra-judicial activities with the Clerk of the Broome County Family Court, the Ethics Commission for the Unified Court System, the Internal Revenue Service, and the New York State Department of Taxation and Finance (R2811-2818).

E. The Commission's Determination

On February 14, 2020, the Commission issued a determination that Petitioner "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 imposed the sanction of removal from office (R12, R22-23). Two Commission members dissented as to the sanction and would have censured Petitioner instead.

THE FACTS[2]

Charge I

Petitioner engaged in a pattern of inappropriate behavior toward staff members of the Broome County Family Court, including making unwelcome comments of a sexual nature.

[2] Testimony about facts and charges that were not sustained by the Commission have not been included. A full recitation of all of the facts elicited at the hearing can be found in the Post-Hearing Memorandum to the Referee and Proposed Findings of Fact and Conclusions of Law by Counsel to the Commission, dated May 1, 2019 (R2638-63).

Petitioner made sexualized comments to Chief Court Clerk Debbi Singer.

In May 2017, the Family Court held a "dish to pass" luncheon at the courthouse, and Singer – along with other staff members – made homecooked dishes to share (R5, R522-23). After the luncheon, Petitioner stopped by Singer's office and said, "If I knew you could also cook, I would have gone for the widow" (R5, R523). Petitioner knew that Singer was a widow (R1027-28).

Singer "took [Petitioner's comment] to mean, you know, he would have made a pass or something" (R523). She was "surprised, shocked, and disgusted" by Petitioner's comment, and she did not find it humorous (R5, R523).

In early June 2017, while Petitioner was in Singer's office, Singer had a hot flash; she took out a fan and said, "I apologize, I'm having a hot flash" (R5, R524, R556-59). Petitioner replied, "It's nice to know I still have that effect on you" (R5, R559).

Later that month, while Singer was standing in her office with the door open, Petitioner stepped inside and announced, "You look really hot in that outfit. You should always wear that outfit" (R6, R526).[3] Singer was "shocked and disgusted" by Petitioner's comment, which she found "unwelcome" (R6, R526). Shortly

[3] While Petitioner's comments would have been inappropriate regardless of what Singer was wearing, the record reflects that her outfit was professional and befitting a court employee (R526).

thereafter, in July 2017, Petitioner was transferred out of Family Court and Singer was therefore no longer subjected to his unwelcome comments (R1606).

At the hearing, Petitioner initially denied making the recounted statements to Singer, despite his testimony that he believed her to be a "truthful" and "honest" person (R6, R1027, R1736). Later, though, he read a statement in which he expressed that he was "troubled that [she] believes that [he] made demeaning comments to her" (R6, R1688). He testified, "I do not have any specific memory of th[os]e comments. All [Singer] . . . 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" (R6, R1688). Petitioner added, "It does me no good to have my co-workers dislike me" (R6, R1688).

Petitioner exhibited demeaning conduct toward Court Assistant Rebecca Vroman.

Prior to her retirement in June 2018, Debbi Singer was the chief clerk of the Broome County Family Court (R3, R512, R1027). In that capacity, Singer oversaw the daily operations of the Family Court and supervised court assistants, including Rebecca Vroman, who joined the Broome County Family Court in 2016 (R3, R478-79, R512-13). As a court assistant, Vroman's duties included assisting Petitioner in the courtroom by running the court audio recordings, processing

paperwork, scheduling Petitioner's court appearances, and supervising two lower-level court assistants (R3, R478-79).

On February 6, 2017, Petitioner was assigned as the emergency intake judge, and thus was charged with hearing petitions for emergency relief (R4, R479-80, R1614-15). That day, Petitioner was scheduled to hear a full slate of regular cases during his morning and afternoon court sessions, in addition to any emergency petitions that were filed (R4, R481, R1614-15). Although Petitioner was scheduled to begin his afternoon session at 1:30 PM and hear seven regular cases, he was late to court because of a physical therapy appointment and did not start afternoon proceedings until after 2:00 PM (R4, R481-82, R1614-15).

At around 2:30 PM, Vroman began receiving emergency petitions (R480, R482). As soon as she received each petition, she printed it and handed it to Petitioner (R482). Initially, Petitioner accepted the petitions without comment (R482). However, between 2:45 PM and 4:00 PM, Petitioner became increasingly agitated as Vroman continued to hand him incoming petitions, shaking his head and telling Vroman that he had to be somewhere at 4:00 PM (R4, R482-83). Court proceedings were not scheduled to conclude until 4:30 PM, and Petitioner had not previously notified Vroman that he needed to leave early (R483-85, R1592, R1612).

When the final emergency petition was called, Petitioner stood up and "yelled" at Vroman (R4, R483-84). Specifically, from a distance of three to four feet from her, Petitioner – speaking in a manner and tone that was "rude," "disrespectful," "condescending," "demeaning," and "belligerent" – said that Vroman was not doing her job properly, and "was going too slow and . . . needed to move faster" (R4, R483-84). Vroman, who had no control over how many petitions were filed or how long it took for the petitions to get from the courthouse receptionists to the courtroom, was "flabbergasted" and upset by Petitioner's outburst (R4, R481, R483). Vroman immediately reported the incident to Singer, telling Singer that Petitioner "had berated her in the courtroom, screaming and yelling at her," and that she "felt very demeaned by it" (R4, R485-86, R527). Two days later, Vroman wrote a "detailed letter" to Singer, which documented her complaint in writing (R4, R485-86, R527).

On March 1, 2017, after learning that Vroman had complained about his "discourteous and demeaning behavior," Petitioner "made a written complaint about Ms. Vroman to chief clerk Singer" (R4, R486, R2441-43). Singer investigated Petitioner's complaints, which included an allegation that Vroman typed too loudly; Singer found Petitioner's complaints to be not only "largely unfounded," but "retaliatory because of the timing" (R4-5, R528-29, R2350-52). Petitioner never apologized to Vroman for yelling at her, and his demeanor toward

her thereafter was "very cold" (R5, R486). At the hearing, Petitioner professed to be "troubled and sorry that Ms. Vroman is still upset" (R5, R1687).

Charge II

Petitioner lent the prestige of judicial office to advance his own private interests when he had his court secretary, Rachelle Gallagher, perform services unrelated to her official duties.

Gallagher typed a letter that enabled Petitioner to collect private legal fees.

From 1994 to 2014, Petitioner maintained a private legal practice located on North Street in Endwell, New York (R1032-33, R1240, R1560-62). After Petitioner's election to the Family Court, his former legal assistant, Danuta "Donna" Filip, continued to work at the North Street law office for Artan Serjanej, Esq., who came to occupy the space and took over some of Petitioner's cases (R190, R777, R1020, R1033, R1243). One of those cases, which was still pending after January 1, 2015, was the *Estate of Roger Funk* (R1032, R1040-41).

On November 6, 2015, Petitioner picked up the mail from his former law office and brought it to chambers, where his secretary – Rachelle Gallagher – was working (R1748). Upon opening that mail, he discovered an envelope addressed to Mr. Serjanej from Thomas Hayes; it contained three unsigned checks drawn from the *Estate of Roger Funk*, one of which was payable to Petitioner in the amount of $11,184.60 (R6-7, R201-02, R779, R1785). According to Petitioner, he

stated that the checks needed to go back to Hayes for signature, and Gallagher offered to type a letter (R7, R19-20).[4]

Gallagher wrote a letter in chambers requesting that the checks be signed and returned to Donna Filip (R7, R202, R779, R927). Gallagher wrote the letter "as if it were from Ms. Filip" (R7) because Petitioner told her to do so (R780). Petitioner then brought the letter back to his former law office and mailed it from there (R7, R1661, R1718). Petitioner received his "unpaid legal fee" in the form of two checks, signed by Hayes, in the amounts of $5,384.00 and $5,800.60 (R1723-24, R1786).

At the hearing, Petitioner testified that he "[didn't] think" that he told Gallagher to write the letter as if Filip were the author and sender (R1715-16). Petitioner conceded that "it was improper for Ms. Gallagher to have prepared the November 6, 2015 letter to Mr. Hayes" (R7, R1719).

Charge III

The Commission dismissed Charge III as "not sustained"; it made no factual findings as to that charge (R7).

[4] Gallagher testified that Petitioner directed her to write a letter to Hayes asking him to sign the checks (R201-02, R779).

Charge IV

Petitioner failed to timely and accurately report his extra-judicial income to the Internal Revenue Service, the New York State Department of Taxation and Finance, the Ethics Commission for the Unified Court System, and the Clerk of the Broome County Family Court.

Petitioner earned extra-judicial income from 2015 through 2017.

By checks dated November 24, 2015, and December 1, 2015, Petitioner received a total of $27,387.60 in legal fees related to work he had done before becoming a full-time judge on *Estate of Deborah Brigham* and *Estate of Roger Funk* (R7-8, R1041-42, R1047-49, R1051-52, R1786, R2112-14).

Additionally, from 2015 through 2017, Petitioner received rental payments from the tenants of two properties in which he had an ownership interest: one on North Street, in Endicott, New York ("the North Street property"); and one on Oakdale Road, in Johnson City, New York ("the Oakdale Road property"). In 2015, Petitioner received $6,000 in rental payments for the North Street property and $1,400 in rental payments for the Oakdale Road property, for a total of $7,400. In 2016 and 2017, Petitioner received $6,000 per year in rental income from the North Street property and $9,600 in rental income from the Oakdale Road property, for a total of $15,600 in each of those two years (R8, R679, R2161-73, R2343-48).

Petitioner failed to report extra-judicial income on his tax returns.

Petitioner and his wife filed joint federal and New York state income tax returns for 2015 and 2016 (R10, R2192, R2240, R2255, R2317). On his federal and New York State returns, Petitioner reported his judicial salary and his wife's income from her partnerships (R10). However, Petitioner did not report the $27,387.60 he earned from his prior legal practice on either of his 2015 tax returns, nor did he report the rental income he received from the Oakdale Road and North Street properties – $7,400 in 2015, and $15,600 in 2016 – on any of his 2015 or 2016 tax returns (R10, R2198, R2260, R2318). Although he did not report the rental income he received, Petitioner claimed thousands of dollars in deductions related to the Oakdale Road property on his federal returns; he did not mention the North Street Property at all (R10, R2198, R2260, R2318).

On July 11, 2017, Petitioner met with his administrative judge, his supervising judge, and the district administrator, who told him that a complaint had been made against him (R1021). Later that day, he found himself locked out of the Family Court building, and thus unable to access his chambers (R1021-22). At some point between that day and August 2, 2017, Petitioner learned that the Commission had taken possession of boxes containing his tax records, which he had stored in his chambers (R1620-21, R1650-51).

On August 2, 2017, Petitioner filed amended federal and state tax returns for 2015 and 2016 to reflect the legal fees he collected in 2015 and the rental income he received in both years (R10-11, R2217, R2248, R2337). The 2015 amended returns resulted in an increased tax liability of $9,590 to the IRS and $1,925 to New York State (R10-11, R2217, R2252). For 2016, Petitioner's federal tax amount remained the same after the amendment due to an increase in claimed expenses for the rental properties, and his New York state tax bill increased by $725 (R10-11, R2260, R2288, R2332).

At the hearing before the Referee, Petitioner testified that he worked with his accountant to amend his 2015 and 2016 income tax returns in April, May and June 2017, notwithstanding that no amendments were filed until August 2017 (R1671-73, R1728). Petitioner knew that the Commission was in possession of his tax records and other financial records, including the checks for his legal fees in *Funk*, which had been in boxes taken from his chambers in July 2017 (R1620-21, R1650-51). Petitioner had also been questioned by the Inspector General in July 2017 about his receipt of the *Brigham* checks (R1728-29).

Petitioner failed to report extra-judicial income to the UCS Ethics Commission.

On May 13, 2016, Petitioner filed his Annual FDF with the Ethics Commission for the Unified Court System for calendar year 2015 (R10, R2174).

That filing failed to disclose any of the more than $27,000 in income Petitioner had received in 2015 from prior legal work (R10, R2177).

On November 16, 2017, twelve days before his scheduled appearance before the Commission for testimony, Petitioner amended his 2015 FDF to include "Income" from "former private law practice" in the Category Amount of $20,000 to under $60,000 (R10, R2189; R1018, R1036-37).

At his November 28, 2017, appearance during the Commission's investigation, Petitioner testified that he listed the bank accounts into which the extra-judicial, legal-work income had been deposited on his 2015 FDF, but "didn't specifically insert a line as to income" (R11). Petitioner subsequently swore that he amended his FDFs "when [he] could get into the Ethics form," and not as a result of the Commission's investigation into his failure to disclose his extra-judicial income on the forms (R1729).

At the hearing before the Referee, Petitioner acknowledged that he had received and cashed the checks for his legal fees from the *Funk* and *Brigham* estates, and he testified that he knew how to report income from the practice of law on his FDF (R1671-72, R1724).[5]

Petitioner claimed that he thought he had received the *Funk* and *Brigham* payments in 2016, not 2015 (R11-12, R1761-62, R1724), which "would have made

[5] Indeed, Petitioner filed an FDF in 2015 for the prior calendar year of 2014 (R1724-25).

them reportable on his 2016 FDF" (R12). Yet Petitioner also failed to report the income on his 2016 FDF, which he filed in May 2017 (R12; R2180-85).

Petitioner admitted at the hearing that he did not report any of the rental income he received in 2015 or 2016 on his original or amended FDFs, claiming that his rental properties operated at a loss when the rents were reduced by expenses (R1037-38, R1643, R1727; R2178-79; R2183-85).[6] As indicated in Petitioner's amended income tax returns, the North Street property had a net income in excess of $1,000 for both 2015 and 2016 (R2228, R2288).

Petitioner failed to file annual reports with the clerk of his court.

In April 2016, Respondent received an email from District Executive Gregory A. Gates that was sent to all Sixth Judicial District judges and their secretaries reminding them of their obligation to report outside income pursuant to Section 100.4(H)(2) of the Rules (R1731-32; R2355-56). That section requires a judge to "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," by filing the report "in the office of the clerk of the court on which the judge serves."

[6] The instruction on paragraph 13 of the FDF states that "Income from . . . real estate rents shall be reported with the source identified by the building address . . . with the aggregate net income before taxes for each building" (emphasis added) (R2168, R2177, R2183, R2189).

Notwithstanding that he received legal fees and/or rental income in 2015, 2016 and 2017, Petitioner failed to file a report of extra-judicial income during any of those years (R9, R531-32, R1647; R2543).

On November 28, 2017, Petitioner appeared for testimony during the Commission's investigation and maintained that he was not aware of the requirement to file a report of outside income pursuant to Section 100.4(H)(2) (R9, R1061-62). Approximately six months later, in May 2018, the Commission sent Petitioner an inquiry letter in which he was again asked about his missing annual disclosure reports (R9, R2340). Petitioner's reply letter asserted that he had not filed annual disclosure reports with the clerk because he "became aware of the filing requirement . . . 'in the course of this investigation'" (R9, quoting R2347). Petitioner acknowledged that he had failed to comply with Rule 100.4(H)(2) (R2347-48).

On January 31, 2019, more than four years after he became a full-time judge, and "after the first five days of the hearing before the [R]eferee in this matter," Petitioner finally filed a report of his extra-judicial income for the years of 2015 through 2018 with the chief clerk of the Broome County Family Court (R9-10).

THE COMMISSION'S DETERMINATION

The Commission determined that Petitioner's conduct 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, and warranted his removal from office.

The Commission unanimously determined that Petitioner committed misconduct.

As to Charge I, Petitioner violated Sections 100.1 and 100.3(B)(3) by failing to act in a manner to preserve the integrity of the judiciary, and to be patient, dignified, and courteous when acting in his official capacity, with respect to his behavior toward Debbi Singer and Rebecca Vroman (R13). In particular, Petitioner made "highly inappropriate," "offensive," and "sexist" remarks to Singer when he told her that he "would have gone for [her]" had he known she could cook; that she "looked really hot" in a particular outfit; that she "should always wear" that outfit; and – in response to her statement that she was having a "hot flash" – that he was glad he "still ha[d] that effect on [her]" (R13). The Commission found those remarks "shocking and unacceptable," especially coming from "a judge to a court employee" (R13, R19). The Commission further found that Petitioner acted inappropriately when he "berated and demeaned" Vroman, and that he made matters worse by filing a "retaliatory" complaint against Vroman upon learning of her "complaint about his discourteous behavior" (R13-14, R20). Petitioner "[c]ompound[ed] his misconduct" as to both women by opining, during

his hearing testimony, that they "had an obligation to tell him that they did not approve of his comments" (R13-14, R19). "To the contrary," the Commission ruled, "it was incumbent upon [Petitioner] to not make sexist comments [and] . . . avoid behaving discourteously . . . even if the woman does not protest" (R14, quotation marks omitted).

As to Charge II, Petitioner violated Section 100.2(C) by "allowing his court secretary to prepare a letter regarding unsigned checks for his prior legal work" (R15). As the Commission observed, that conduct improperly "advance[d] the private interests of the judge" because "the letter related to [Petitioner's] former private practice of law and had nothing to do with the work of the Family Court" (R15). Moreover, that misconduct was exacerbated by the fact that Petitioner "ha[d] his court secretary write [the] letter as if it were from his former law firm secretary" (R19-20).

As to Charge IV, Petitioner violated Sections 100.2(A), 100.3(C)(1), 100.4(H)(2), and 100.4(I) by failing to properly report his extra-judicial income for the years of 2015, 2016, and 2017 on his federal or state tax returns, on his financial disclosure form filed with the Ethics Commission for the Unified Court System, or on his annual report to the Clerk of the Broome County Family Court (R12, R15-18). As to the annual reporting requirement to his court clerk, the Commission found that Petitioner's claimed ignorance of the requirement was "no

excuse," and that Petitioner "should have taken the utmost care" to comply with Rule 100.4(H)(2), in that he "had been previously censured for violating the Rules" (R16).

The Commission found it "undisputed that [Petitioner] failed to disclose his income from the practice of law and rental income . . . on his federal and state tax returns," which constituted plain misconduct that was "improper and violated the Rules" (R18).

The Commission found petitioner's failure to report "approximately $27,000 in legal fees on his 2015 FDF" similarly problematic, noting that "[w]hen asked about the omission, [Petitioner] gave varying implausible reasons," some of which were "nonsensical" (R17, R20-21). Most notably, Petitioner testified at the hearing that "he thought that he had cashed the legal fee checks in 2016 which would have made them reportable on his 2016 FDF," but the fact that he "again did not report the legal fees" on his 2016 FDF demonstrated that his sworn testimony on that score was "baseless" (R17).

With respect to his report to the clerk of his court, the Commission determined that Petitioner had clearly learned of the annual filing requirement in November of 2017, but "chose not to make any filing" until January 2019, which was long "after the hearing before the referee had commenced" (R16-17). The

Commission found that conduct "emblematic of [Petitioner's] overall inattention to his ethical responsibilities" (R17).

The Commission concluded that Petitioner "engaged in a pattern of placing his personal interests before his ethical obligations . . . as a judge" (R20).

The Commission determined that Petitioner should be removed from office.

The totality of those "three separate types of misconduct," coupled with Petitioner's failure to "take[ ] responsibility for his actions" and the fact that he had been previously censured by the Commission, led the Commission to determine that he should be removed from office (R19-22). Noting its "mandate . . . to protect the integrity of the courts," the Commission concluded that "if [Petitioner] were to be censured again and allowed to remain on the bench," then "public confidence in the courts and the judiciary process would be undermined" because of the "message another censure would send to the public" (R21). "This is particularly true," the Commission found, in light of the interplay between the "highly inappropriate sexist comments petitioner made to a female court employee," and Petitioner's station in family court, "'where matters of the utmost sensitivity are often litigated'" (R21, quoting *Matter of Esworthy*, 77 NY2d 280, 283 [1991]). Thus, while remaining "mindful that 'removal . . . should not be imposed for misconduct that amounts simply to poor judgment or even extremely poor judgment,'" the Commission determined that removal was appropriate here

because of Petitioner's "pattern of conduct [that] violated the Rules in numerous ways" and his "failure to learn from previous discipline" (R21-22, quoting *Matter of Mazzei*, 81 NY2d 568, 572 [1993]).

Two Commission members dissented as to sanction; they agreed that petitioner committed the misconduct described by the majority, but believed that another censure, rather than removal, would have been appropriate (R22, R24-27). The dissent opined that the sexist comments Petitioner made about Singer, though "crude and vulgar," were "intended to be humorous" (R25-26), and that, as the Referee found, the eventual filing of amended tax returns and FDF was mitigating (R26). Finally, the dissent discounted Petitioner's prior censure as too remote and substantively unrelated to the instant matter (R27).

POINT I

PETITIONER COMMITTED MULTIPLE ACTS OF SERIOUS MISCONDUCT OVER A PERIOD OF SEVERAL YEARS, INCLUDING MAKING A SERIES OF SEXIST AND DEMEANING REMARKS TO FEMALE COURTHOUSE EMPLOYEES, FAILING TO REPORT INCOME, AND MISUSING HIS JUDICIAL OFFICE.

Petitioner committed multiple acts of serious misconduct over a period of several years. He repeatedly made sexist and demeaning comments to the chief clerk of his court. He berated and retaliated against a female court assistant in his courtroom. He had his judicial secretary write a letter pertaining to his former private legal practice while posing as his private law-firm secretary. He failed to

report tens of thousands of dollars in extra-judicial income on his state and federal income tax returns, his Ethics Commission FDFs, and his required annual disclosure reports. And he engaged in such behavior despite prior discipline that evidently did little to sensitize him to his ethical obligations.

The Commission found that "through his pattern of conduct, [Petitioner] violated the Rules in numerous ways which exhibited his continued disregard for the Rules and his obligations as a judge" (R21). He should be removed from judicial office.

A. Petitioner made sexist and demeaning comments to female court employees.

Petitioner made multiple sexist comments to the chief clerk of his court, and he berated, demeaned, and retaliated against a second female court employee. In doing so, Petitioner failed to act in a manner to preserve the integrity of the judiciary, in violation of Section 100.1 of the Rules, and he failed to be patient, dignified, and courteous in his official dealings, in violation of Section 100.3(B)(3) of the Rules.

1. Petitioner made multiple sexist comments to Chief Clerk Singer.

As the Commission unanimously found,[7] Petitioner improperly told Debbi Singer, the chief clerk in his courthouse, that:

[7] Although two members dissented as to sanction, they joined in the majority opinion's finding that Petitioner committed multiple acts of misconduct (R24).

- she looked “hot” in a certain outfit and should “always wear it”;
- that he would have “gone for” her if he had known she was a good cook; and
- in response to her apologetic comment that she was using a fan to alleviate a “hot flash,” that “it was nice to know [he] still ha[d] that effect” on her (R5-6, R13).

Petitioner does not contest the finding that that he made the first two remarks, nor does he challenge the Commission’s determination that such conduct clearly violated the Rules (PB 14-15, 32; R12-15). *See Matter of Duckman*, 92 NY2d 141, 152 (1998) (judge’s comments to prosecutor that “she was ‘too sexy’ to wear flat shoes and that she had ‘nice legs’” violated the rules); *Matter of Dye*, 1998 WL 184269 at *1-2 (Com Jud Cond 1998) (judge violated rules by telling his secretary “he enjoyed talking to her because she was physically attractive,” that “she had attractive legs,” and that “her clothes inspired his sexual feelings”).

Petitioner claims, however, that he did not tell Singer it “was nice to know [he] still ha[d] that effect” on her, and that the Commission’s finding to the contrary is “based entirely on [Rachelle] Gallagher’s hearsay assertion” (PB 18, 39-40). That contention is entirely without merit.

Singer explicitly testified that, after apologizing to Petitioner for her hot flash while the two were alone in her office, Petitioner said to Singer, “It’s nice to

know I still have that effect on you" (R559). Although Singer's direct examination testimony created the impression that Petitioner made that comment privately to Gallagher (R524-25), Singer clarified the matter both on cross-examination and redirect examination by explaining, in no uncertain terms, that Petitioner made this remark to her face.

Significantly, on cross-examination, after Petitioner's attorney brought up the "hot flash" apology, Singer asserted flatly, "He made that comment to me" (R555).[8] Several pages later, Petitioner's attorney summed up his own understanding of what had happened and asked Singer, "Judge Miller went that day and told Rachelle Gallagher about the comment that was made to you, correct?" (R558, emphasis added). Singer replied, "Yes" (*id*.). On redirect, Commission Counsel eliminated any ambiguity by asking Singer to re-check her notes about this incident, after which the following colloquy occurred:

Commission Counsel:	". . . [when] you said that you had a hot flash, did the judge respond to you personally?"
Singer:	After – Sorry. Having referred to my notes, he replied, "It's nice to know I still have that effect on you."

[8] As is evident from this exchange during cross-examination, Petitioner's claim that Singer changed her testimony on redirect "only after prompting from Commission Counsel" (PB 18) is plainly untrue.

Commission Counsel: And he replied that to you?

Singer: Yes.

(R559).

It is easy to see why every single Commission member accepted Singer's cross-examination and redirect testimony that Petitioner made the comment directly to her. Petitioner himself testified that he believed Singer to be a "truthful" and "honest" person (R1027, R1676). The Referee explicitly described Singer as "a credible witness with no interest in the outcome of the proceeding" (R2800). Thus, there is no basis to believe that Singer deliberately lied as to this one point. The obvious explanation for the disparity is that Singer made a mistake during her direct examination, and then remedied the matter when asked about it on cross-examination and after reviewing her notes on redirect.

In pressing his claim that he did not make the "hot flash" comment to Singer, Petitioner largely pretends that the above-quoted testimony from Singer's cross- and redirect examinations does not exist. His clearly erroneous assertion that the "nice to know I still have that effect on you" finding was "based entirely on Ms. Gallagher's hearsay assertion" (PB 39), is consistent with his tendency at the hearing to provide "shifting and implausible" defenses (R21) when pressed about his wrongdoing.

2. Petitioner berated and demeaned Court Assistant Vroman.

The Commission found that Petitioner "berated and demeaned" Court Assistant Rebecca Vroman by "screaming and yelling at her" in his courtroom because he thought she was working too slowly to accommodate his unannounced plans to leave early (R4, R13, R19, R22). That constitutes plain misconduct. *See Matter of O'Connor,* 32 NY3d 121, 126 (2018) (removing judge who, *inter alia*, "acted impatiently, raised his voice, and made demeaning and insulting remarks, often in open court"); *Matter of Simon*, 2016 WL 1411487 at *17 (Com Jud Cond 2016), *removal accepted* 28 NY3d 35 (2016) (judge violated rules by "subject[ing] [court staff] to demeaning treatment, insults and angry diatribes in response to perceived disrespect or shortcomings in the performance of their duties").

Contrary to Petitioner's claim (PB 41-42), the fact that the Referee did not resolve conflicting testimony between Vroman and Petitioner regarding whether Petitioner had yelled, and was thus "unable to conclude that [Petitioner's] demeanor was "loud and angry," does not compel a factual finding in Petitioner's favor. It is well settled that "[n]either the Commission nor this Court is bound to accept the Referee's findings." *Matter of Marshall*, 8 NY3d 741, 743 (2007).

The Commission had several good reasons to accept Vroman's testimony that Petitioner had yelled at and berated her. First, Vroman promptly filed a report of Petitioner's outburst, which indicated that he had "berated her in the courtroom,

screaming and yelling" (R485-86, 527-28). Had Petitioner not acted so abusively in open court, she likely would not have taken the drastic step of officially documenting the incident, which carried the risk of repercussions. And repercussions there were, as Petitioner responded with a counter-complaint about Vroman's job performance. Importantly, though, after Singer reviewed both complaints, she determined that Petitioner's claim was unfounded and retaliatory. The fact that Petitioner filed retaliatory complaint suggests that Vroman's initial report had touched a nerve by alleging an unpleasant truth.

In addition, the Commission had a sound basis to credit Vroman's account over Petitioner's based on Petitioner's demonstrated lack of candor throughout the proceedings. As the Commission noted, when pressed about his financial wrongdoings, Petitioner gave "varying," "shifting," and "implausible" responses, and at times, his explanations were downright "nonsensical" and "baseless (R17, R21). A finding that he testified untruthfully regarding his behavior toward Vroman is consistent with this pattern.

Furthermore, Petitioner was not forthright about Vroman's allegations. He testified that he would have apologized to her if she had told him that he had upset her (R1688). Yet the Commission appropriately found this testimony to be "inaccurate since after Ms. Vroman complained about his behavior, [Petitioner's] response was not to apologize, but to file a complaint against Ms. Vroman" (R14

n2). In that light, the Commission rightly accepted Vroman's characterization of Petitioner's misconduct against her.

B. Petitioner improperly used his judicial secretary for personal business.

Petitioner used his judicial office to advance his own private interests by having his chambers secretary draft a letter seeking payment for work Petitioner did in his former private practice, in violation of Section 100.2(C) of the Rules. *See Matter of McGuire*, 2020 WL 1669487 at *28 (Com Jud Cond 2020) (judge "improperly lent the prestige of his office to advance his private interests" by having "his court secretary" prepare documents and write a letter related to the judge's private practice); *Matter of Ruhlmann*, 2009 WL 819909 at *6 (Com Jud Cond 2009) (judge violated the Rules "[b]y using her court secretary to provide repeated personal services during court business hours").

C. Petitioner failed to report tens of thousands of dollars of extra-judicial income on his 2015 and 2016 tax returns and FDFs, and he failed to file required annual disclosure reports with the clerk of his court.

Petitioner failed to report tens of thousands of dollars of extra-judicial income on multiple state and federal income tax returns and on his financial disclosure statement to the Ethics Commission of the Unified Court System. Petitioner also failed to file three required annual reports disclosing this income with the clerk of his court.

Petitioner earned over $27,000 from his private law practice in 2015, yet he failed to disclose that income on any of his 2015 tax returns or on his 2015 FDF. Petitioner also received thousands of dollars in rental income in both 2015 and 2016 from properties he owned – and he took tax deductions for expenses for one of those properties – and yet he did not report that income on any of his tax returns or FDFs for those years (R10).

Although Petitioner ultimately amended his inaccurate tax returns and his 2015 FDF, he did so only after learning that the Commission was in possession of his tax records (R1620-21, R1650-51). Prior to filing his amended returns, Petitioner was also questioned by the Inspector General about income he received for his work on the *Estate of Deborah Brigham* (R1728-29), income he had not reported on his tax returns or his 2015 FDF (R7-8, R10-11).

Petitioner never amended his 2016 FDF. His argument that he "did not amend his 2016 [FDF] as there was no additional income to report" (Petitioner's Brief 32) is simply untrue. As Petitioner's amended 2016 income tax return makes clear, he received thousands of dollars in reportable rental income from his North Street property (R2288) that is not reflected on his 2016 FDF (R2183).[9] And

[9] The instructions for the FDF clearly state that "Income from . . . real estate rents shall be reported with the source identified by the building address . . . with the aggregate net income before taxes for each building" (R2183, emphasis added).

although Petitioner amended his 2015 FDF to include his legal-services income, he did not include his rental income on that amended FDF (R2189).

Finally, Petitioner did not file any annual reports of extra-judicial income, as required by Section 100.4(H)(2) of the Rules, for the years 2015, 2016, or 2017, until the middle of his hearing before the Referee, in early 2019.

Petitioner's repeated failure to accurately report his income on his tax returns and financial disclosure forms violated the Rules.[10] *See, e.g.*, *Matter of Alessandro*, 13 NY3d 238, 249 (2009) ("Judges must complete their financial disclosure forms with diligence, making every effort to provide complete and accurate information"); *Matter of Steinberg*, 51 NY2d 74, 79 (1980) (misconduct included judge's "fail[ure] to report a total of $3,203 of the income from his [private] loan business on [three years of] Federal tax returns"); *Matter of Ramich*, 2002 WL 31954075 at *5 (Com Jud Cond 2002) (failure to include income on tax return and to report extra-judicial income to the chief clerk of his court constituted misconduct).

[10] Petitioner's repeated failure to report extra-judicial compensation violated Sections 100.2(A), 100.3(C)(1), 100.4(H)(2), and 100.4(I) of the Rules.

POINT II

PETITIONER'S MULITPLE ACTS OF MISCONDUCT, TAKEN TOGETHER WITH HIS REFUSAL TO ACCEPT RESPONSIBILITY FOR HIS ACTIONS AND HIS PRIOR CENSURE, WARRANT HIS REMOVAL FROM OFFICE.

There is no place in the court system for sexist and demeaning behavior by a judge, even if intended as humor. *Matter of Romano*, 93 NY2d 161 (1999); *Matter of Duckman*, 92 NY2d 141 (1998). Petitioner's pattern of such conduct toward court employees Debbi Singer and Rebecca Vroman was serious, unacceptable, and aggravated by his failure to apologize, his shift of the onus to them, and his retaliation against Vroman for speaking up.

Nor is it acceptable for a judge, whether negligently or purposefully, to shirk significant financial reporting and tax-paying obligations. *Matter of Steinberg*, 51 NY2d 74 (1980). Petitioner's series of improper financial filings, individually and collectively, constituted serious transgressions that were compounded by his revolving door of "nonsensical" and "implausible" excuses, which suggests intentional misconduct.

Taken together, Petitioner's substantive misconduct, repeated refusal to accept responsibility, and demonstrated dishonesty in this proceeding, combined with his having been censured and cautioned previously by the Commission, warrant his removal from office.

A. Petitioner's sexist comments to Chief Clerk Singer, his demeaning conduct toward Court Assistant Vroman, and his failure to accept responsibility for his actions or apologize to the women he demeaned, support the sanction of removal.

As the Commission found, Petitioner engaged in a "pattern of sexual comments" toward Chief Clerk Debbi Singer and "berated and demeaned" Court Assistant Rebecca Vroman (R19).

Petitioner's "sexist" comments to Singer – that she looked "hot," that he "would have gone for her," and that he was the cause of her hot flash – "are shocking and unacceptable" (R13). This Court has previously sanctioned judges who subjected court staff to such offensive and sexually charged comments. *See Matter of Shaw*, 96 NY2d 7, 9-10 (2001) (judge, *inter alia*, made inappropriate sexual remarks to his secretary about her physical appearance, focusing on certain physical attributes and the way her clothing fit); *Matter of Collazo*, 91 NY2d 251, 253 (1998) (judge, *inter alia*, passed "ribald note" and made "indelicate suggestion" about appearance of female intern).

Petitioner "[c]ompound[ed] his misconduct" toward Singer by testifying to a disturbing "misapprehension" that, following his "sexist comments," Singer "had an obligation to tell him that [she] did not approve" of what he said (R13-14). Rather than accept responsibility for his behavior, Petitioner blamed his victim, thereby simultaneously ignoring "his responsibility to avoid behaving discourteously toward court employees" (R14) and "minimizing his responsibility

for his own conduct" (R14, n2). Petitioner similarly failed to accept responsibility for berating and demeaning his court assistant. When Petitioner "became aware of Vroman's complaint about his discourteous behavior, [his] response was to file a written complaint against her" (R20).

It is telling that Petitioner insists in his brief to this Court that he has "repeatedly apologized" to Singer and Vroman (PB 45) when his own citations to the record make plain that he did no such thing. While it is true that Petitioner told the Commission that he "reiterated" his apology during oral argument (R3029) – at a time neither Singer nor Vroman was there to hear it – there is no evidence that Petitioner ever apologized to the women themselves. Vroman testified that Petitioner never apologized (R486). As to Singer, Petitioner's citation to pages 1687-88 of the record reveals only that Petitioner maintained that he "would have apologized" if Singer had complained. Notably though, even then, Petitioner "would have apologized" not because Singer deserved an apology, but because he saw "no good [in] hav[ing] [his] co-workers dislike [him]" (R6, R14).[11] Thus, even at the hearing, Petitioner continued to consider only how his actions have affected <u>him</u>, without "acknowledg[ing] his obligations and the implications of his

[11] As the Commission recognized, Petitioner's assertion that he "would have apologized" is highly questionable. Vroman did in fact complain about Petitioner's behavior toward her, and his "response was not to apologize, but to file a complaint against [her]," which was ultimately determined to be meritless and retaliatory (R14, R20).

conduct." *Matter of Ayres*, 30 NY3d 59, 65 (2017). As this Court has held, such an "inability to recognize the seriousness of one's misconduct" is an aggravating factor that "can be grounds for removal." *Id*; *see Matter of Hart*, 7 NY3d 1, 10 (2006) (judge's failure to recognize the seriousness of misconduct constituted a "significant aggravating factor on the issue of sanctions," quoting two removal cases: *Matter of Aldrich,* 58 NY2d 279, 283 [1983], and *Matter of Bauer,* 3 NY3d 158, 162 [2004]).

In an attempt to claim mitigation, Petitioner points to the finding of the Referee that his improper comments toward Singer "may well have been intended to be humorous" (PB 41, 43). Singer certainly did not think Petitioner's comments were "funny" (R523-24). And such comments, "even if made in jest, are, without question, demeaning, entirely inappropriate and deserving of some sanction." *Collazo*, 91 NY2d at 254-54. *See also Romano,* 93 NY2d at 163.

The Commission majority properly rejected the idea that Petitioner was making a joke as "implausible" (R22), noting that as "a longtime judge with prior run-ins with this Commission, a family man by his own account, [and] a coach and volunteer," Petitioner could not have reasonably believed that sexualizing Singer to her face, in the courthouse where they both worked, was humorous (*id.*). Indeed, it is arguably worse if Petitioner did think his comments were funny, as it would demonstrate his astonishing lack of judgment on the topics of gender relations and

hostile work environments, about which – particularly as a family court judge – Petitioner should have been especially sensitive.

Lastly, Petitioner's reliance on *Matter of Dye* and *Matter of Doolittle* in support of his contention that censure is appropriate (PB 45) is misplaced. Much has changed in our society in the 22 years since *Dye* was decided and even more in the 35 years since *Doolittle*. Our collective tolerance for offensive sexual comments in the workplace, especially as between a superior and his subordinate, has severely diminished. Indeed, as this Court has said, even "isolated statements" of a sexist nature that may not indicate bias "are highly inappropriate and antithetical to the role of a Judge." *Duckman*, 92 NY2d at 152, n4.

B. Petitioner's failure to report tens of thousands of dollars of extra-judicial income, combined with his "shifting," "implausible," "nonsensical," and "baseless" explanations, is serious misconduct and supports the sanction of removal.

Petitioner's failure to disclose tens of thousands of dollars of extra-judicial income on his 2015 and 2016 state and federal income tax returns and financial disclosure statements, and his failure to file years' worth of annual reports of his extra-judicial income with the clerk of his court, constitute serious misconduct that supports the sanction of removal.

To be sure, "[c]areless omissions from a financial disclosure statement are not the type of 'truly egregious' conduct that warrants removal from judicial office," and this Court has expressed its "unwilling[ness] to remove a judge from

office for completing [financial paperwork] in a sloppy fashion where there is no evidence of intent to deceive." *Alessandro*, 13 NY3d at 249 (quoting *Matter of Cunningham*, 57 NY2d 270, 275 [1982]).

However, "the ultimate responsibility for timely filing accurate returns rested on petitioner," and "[e]ven assuming that the failure . . . was negligent, petitioner's explanation [for his conduct] is unacceptable." *Matter of Boulanger*, 61 NY2d 89, 91 (1984). Moreover, financial filing "lapses are not excused by negligence or inattention and, even if inadvertent, create the appearance that [Petitioner] was intentionally concealing his extrajudicial activity." *Ramich*, 2002 WL 31954075 at *5. That inference of intentional concealment is reinforced here, many times over, by the number and circumstances of Petitioner's "lapses." *Id.* Here, there is ample evidence that Petitioner's omissions from his tax returns, and his faulty or missing financial disclosures, constituted deliberate attempts to deceive the state and federal government for his own financial gain.

Petitioner failed to report significant amounts of extra-judicial income over a period of years on multiple state, federal, and court system filings. Those repeated failures demonstrated a "pattern of placing his personal interests before his ethical obligations to comply with the Rules and his responsibilities as a judge" (R20). *See Alessandro*, 13 NY3d at 248-49 (finding intentional misconduct based on the "ongoing pattern" of disclosure failures). Over a period of years, Petitioner:

- failed to report over $27,000 in income he had earned from his prior legal practice on his 2015 federal and state income tax returns;
- failed to report approximately $7,400 income from his North Street and Oakdale Road rental properties on his 2015 federal and state income tax returns;
- failed to report approximately $15,600 in rental income from the North Street and Oakdale Road rental properties on his 2016 state and federal tax returns;
- failed to report any the income from legal fees or his rental income on his 2015 and 2016 FDFs; and
- failed to file reports acknowledging receipt of any of that income with the clerk of his court in 2015, 2016, or 2017.

(R7-12).

Significantly, Petitioner's brief to this Court does not repeat his hearing testimony that he failed to report the $27,000 in legal fees on his 2015 filings because he thought that he received that money in January 2016 – a claim the Commission found was "baseless" (R17). As the Commission noted, Petitioner likewise failed to report that income on his 2016 tax returns (R12, R17).

Against that backdrop, Petitioner's claim that he also simply forgot to include $23,000 in rental income from the same filings is immediately suspect,

particularly since his original 2015 and 2016 federal tax returns claimed deductions for the Oakdale Road property but failed report any rental income (R10). Clearly, Petitioner had not forgotten about the Oakdale property or the money it brought in; to the contrary, he used that property to his financial advantage while conveniently ignoring the aspect of his ownership that worked to his detriment. Those circumstances stray well beyond what might be categorized as simple carelessness or unfortunate coincidence, and instead point directly to a "pattern of placing his personal interests before his ethical obligations" (R20).

Petitioner continued that pattern by failing to file annual disclosure reports of extra-judicial income with the clerk of his court in 2015, 2016, or 2017. As an initial matter, the Commission made clear that although Petitioner claimed he was "unaware" of the rule requiring such disclosures, "[i]gnorance and lack of competence do not excuse violations of ethical standards," particularly by judges such as Petitioner, who "ha[ve] been previously censured for violating the Rules" and thus "should have taken the utmost care to abide by the[m]" (R16). Still, Petitioner conceded that he learned of the requirement during the Commission's investigation as early as November 2017 (R16). Yet he did not file the required reports until January 31, 2019, after the first five days of the hearing before the Referee had concluded (R9).

To be sure, Petitioner amended his tax returns and one of his FDFs, and he belatedly filed his annual reports. But amended and belated filings do not excuse the misconduct attendant to failing to make appropriate filings in the first place. *See Ramich*, 2002 WL 31954075 at *2, *5 (failure to report income on tax return or in annual report constituted misconduct, even though an "amended return was filed by Petitioner prior to the issuance of the Formal Written Complaint"); *Matter of Dier*, 1995 WL 848917 at *2-3 (Com Jud Cond 1995) (sustaining charge of failure to report rental property income, notwithstanding that the Petitioner subsequently filed an amended FDF). In any event, Petitioner still has not amended all of his pertinent disclosure forms adequately, as neither his 2015 nor 2016 FDF filings, amended or otherwise, reflect any of the rental income he received from his North Street or Oakdale Road properties.

Petitioner now unpersuasively contends that the belated timing of his amended filings actually constitutes "mitigation of the highest order," rather than an aggravating factor (PB 29-32, 43, 48-50, 53). Specifically, he claims that he amended all of his tax returns and his 2015 FDF "before he was placed on formal notice by the Commission that the Commission was looking into those issues" (PB 43, quoting R2813) (emphasis added).

But although Petitioner may not have been placed on "formal" notice of the Commission's investigation into his financial dealings, the record more

importantly suggests that he had actual notice of the Commission's investigation and the Inspector General's inquiry into his extra-judicial income. Petitioner concedes that on July 3, 2017, he learned that he was locked out of his chambers, and that the Commission had obtained two boxes of his financial documents, including his tax records (PB 26-27; R1650-51). On July 14, 2017, Petitioner was interviewed by the Inspector General's office and was asked about extra-judicial income he received for his work on the *Estate of Deborah Brigham* (R1728-29).

The fact that Petitioner knew the Commission had taken possession of his tax returns, and that the Inspector General was inquiring about extra-judicial income, was more than enough to alert him that his financial dealings were under investigation, even if he had not yet been "formally" charged. Thus, when Petitioner filed his amended tax returns on August 2, 2017, he had known for a month that the Commission had his records and so had every reason to believe that the Commission was investigating the matter. That a "formal" notice, *i.e.* an Administrator's Complaint, was not filed until August 11, 2017, is of no moment. Notably, Petitioner's 2015 FDF amendment came even later – on November 16, 2017, a mere 12 days before he was scheduled to appear appearance before the Commission. Thus, nothing about the timing of Petitioner's amendments was mitigating.

Furthermore, Petitioner – through his hearing testimony – subverted his own claims of innocent carelessness by providing explanations for his misconduct that were, in the Commission's words, "shifting," "implausible," "nonsensical," and "baseless" (R17, R20-21). Petitioner initially testified that he believed he had disclosed his income from the practice of law on his 2015 FDF by listing his bank account holdings (R1048, R1052-53); yet he had appropriately reported income from the practice of law on his 2014 form (R2168), which made that explanation patently "nonsensical" (R17). Petitioner subsequently changed his story, testifying before the Referee that he thought he had received the income in 2016, rather than 2015 (R1671-72). The Commission found, however, that he also failed to report that income on his 2016 FDF and 2016 income tax returns, which "demonstrate[d] that this claim was also baseless" (R17). Given that finding, it is not surprising that Petitioner did not advance that excuse in his brief to this Court.

Petitioner's defense for failing to disclose thousands of dollars in rental income on his FDFs and tax returns – that the properties ran a net deficit – also strains credulity. That explanation runs contrary to the simple and specific instructions on the face of the forms, which required Petitioner to disclose the rental income, before taxes, for <u>each</u> building (R2183). All told, Petitioner's "changeable answers" and "evasiveness create[ ] a strong inference that he was dishonest in his dealings . . . and in his testimony in these proceedings."

Alessandro, 13 NY3d at 248; *See Matter of Doyle*, 2007 WL 2505975 (Com Jud Cond 2007) (judges are obliged to be "forthright" and "candid" in Commission proceedings). Petitioner's repeated protestations that he acted carelessly, but without intent to deceive (Petitioner's Brief 48-50, 53), should be rejected.

The totality of Petitioner's misconduct surrounding his improper tax and financial disclosure filings supports the sanction of removal. Indeed, this Court repeatedly has imposed removal as a sanction where, as here, the judge under investigation committed recurring intentional misconduct and dealt dishonestly with the Commission. *See Alessandro*, 13 NY3d at 248-49 (in consolidated cases, declining to remove judge who made "careless" omissions from financial disclosure statements, but removing judge who engaged in "an ongoing pattern" of intentional misconduct related to "dishonest" financial dealings); *Matter of Moynihan*, 80 NY2d 322, 325 (1992) (removing a judge who, *inter alia*, had "not adequately explained his failure to file reports of the compensation he received from his extra-judicial activities . . . or his alteration of several checks and check stubs submitted to the Commission staff that obscured or concealed notations identifying client work"); *Boulanger*, 61 NY2d at 91 (removing a judge whose "explanation" of a failure to file gift tax return was "unacceptable," regardless of whether that failure was negligent or intentional); *Steinberg*, 51 NY2d at 81-82 (1980) (removing judge who, *inter alia*, not only failed to report over $3,000 on

various federal income tax returns, but "intentionally misrepresented his income and allowable deductions" and then gave explanations to the Commission that "lack[ed] the ring of truth").

C. Petitioner's prior censure and caution exacerbate his misconduct, making removal the only appropriate sanction.

Petitioner has heard from the Commission twice before – he was censured in 2002, and he received a private cautionary letter in 2015.[12] This Court has repeatedly held that a prior discipline exacerbates the misconduct and elevates the appropriate sanction. *See Ayres*, 30 NY3d at 64 ("the failure to heed a prior warning [is a] significant aggravating factor[ ], and can be grounds for removal"); *Matter of O'Connor*, 32 NY3d 121, 129 (2018) ("Petitioner's prior censure further supports the finding that [his] future retention of office is inconsistent with the fair and proper administration of justice") (quotation marks omitted); *Matter of George*, 22 NY3d 323, 331 (2013) (failure to heed a prior warning as a ground for removal); *Matter of Rater*, 69 NY2d 208, 209 (1987) ("Failure to heed a prior

[12] Petitioner's 2002 censure primarily related to an inappropriate intermingling of his roles as a lawyer and judge, including: presiding over two cases in which a party or a member of the party's immediate family was a client of Petitioner's law firm; presiding over six cases in which Petitioner engaged in conduct that conveyed an impression that he was presiding over a client's matters; representing defendants on charges originated in Petitioner's court; acting, in one case, as an attorney in a proceeding in his own court; and issuing notices to a small claims defendant that stated that a warrant would be issued for the defendant's arrest if he did not appear. *Matter of Miller, II*, 2002 WL 31954074 (Com Jud Cond 2002).

In 2015, the Commission cautioned Petitioner for allowing his campaign for his present judgeship to distribute advertising that falsely implied he was the incumbent.

censure is an aggravating factor militating in favor of the strictest sanction"); *Matter of Cerbone*, 2 NY3d 479, 483, 485 (2004) (prior public admonition and private cautions may be considered in determining sanction, even where "the facts of the cases differ greatly"); *see also Matter of Doyle*, 23 NY3d 656, 662 (2014) ("The mere existence of a prior censure would be noteworthy regardless of whether it was related to the instant misconduct").

In levying Petitioner's 2002 censure, the Commission found that "Petitioner's conduct showed insensitivity and inattention to his ethical responsibilities." *Miller*, 2002 WL 31954074 at *3. It is apparent that Petitioner has not become more sensitive to his ethical obligations since then, as the Commission's instant determination found the same thing, in near-identical terms (R21). Indeed, Petitioner has continued a pattern of self-serving, injudicious behavior, and his misconduct – as demonstrated by the record in this case, together with his history of past misconduct – shows that he is unable to understand and abide by the special ethical obligations to which judges must adhere. *See Ayers*, 30 NY3d at 66 ("Judges are held to standards of conduct more stringent than those acceptable for others") (internal quotation marks omitted); *Matter of Kuehnel*, 49 NY2d 465, 469 (1980) (same, "so that the integrity and independence of the judiciary will be preserved"). Just as in 2002, Petitioner "violated the Rules in numerous ways which exhibited his continued disregard for the Rules and his

obligations as a judge," and an "inattention to his ethical obligations" in particular (R21). No less can be said in light of the totality of the misconduct at play: all within a three year period, Petitioner demeaned two women in his courthouse, had his judicial secretary pen a letter in someone else's name for personal financial gain, and dodged his obligations with respect to a host of financial reporting requirements.

Petitioner himself, belatedly recognizing the seriousness of his situation while still denying some of the misconduct found against him, argues now as he did below for censure (PB 3, 7, 54). The Commission, mindful of the totality of the record and its obligation to "protect the integrity of the courts" (R21), rejected that argument, determining that the imposition of "another censure" would send an "unfortunate message . . . to the public" (R21).

Where, as here, a judge repeatedly engages in serious misconduct that brings disrepute to the judiciary, remains insensitive to his ethical obligations despite prior discipline, and delivers half-apologies and flimsy excuses when called to account, removal is the appropriate result.

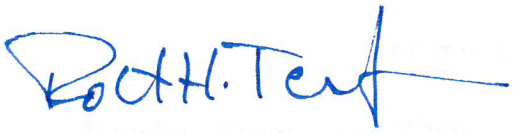
This Court should accept the Commission's determination and remove Petitioner from office.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that this Court should accept the Commission's determination that Petitioner engaged in judicial misconduct and should be removed from office.

Dated: June 2, 2020
Albany, New York

Respectfully submitted,



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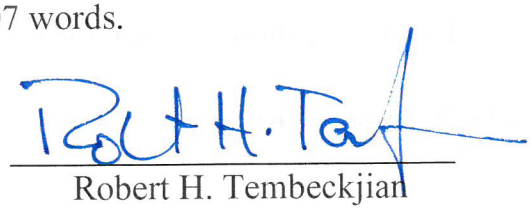

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