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

Docket No. JCR-2018-00003

NEW YORK STATE COURT OF APPEALS

- -

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.

BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner HON. TERRENCE C. O'CONNOR, by the undersigned counsel, respectfully submits this brief in support of his request for review of a determination of the New York State Commission on Judicial Conduct, issued March 30, 2018, removing him from office as a Judge of the Civil Court, Queens County. Judge O'Connor has been suspended with pay pending this Court's review of the aforesaid determination.

QUESTIONS PRESENTED

1. Did the Commission err in finding that "actual notice" of the hearing date via email could substitute for the method of service specifically prescribed by Section 44(4) of the Judiciary Law?

2. Did the Commission deprive Judge O'Connor of due process by refusing his counsel's request to adjourn a first-time-on hearing to a reasonable future date?

3. Did the Commission err in determining that the conduct alleged in Counts II through IV amounted to misconduct rather than mere error of law?

4. Did Judge O'Connor's conduct in the underlying civil cases amount, at most, to errors of judgment not warranting the drastic sanction of removal?

5. Was Judge O'Connor's alleged "failure to cooperate" with the Commission's investigation an improper, or at minimum insufficient, aggravating

factor and thus not a proper basis on which to determine that Judge O'Connor should be removed?

Defendant submits that the answer to each of these questions is "yes."

STATEMENT OF FACTS

The petitioner, Hon. Terrence C. O'Connor, was admitted to the New York Bar in 1977 after graduating from St. John's University Law School. In November 2008, after more than 30 years of distinguished practice, he was elected to the Queens County Civil Court for a term expiring December 31, 2018. He will reach the mandatory retirement age of 70 on December 29, 2018 and has thus not filed for re-election.

By Formal Written Complaint dated May 30, 2018, the Commission charged Judge O'Connor with four counts of judicial misconduct. (54-81).[1] These were as follows:

* Charge I alleged that Judge O'Connor failed to cooperate with the Commission's investigation of the underlying conduct by failing to timely respond to inquiries and failing to testify before the Commission on two occasions (56-65);

* Charge II specified that, in two civil cases heard in his court, Judge O'Connor "was impatient and

[1] Pursuant to the Clerk's supplemental scheduling order dated June 6, 2018, petitioner has filed a single copy of the full reproduced record with this brief, and a motion to perfect via the appendix method remains pending. The page citations in this brief refer to both the record and the proposed appendix, i.e., if this Court grants permission to perfect via the appendix method, the citations will not change.

discourteous" and "sua sponte struck critical testimony because lawyers for the petitioners occasionally responded 'okay' after witnesses answered certain questions" (65-70);

* Charge III alleged that in three other non-jury trials, Judge O'Connor "made impatient, discourteous and undignified remarks to lawyers appearing before him" (70-76);

* Charge IV specified that in nine no-fault actions, Judge O'Connor awarded "fees" to the defendants without providing plaintiffs with a reasonable opportunity to be heard and without setting forth a basis for the amount awarded (77-80).

In a written response affirmed under penalty of perjury, Judge O'Connor denied the charges, arguing that (a) all the Commission's requests were complied with and written responses provided; (b) that his decision not to testify before the Commission was due to conduct casting doubt upon its impartiality and denial of his due process rights; and (c) that the underlying civil cases in Charges II through IV "involve[d] less than one percent of thousands of cases [petitioner] has handled" and that he will present a rebuttal. (197-98).

A. The Underlying Civil Actions.

The civil cases underlying Charge II were landlord-tenant actions, Main Street Shops v. AV Queens Nail Spa Salon and N&E Holdings, LLC v. Apex Auto Details II, LLC. In the Main Street Shops case, the petitioner's counsel called Jacob Sedgh, the managing agent for the property, as his sole witness. At the

beginning of the trial, the following colloquy ensued:

> Q. And specifically, what is your relationship to premises known as 67-21 Main Street, Flushing, New York?
> A. Run the property, managing agent.
> Q. Okay. I'm going to show you a document.
>
> [...]
>
> JUDGE O'CONNOR: Right now. Don't tell him his answers are okay. I'm going to strike his testimony if you keep telling him his answers are okay. That's a form of leading.
>
> PET. ATTORNEY: I apologize, Your Honor.
>
> JUDGE O'CONNOR: This guy is a couple of hours late, and you've obviously had time to talk to him and it seems to me that that's a form of communication with your client, and if you do it again, I'm going to strike his testimony.
>
> PET. ATTORNEY: I'm sorry, Judge.

(633). Three pages later, counsel again responded to the witness' answer by saying "okay, thank you" (636), to which Judge O'Connor responded "that's twice you've done that. After I warned you" (637). Main Street Shops' counsel stated "Sorry Judge, it's out of habit," and Judge O'Connor responded that counsel had been warned and that the witness' testimony was stricken. (637). The court then asked AV Queens Nail Spa's counsel if he had a motion (637) and granted the resulting motion to dismiss on the ground that Main Street Shops had failed to produce competent evidence in support of its petition. (184).

In the N&E Holdings case, the petitioner's counsel Pamela Smith called Dori Nagar, the property manager, as a witness. Several pages into Mr. Nagar's testimony, after Ms. Smith prefaced a question with "okay," Judge O'Connor stated, "stop telling him his answers are okay." (647). Ms. Smith obeyed this instruction for a while but then began three further questions with "okay." (656). The court stated "stop telling him his answers are okay," to which Ms. Smith answered "I'm sorry, it's a reflex. I apologize." (656). Judge O'Connor then stated:

> THE COURT: It's not a reflex. It tells me that you're telling him that his answers are good.
>
> MS. SMITH: Okay, I won't –
>
> THE COURT: *Because you don't do it all the time.* So next time you do it I'm going to strike his testimony and dismiss his case. Understood? Do we understand each other?
>
> MS. SMITH: Understood, Your Honor.

(656) (emphasis added). Immediately afterwards, Ms. Smith again began a question with "okay," and Judge O'Connor struck Mr. Nagar's testimony. (657).

Ms. Smith then called another witness and again began a question with "okay." (660). On the second such occasion, Judge O'Connor struck this witness' testimony as well. (662). Thereafter, upon application of Apex, the court dismissed the petition. (185, 663).

It is noted that, prior to dismissing the case, Judge O'Connor made evidentiary rulings that favored N&E Holdings, sustaining several objections made by Ms. Smith (650-52) and overruling Apex' objection to the authenticity of a document (652-53).

Charge III involved three other commercial landlord-tenant cases: 57th Ave. Assocs. v. The New Lefrak City Laundromat, Inc.; Haberman v. Triple W, Inc.; and Waldman v. United Dental Group. In the 57th Ave. Assocs. case, the landlord was represented by Anthony Mordente and the tenant by Glenn Michaelson, and Judge O'Connor presided over a non-jury trial at which he admitted evidence and listened even-handedly to arguments presented by both sides. (665-702). At the ostensible conclusion of the trial, Mr. Michaelson – who had never filed an answer on behalf of his client and whose attempt at answering on the date of trial was rejected due to the answer being unsigned and unverified (696-98) – moved to exclude current rent from the petition (702).

The following colloquy then ensued:

> JUDGE O'CONNOR: And so, if I go along with you, what is this, just to make money to use so that they'll hire you again for when he brings the next case?
>
> MR. MICHAELSON: Yes.
>
> JUDGE O'CONNOR: It seems totally disingenuous.
>
> MR. MICHAELSON: It's not disingenuous.

> JUDGE O'CONNOR: It's not?
>
> MR. MICHAELSON: I'm trying to represent a client. If the client doesn't have to pay more money, it might suit her interests not to have to pay more – pay less rather than more. So, I'm doing my job. I feel it's perfectly appropriate.
>
> JUDGE O'CONNOR: You and I have probably a different idea of how a professional conducts themselves.

(702-03). The court then granted Mr. Mordente's motion to amend the pleadings to the proof and awarded rent through January 2013. (703).

Mr. Michaelson continued to argue the issue, acknowledging that there had been testimony as to January's rent but contending that a formal motion to amend had not been made. (703-04). Judge O'Connor stated, correctly, that such a motion had "just [been] made." (704). Mr. Michaelson continued to dispute the issue and to attempt to reopen the case, at which point Judge O'Connor stated that he "apparently... [didn't] understand how a trial was conducted" and that "now, all of a sudden, you want to put on a case," and that "apparently, you're the smartest guy in the room here and you know how everything needs to be done and I don't." (704-05). However, the court permitted Mr. Michaelson to reopen the case and call a witness, Juana Tovar. (705).

During Ms. Tovar's testimony, the court asked her a question about her understanding of the lease, and both she and Mr. Michaelson answered "yes." (706-07). Judge O'Connor told Mr. Michaelson, "why don't you take the stand

then, if you want to testify, okay?" (707). Mr. Michaelson stated "I don't want to testify, I just agreed with you," to which Judge O'Connor replied – again properly – "when I ask your client a question, I expect an answer from her, not from you, whether you agree with me or not." (707). Mr. Michaelson said "I didn't understand what you were asking her, Judge" – notably, a contradiction of his previous representation that he was agreeing with the court – and Judge O'Connor responded "Apparently there's a lot you don't understand." (707).

The court then permitted Mr. Michaelson to finish his examination of Ms. Tovar. (707-09). During cross-examination, Mr. Michaelson, *inter alia*, demonstrated his unfamiliarity with basic rules of evidence by objecting to certain questions on the ground that they were leading. (714). The court allowed the parties to sum up (716-19) and indicated that it would issue a written decision; subsequently, Judge O'Connor reaffirmed his previous finding of liability for rent through January 2013.

In the Haberman case, the landlord-petitioner was represented by Bessie Chinboukas and the tenant by Ted Somos. During the trial, Ms. Chinboukas sought to introduce into evidence her client's lease for the premises next door to the one at issue. (728). When Judge O'Connor questioned the relevance of this lease, she argued that this was relevant to whether lottery tickets were permitted in the lease. (728). Mr. Somos countered that the provisions of another lease did not

affect whether lottery tickets were allowed under the lease at bar. (728). After Mr. Chinboukas pressed the issue further, Judge O'Connor stated "I think it's irrelevant hut if you wanna do it, fine. Go ahead. I think you're wasting everybody's time but you wanna make a record, go ahead." (729). Then, over Mr. Somos' objection, Judge O'Connor allowed the other lease into evidence. (729-31).

Ms. Chinboukas then interrupted the witness' testimony to make a further legal argument, apparently regarding certain language in the other lease and its significance to whether lottery sales were allowed. (733). Judge O'Connor responded, *inter alia*, "I thought you were examining a witness rather than making speeches but go ahead," and when Ms. Chinboukas said "thank you, Your Honor," he said "you don't have to sarcastically say thank you every time I make a ruling, okay counsel?" (733).

After the completion of Ms. Chinboukas' two witnesses and Mr. Somos' witness, during which Judge O'Connor made several evidentiary rulings in Ms. Chinboukas' favor, the court invited Ms. Chinboukas to put in rebuttal, at which point she stated, "I'd like to call the witness one more time." (746). Judge O'Connor told her that she was not being specific to which witness, and after she said "I apologize," he responded, "maybe you should do something right for a change instead of just apologizing all the time, okay, counsel?" (746).

After closing arguments, Judge O'Connor set a briefing schedule for post-

trial memoranda. (752-53). It is noted that Judge O'Connor ultimately ruled in favor of Ms. Chinboukas' client.

In the Waldman matter, Janet Navarro represented landlord Anna Waldman and Boris Lepikh represented tenant United Dental. Prior to the trial, Ms. Navarro noted that the tenant had filed a lengthy motion the previous day and that she had not had time to respond. (757-58). Mr. Lepikh acknowledged that the motion had been "filed yesterday morning" and was "before Your Honor today." (758). Mr. Lepikh also represented that the tenant had been paying the rent, and Ms. Navarro pointed out that rent was in fact being paid by another dentist. (758-59). The following colloquy ensued:

> MR. LEPIKH: He's not a party to this case, Judge.
>
> MR. O'CONNOR: Why don't you let her finish before you interrupt her?
>
> MR. LEPIKH: I'm sorry. I apologize.
>
> JUDGE O'CONNOR: You don't even have the courtesy [to] take off your coat, you're in a hurry? If we're talking too much of your time, counsel, I apologize.
>
> MR. LEPIKH: No.

(759). Ms. Navarro then continued the argument she had been making before she was interrupted, namely that Mr. Lepikh's client was not paying rent and was squatting on the premises in the hope of waiting out the other dentist, and that Mr. Lepikh had no authority to settle. (759-60).

Judge O'Connor then reviewed the motion that Mr. Lepikh had filed on one day's notice, determined that it was not supported by documentary evidence, and denied it on the basis that it was "a delay tactic" and that the tenant had had a month to make the motion since the case was last on. (763-64).

The court then ordered the case to trial. Mr. Lepikh requested "a brief adjournment" so that a Mr. Rothenberg, his senior counsel, could attend trial. (764). While he requested this adjournment, he was texting his employer without having asked the court for permission to do so. (476). Ms. Navarro objected to the adjournment and Judge O'Connor responded that the adjournment was denied because court started at 9:30. (764). Judge O'Connor then told Mr. Lepikh to "put that phone away... [i]s there some course in law school now how to be discourteous and how to be rude? Because if there is, you must have gotten an A in it." (764-65).

Trial then proceeded, at which Mr. Lepikh effectively cross-examined the landlord's witness by *inter alia* confronting the witness with rent checks written by his client and other documents evincing the client's occupancy. (772-89). At a certain point, Judge O'Connor admonished Mr. Lepikh not to tell the witness "her answers were okay" (783) but took no further action after Mr. Lepikh stopped using "okay" to preface his questions (479).

Charge IV relates to nine no-fault cases in three related groups. On May 21,

2015, in the case of T&J Chiropractic, P.C. (Vante) v. Hertz Co., Judge O'Connor struck the plaintiff's complaint and dismissed the action for failure to provide discovery that had been ordered by another judge. (188). The order additionally stated, "Plaintiff is further ordered to pay $1,500.00 in counsel fees to Defendants' counsel." (188).

On October 23, 2015, Judge O'Connor issued orders in three related no-fault suits by Active Care Medical Supply Corp. against Delos Insurance Company. (189-91). He dismissed each case on grounds of *res judicata*, holding that Delos' lack of duty to pay no-fault benefits had been established in a related declaratory judgment action. (189-91). Each order further provided that "defense counsel si awarded $250.00 in fees." (189-91).

Also on October 23, 2015, Judge O'Connor issued orders in five cases in which Gentlecare Ambulatory Anesthesia Services had made no-fault claims against Geico Insurance Company. (192-96). Again, in each case, the ground for decision was the same: that summary judgment was granted to the defendant due to the plaintiff's failure to appear for examination under oath. (192-96). Each order further awarded $250 in fees to defense counsel. (192-96).

Notably, the part of each order that awarded fees was in handwriting obviously different from the rest of the order. (188-96).

B. Procedural History Prior to the Formal Written Complaint.

On September 9, 2016, the Commission notified Judge O'Connor by letter that it was investigating complaints regarding the above-mentioned cases, and asked that he respond to various questions by September 26. (42-50). Judge O'Connor timely served a detailed written response on September 22, 2016. (51-53).

In this response, Judge O'Connor acknowledged striking the testimony of witnesses where the attorney said "okay," characterizing this as coaching and leading, and further elaborating that "I would not have stricken the testimony unless counsel was looking at the witness and nodding in agreement while making that statement." (51).

As to the 57th Ave. Assocs. case, Judge O'Connor acknowledged the colloquies reflected in the transcript and stated that this was "merely a statement of fact" because the attorney had filed an unsigned and unverified answer on the date of trial and generally did not know what he was doing. (52). Judge O'Connor noted that the attorney as given ample opportunity to present evidence and arguments and that his ruling had not been reversed. (52).

As to the Haberman matter, Judge O'Connor stated that counsel was making mistakes and that he "pointed out to her that if she did things right there would be no need to apologize." (52). His assessment of her sarcasm in saying "thank you"

was "based on her physical demeanor, facial expressions and tone of voice." (52).

As to the Waldman case, Judge O'Connor noted that the complaining firm had been before him on many other occasions and that they had made no complaints of bias when he ruled in their favor, and that they had a reputation for sharp practice and had been sanctioned by the Appellate Term. (52).

As to the matters in which fees were awarded, Jude O'Connor stated that he had orally made counsel aware of his intention to award fees, that counsel had not asked for time to submit a written opposition, and that he then "asked opposing counsel for an estimate of their time and made [his] award accordingly." (53). The reason the fees were awarded was counsel's failure to comply with court orders. (53).

Judge O'Connor otherwise denied independent recollection of the matters in question. (51-53).

Thereafter, on December 13, 2016, the Commission wrote to Judge O'Connor and requested that he appear to give testimony on January 4, 2017. (84-85). By letter dated December 20, 2016, Judge O'Connor responded that he was unable to appear on that date because his attorney was undergoing medical treatment, and that he would ask counsel to contact the Commission when he returned to the office. (88).

The Commission responded that it would postpone the appearance and

requested that Judge O'Connor provide his counsel's name and telephone number. (90). It sent two follow-up letters on January 6, 11 and 30, 2017, stating that it had not received a response. (92-93, 95-96, 103-05). By letter dated January 31, 2017, Judge O'Connor stated that "the bulk of [the Commission's] correspondence was sent when the Court was closed for the Holidays and I was out with a back injury the first week of January." (119). Judge O'Connor further stated that he had responded to the original letter on the date he received it and that his counsel was Joseph V. DiBlasi, who had since died. (119). He was awaiting word of who would take over Mr. DiBlasi's cases. (119).

It is undisputed that Mr. DiBlasi had represented Judge O'Connor in a previous Commission matter that related to the winding up of guardianships he had undertaken before becoming a judge. (4 n.1).

The Commission also received a note from Judge O'Connor postmarked February 1, 2017, enclosing correspondence that had been returned as undeliverable. (121-24). This letter consisted of Mr. DiBlasi's registration information and the notation "1/10/17 Here is my atty TCOC." (122). The envelope returned as undeliverable was addressed to "Laura Soto 646 386 4810 State of New York 61 Broadway, NY, NY 10006." (124).

The Commission then set Judge O'Connor's appearance date as March 7, 2017, refusing to hold the proceeding in abeyance for the naming of Mr. DiBlasi's

executor or the disposition of his law practice. (125-26).

On March 7, 2017, Judge O'Connor appeared before the Commission as scheduled. (127-57). At that time, he stated that Mr. DiBlasi had died and that he didn't have access to any records because no executor had been appointed for the estate. (128-29). He had not asked for or obtained documents from Mr. DiBlasi prior to the attorney's death. (130). He represented that according to Mr. DiBlasi's family, Sullivan & Cromwell was handling the estate and he had not spoken to Sullivan & Cromwell. (130-31).

Judge O'Connor then stated that he was not comfortable taking an oath and giving sworn testimony without counsel present. (133-34).

The Commission's referee, Malvina Nathanson, then said that the Commission was going to provide another "copy of everything that is in [Mr. DiBlasi's] files," and over Judge O'Connor's objection that Mr. DiBlasi might have other documents not in the Commission's file, another appearance was set for March 27. (135-36, 152-54).

By letter dated March 13, 2017 (167-69), the Commission stated that it would not adjourn the matter any further beyond March 29. This letter also alleged that, as Judge O'Connor was leaving the Commission's offices on March 7, he was heard to remark "this is a fucking clown show." (168). The Commission's administrative officer acknowledged that, when Judge O'Connor said this, he was

upset because he felt the Commission's counsel was following him (519) and in its ultimate determination, the Commission explicitly disclaimed this remark as a basis for a finding of misconduct. (6-7 n.3).

By letter dated March 27, 2017, Judge O'Connor stated that "based on the blatant lies in your most recent letter, it is clear that nothing you are involved with would be remotely fair and thus I decline your invitation to appear on the 29th." (181). The reference to "your most recent letter" was an apparent reference to the March 13, 2017 letter and its "clown show" allegation. On March 29, 2017, the Commission convened at its offices and Judge O'Connor did not appear. (173-80).

C. Procedural History From Complaint To Hearing.

As noted above, the Commission filed a four-count written complaint on May 30, 2017 (54-81) and Judge O'Connor timely submitted a written answer (197-98). By order dated July 18, 2017, Peter Bienstock was designated as referee to hear and report. (200). Mr. Bienstock then wrote to the parties proposing a pretrial conference in late July and a hearing during August. (201-02).

There followed a chain of correspondence regarding the hearing date in which, *inter alia*, Judge O'Connor objected to telephone or email communication and requested that communication take place in writing (206).[2] The referee

[2] Notably, in its response to this objection, the Commission belittled Judge O'Connor's concern that the OCA might be monitoring his email (208) but later presented an affidavit showing that OCA did exactly that (816-17).

overruled the objection to email communication and set the week of September 11 through 15, 2017 for hearing. (210).

It is undisputed that notice of this hearing date was only provided by email and not by certified mail as required by Judiciary Law § 44(4).

In further correspondence concluding August 25, 2017, Judge O'Connor demanded and was provided with disclosure. (215-75). Supplemental discovery was produced on September 5, 2017. (342-44). The Commission submitted witness subpoenas for signature, which the referee signed. (276-319).

On September 7, 2017 – four days before the scheduled hearing, but just *two* days after discovery was completed – attorney David Cohen wrote to the referee stating that he had been consulted by Judge O'Connor and that he requested an adjournment:

> While I have been made aware of some of the history of this proceeding, I, nonetheless, feel that in a matter of this importance, the Judge should be given one final opportunity to be represented by counsel. We are all too familiar with clients who "bury their heads in the sand," hoping that the matter will "just go away."

(329). Mr. Cohen stated that he had a trial commitment starting September 25 but would be able to represent Judge O'Connor at a December hearing. (329).

The Commission opposed this adjournment, characterizing it as a delaying tactic (330) and further noting that Judge O'Connor "ha[d] been participating pro se" (333).

The referee then stated that an adjournment would be denied on the ground that Mr. Cohen's communication "contained no valid reason or explanation why Judge O'Connor did not retain counsel weeks or months ago" and did not contain "any reason why Mr. Cohen, even if recently consulted, could not have been immediately retained and prepared to begin the hearing on Monday." (337).

D. The Hearing.

The hearing was held on September 11 and 12, 2017. (349-628). Judge O'Connor did not appear. (351-55). On that date, Pamela Smith testified regarding the N&E Holdings case, stating *inter alia* that her use of the word "okay" was to "move the dialogue along" and was "purely a reflex" and that she felt Judge O'Connor's response was rude (368, 373-75, 376-77). Notably, although Ms. Smith felt belittled by Judge O'Connor's acts, she did not testify that such acts resulted from any animus or vindictiveness against her, and acknowledged that Judge O'Connor did not know she was on the autism scale (381).

Daniel Pomerantz testified similarly as to the Main Street Shops case, i.e., that "okay" was "more or less a verbal tic" for him rather than leading the witness and that this had never happened to him before. (396, 398-99). He subsequently appeared before Judge O'Connor on another occasion and there were no repercussions. (404).

Mr. Michaelson testified regarding the 57th Ave. Assocs. case consistently with the transcript discussed above. (410-21). Notably, Mr. Michaelson acknowledged that in 99 percent of cases, oral motions to amend the petition to include current rent were granted – i.e., that his objection to such motion was essentially frivolous. (413-14). Mr. Lepikh testified similarly regarding the Waldman matter, identifying relevant parts of the transcript. (469-79).

Dinsmore Campbell of the Rybak Firm testified that he believed the counsel fee orders in the T&J, Active Care and Gentlecare cases were in Judge O'Connor's handwriting and that he was not given an opportunity to be heard before the fees were imposed. (430-49). Notably, he did not testify that Judge O'Connor was incorrect about any of the reasons stated on the orders as to why judgment was entered against his clients.

Hon. Joseph J. Esposito, the supervising judge in Queens Civil Court, testified that after receiving a complaint from Ms. Smith, he reassigned Judge O'Connor to a no-fault part. (453-60). He further testified that although he had received other complaints regarding Judge O'Connor, such complaints "may be real [or] untrue" and that several of the complaints related to legal rulings or the result of the case. (463). He characterized Judge O'Connor as a judge who "rarely suffered a fool and he was very meticulous and he had an old-fashioned way about him and he held the lawyers to a very high standard and people will differ on how

they handle their court." (464).

Laura Soto, an employee of the Commission, testified to the various correspondence between the parties. (484-528).

After the conclusion of the first day of testimony, the referee emailed Judge O'Connor that the hearing was continued to the following day. (341). At the same time, Judge O'Connor wrote to the referee expressing his objection to the notice of hearing not being delivered personally or by certified mail. (347).

On September 12, Andrew Zagami of the Commission testified regarding the hand delivery of three letters to Judge O'Connor (543-55) and Malvina Nathanson, the Commission referee at the March 7 and March 29, 2017 appearances, testified in accordance with the transcripts thereof (556-77). Heather Diamond, an employee of the 61 Broadway management company, testified that there were four New York State agency tenants at 61 Broadway at the time of Judge O'Connor's returned letter. (581-82). Finally, Hon. Jodi Orlow testified to receiving and forwarding a letter to Judge O'Connor in January 2017. (613-15).

Notably, the Commission did not call a witness regarding the Haberman case and stated on the record that Ms. Chimboukas (who is identified in the transcript as "Shingle") was uncooperative. (584-85). Instead, excerpts of the audio recording of the Haberman trial were played into the record without benefit of a witness' testimony. (585-92).

E. Procedural History From Hearing To Determination.

Following the hearing, a chain of correspondence ensued regarding Judge O'Connor's September 11, 2017 letter objecting to the form of notice of the hearing. In pertinent part, David Cohen reiterated that he would have been able to represent Judge O'Connor had an adjournment been granted. (798). The Commission then argued that Judge O'Connor's objection was "untimely and deficient" on the ground that he had received "actual notice" of the hearing. (800-04). The referee scheduled a hearing on the application for October 6 (805) to which Judge O'Connor again objected on the ground that statutory notice had not been given and that he had pre-existing plans to be away (822).

On October 3, 2017, the Commission made a submission further arguing that the hearing should not be reopened. (823-29). Although not disputing that notice of the hearing was never served by certified mail, the Commission again argued that actual notice was sufficient, and annexed correspondence and affidavits indicating that Judge O'Connor had received certain correspondence (808, 814, 816-17, 830-41).

The Commission did propose to reopen the hearing during the week of November 6 or 13, but only on the condition that Judge O'Connor subpoena any necessary witnesses himself; i.e., it did not concede that the September 11-12 hearing was a nullity and proposed that Judge O'Connor would have to bear all the

expense and work of presenting evidence. (828, 855-56). The referee "invited" Judge O'Connor to reopen the hearing, but only on these conditions. (859).

The reopened hearing did not take place, and thus, the Commission filed a post-hearing memorandum with proposed findings of fact and conclusions of law (862-948). On December 14, 2017, the referee issued a report recommending that the charges of misconduct be sustained. (949-73). Notably, the first page of the report begins "*Proposed* Findings of Fact and Conclusions of Law" (949) (emphasis added), meaning that the referee cut and pasted the Commission's proposed findings without editing.

Judge O'Connor filed a written response to the report, contending *inter alia* (a) that the hearing was a nullity because it was held without statutory notice; (b) that he was denied his right to counsel; and (c) that the proposed reopening of the hearing improperly "shift[ed] the burden of producing witnesses to [him]." (976).

The Commission likewise filed a memorandum requesting that the referee's findings be confirmed and that Judge O'Connor be removed from office. (977-1044). The Commission also responded to Judge O'Connor's memorandum, arguing in pertinent part that he received actual notice and that an adjournment to accommodate Mr. Cohen's schedule was properly denied. (1048-51). Judge O'Connor submitted a sur-reply contending *inter alia* that the statute did not provide for "actual notice" being a substitute for certified mail and that, given that

the underlying investigation had gone on for at least two years, an adjournment of a few weeks to accommodate counsel's schedule was reasonable. (1052).

Oral argument before the Commission was scheduled for February 1, 2018 (1045-46) and took place as scheduled (1053-81). Judge O'Connor did not attend, in effect resting on his written submissions. (1054).

During the argument relating to Charge I, the Commission counsel conceded that the failure to serve notice of the hearing by certified mail was "a mistake" (1056) but that actual notice should be sufficient (1056-58). Counsel likened this case to Matter of Lockwood, 2007 Ann. Rep. 123 (CJC 2006) as a "flat out no show" and referenced the Lockwood case as a basis for removal. (1063, 1073).[3]

In further argument, the Commission questioned *inter alia* whether the hearing should have been adjourned in light of the fact that the referee was available in December and an attorney had actually entered the picture on Judge O'Connor's behalf. (1064). Counsel voiced his suspicion that the judge was trying to "stretch things out" but did not state any reason why a December hearing would have been impractical. (1064).

Counsel also conceded, in response to questioning, that while Judge O'Connor had not attended appearances, he did respond and set forth his position in writing, and that his written arguments had in fact been admitted and used

[3] As discussed infra, Judge Lockwood, unlike Judge O'Connor, did not participate even via written submissions.

against him at the hearing. (1070-71).

Moving on to the underlying cases, the Commission questioned what the proper sanction would have been absent the alleged failure to cooperate, and counsel to the Commission acknowledged, based on a prior case, that the "benchmark" was censure rather than removal. (1069-70).

Further, in response to questioning regarding whether the handwriting on the fee awards was Judge O'Connor's, counsel stated that by failing to attend the March 2017 appearances, he lost the chance to defend an issue that might have been defended (1076-79), thus acknowledging that failure to participate was in part its own punishment.

F. The Determination.

On March 30, 2018, the Commission issued a sustaining all four counts of judicial misconduct and determining that Judge O'Connor should be removed from office. (2-34). In pertinent part, the Commission found that Judge O'Connor "mistreat[ed] attorneys" and "abuse[d] his judicial power" and that his "lack of cooperation with the Commission... constitutes a level of misbehavior that cannot be viewed as acceptable conduct by one holding judicial office." (19-20).

As to Charge I, the Commission cited the following conduct: (a) misaddressing the original letter in which Judge O'Connor identified his counsel; (b) tying his testimony to the appointment of an executor for his attorney's estate;

(c) refusing to be sworn at the March 7, 2017 appearance; and (d) not attending the March 29 appearance. (21-22). The Commission conceded that Judge O'Connor had a right to counsel and "identified [his] attorney after some delay" – notably not disputing Judge O'Connor's assertion that he was away for much of January – but concluded that "an adjournment cannot be indefinite" and that it was "absurd" that access to Mr. DiBiasi's files might have to await the appointment of an executor. (22-23). The Commission opined that "[a]ny one of these actions might be an understandable error" but concluded that in their totality they constituted a pattern of delay. (24).

As to Charges II and III, the Commission found that Judge O'Connor had demeaned lawyers in his courtroom and used inappropriate language, and that the use of "okay" was not leading and was not objected to as such by opposing counsel in the underlying cases. (24-27). As to Charge IV, the Commission determined that although judges were permitted to award costs in simplified form, the failure to allow the opposing parties to be heard regarding the award of fees rose to the level of misconduct rather than mere error of law, albeit "not as significant as the other misconduct presented in this record." (27-28 & n.7).

The Commission rejected Judge O'Connor's procedural arguments, finding that actual notice of the hearing was sufficient even if statutory notice was not given and that the judge "waived any technical deficiency" by participating in the

proceedings. (30). The Commission further stated that the denial of a "lengthy adjournment" was "not unreasonable." (31). Finally, the Commission determined, in light of *inter alia* Judge O'Connor's prior censure – without noting that such censure was for entirely dissimilar conduct and was directed primarily to conduct that occurred or began before he became a judge – that a "heightened sensitivity to his ethical obligations" was required and that the appropriate sanction was removal. (31-32).

Two members of the Commission, Joseph W. Belluck and Joel Cohen, filed a separate concurrence which stated *inter alia* that Judge O'Connor's lack of cooperation with the proceedings was "hard to understand" because of the Commission counsel's concession that if not for this factor, it was "quite possible that the Commission staff would not have sought [his] removal." (33-34).

Judge O'Connor timely filed a Request for Review (1) and now respectfully submits that this Court should reject the Commission's determination to the extent specified below and order a new hearing or else impose a lesser sanction than removal.

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

Petitioner first submits that, contrary to the determination, the Commission

did not have authority to substitute an "actual notice" standard for the specific method of service commanded by the Judiciary Law. The plain language of Jud. Law § 44(4) provides that service by personal delivery or certified mail is required not only for the initial complaint but for notice of any hearing date:

> If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the judge involved, either personally or by certified mail, return receipt requested. The judge shall file a written answer to the thel complaint with the commission within twenty days of such service. ***If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the judge involved shall be notified in writing of the date of the hearing either personally, at least twenty days prior thereto, or by certified mail, return receipt requested, at least twenty-two days prior thereto.***

It is undisputed that this provision was not complied with, and at oral argument, counsel for the Commission acknowledged that this was a "mistake." Nevertheless, the Commission felt free to essentially treat the Judiciary Law as a mere guideline and to hold that it can be safely ignored because Judge O'Connor received notice of the hearing by email. Petitioner submits that this is not so.

"It is a basic principle of service of process that service must be made exactly as the statute requires; actual notice alone is insufficient." Columbus Prop., Inc. v. ISKS Realty Corp., 163 Misc. 2d 446, 448 (Civ. Ct. 1994). In

another case, the court held that where "[t]he statute provides for the delivery of the petition, and it was mailed," service was improper because "[a]lthough there is no question that the respondent was informed of the proceeding, the statute prescribes a specific method of service, and it must be strictly construed." Rizika v. Board of Assessors of Town, Village and County of Herkimer, 62 Misc. 2d 774, 774-75 (Sup. Ct. 1970) (collecting cases); see generally U.S. Bank, N.A. v. Vanvliet, 24 A.D.3d 906 (3d Dept. 2005); Brown v. State of New York, 114 A.D.3d 632 (2d Dept. 2014).

This principal has not been confined to service of papers that establish jurisdiction, but has also been applied to other forms of statutory notice. For instance, 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), the court found that the provisions regarding a notice of intent to arbitrate must be strictly construed and that improper service of such notice could not be cured by actual knowledge. Petitioner thus submits that the distinction drawn by the Commission between papers that confer jurisdiction and interlocutory papers is misplaced.

The provision of Section 44(4) stating that "[t]he failure of the commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings

before the commission provided that such failure is not substantially prejudicial to the judge" is not to the contrary; indeed, this language only underscores Judge O'Connor's position. The language at issue permits non-prejudicial errors to be ignored *only* where they involve service of "documents, statements and/or exculpatory evidentiary data and material" – i.e., the items of discovery referred to in the previous sentence of the statute – and does not provide for a similar "lack of prejudice" excuse for improper and/or untimely service of *notices*.[4]

Indeed, under the maxim of *expressio unius est exclusio alterius*, "where a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned." Kimmel v. State of New York, 29 N.Y.3d 386, 394 (2017), quoting McKinney's Cons. Laws of NY, Book 1, Statutes § 240. Since Section 44(4) of the Judiciary Law contains a "no prejudice" exception only to untimely service of discovery, it must be construed not to include such an exception for service of statutory notices. As such, the case upon which the Commission relied, Ross v.

[4] To the extent that any ambiguity may exist concerning the scope of the "not substantially prejudicial" clause, petitioner submits that the rule of *noscitur a sociis*, as set forth in McKinney's Consolidated Laws of N.Y., Book 1, New York Statutes § 239(a), is that "words employed in a statute are construed in connection with, and their meaning is ascertained by reference to the words and phrases with which they are associated." See generally Kese Indus. v. Roslyn Torah Foundation, 15 N.Y.3d 485, 491-92 (2010). Here, the words and phrases setting forth the errors that may be ignored if not prejudicial to the judge all connote discovery materials and are indeed identical to the categories of discovery listed in the previous statutory sentence.

New York State Dep't of Health, 226 A.D.2d 863 (3d Dept. 1996), is distinguishable, because it did not involve a statute such as Jud. Law § 44(4) that contains a "no prejudice" exception as to some items and must thus be construed not to include such an exception as to any others. Simply put, the language of Section 44(4) does not permit the Commission or this Court to treat its service provisions as mere guidelines.

Moreover, the Commission's conclusion that Judge O'Connor waived and/or abandoned his reliance on Section 44(4) is likewise infirm. As noted in the Statement of Facts, not only did Judge O'Connor specifically object on this ground in his September 11, 2017 letter (347) but he had *previously* objected, as early as August 1, to communication by email or telephone (206). His participation in the discovery process was undertaken pursuant to that objection. And since the referee's proposal to reopen the hearing (a) was also made by email rather than by certified mail or personal delivery; and (b) was made contingent upon Judge O'Connor assuming the burden of subpoenaing witnesses rather than treating the September11-12 hearing as a nullity, the fact that petitioner declined that proposal did not constitute an abandonment of his objection.[5]

[5] Certainly, the case of Plantation House & Garden Prods. v. R-Three Invs., 285 A.D.2d 539 (2d Dept. 2001) and Acovangelo v. Brundage, 271 A.D.2d 885 (3d Dept. 2000) are not to the contrary. In both cases, the appellant was directed to make a motion in a certain form and never did so. There is no indication in this case that Judge O'Connor was ever directed to state his objection in such other

Finally, this Court should note the irony of the Commission determining that it is free to ignore the statutory form of service at the same time that it repeatedly faulted Judge O'Connor for such things as misaddressing letters or failing to strictly follow procedural rules. "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. Here, where the Commission has determined to remove Judge O'Connor from office in large part because of his failure to strictly comply with its procedures, it should not be permitted to write itself an excuse for its own lapses. This Court should accordingly vacate the determination on the ground that the hearing was a nullity and remand to the Commission for further proceedings.

POINT II

THE HEARING SHOULD HAVE BEEN ADJOURNED TO ACCOMMODATE THE SCHEDULE OF JUDGE O'CONNOR'S COUNSEL

The Commission also erred in holding that it was reasonable to deny a "lengthy adjournment" of the hearing "nine months after [Judge O'Connor's] attorney's death," because the adjournment sought was not "lengthy" and the case had only recently reached the stage where it was imperative to retain counsel.

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form; moreover, after stating such objection, there was no need for him to take further exception to the referee's ruling in order to preserve an issue of law. It would elevate form over substance to hold otherwise.

As noted in the Statement of Facts, while Judge O'Connor's counsel did indeed die in January 2018, the formal written complaint was not served until May 30, a hearing date was not set until August, discovery was exchanged on August 25, and supplemental discovery was only completed on September 5. Until May 30, Judge O'Connor might reasonably have hoped that the investigation would not result in formal charges and that the need to go to the expense of retaining counsel might be obviated. Moreover, even after May 30, Judge O'Connor was not fully apprised of the dimensions of the Commission's case until late August or early September and thus not possessed of all the information he might need in order to determine if he required counsel or not. Thus, while it would no doubt have been better for Judge O'Connor to retain counsel earlier, his retention of David Cohen on September 7 should not be construed as an abandonment of his rights.

Nor, in the scheme of things, would it have been prejudicial to adjourn the hearing until December. Given the volume of evidence involved, it would not have been practical for Mr. Cohen to litigate the hearing on four days' notice, and his September 25 trial commitment was a bona fide reason why he could not proceed to hearing in late September or October. Moreover, as Judge O'Connor noted in his written submission, the investigation had been going on for two years at this point, with the initial complaints occurring in 2015 and the Commission's opening letter to Judge O'Connor having been sent in September 2016, and thus,

another two months wouldn't have been the end of the world. Certainly, granting the adjournment to December (when, as stated by Commissioner Stoloff, the referee agreed that he would be available) would have avoided the months of subsequent wrangling over whether or not proper notice of the hearing had been given.

Further, to the extent that counsel for the Commission argued that an adjournment might have been futile because Judge O'Connor might not have appeared in December, such an argument is contradicted by the fact that (a) a named attorney had entered the picture, and (b) the attorney explicitly stated that he would represent Judge O'Connor if the hearing were adjourned. There was thus a commitment, not from Judge O'Connor but from the attorney himself, to appear in December, so the referee would not have been relying on Judge O'Connor's word if he had granted the adjournment.

It has been held that "insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." Ungar v. Sarafite, 376 U.S. 575, 589 (1964), citing Chandler v. Fretag, 348 U.S. 3 (1961). "[W]hen the protection of fundamental rights has been involved in requests for adjournments, the discretionary power [of the trial court to manage its calendar]... [is to be] narrowly construed." People v. Spears, 64 N.Y.2d 698, 700 (1984).

Moreover, this principle does not apply only to criminal cases but has also been applied in administrative proceedings. See Leonard v. Kirby, 84 A.D.2d 538, 539 (2d Dept. 1981); see also Cenegal Manor, Inc. v. Casale, 251 A.D.2d 259 (3d Dept. 1998) (arbitrary and capricious to deny adjournment where petitioner had meritorious defense and there was no prejudice to the public). "In light of a petitioner's right to put forth a defense... courts have found the failure to adjourn such a hearing to be arbitrary, capricious and without a rational basis when there appears to be a reasonable basis for such an adjournment and the agency fails to articulate a countervailing reason to deny an adjournment or otherwise express that it would incur some prejudice if the hearing was adjourned." United Deli Corp. v. New York State Liq. Auth., 2007 WL 171903, *2 (Sup. Ct., Kings Co. 2003).

Petitioner thus submits that (a) there was a reasonable basis for an adjournment due to Mr. Cohen's upcoming trial commitments and need to get up to speed on this voluminous matter; (b) the requested adjournment was not excessive in the context of a two-year investigation and would not have been prejudicial to the Commission; and (c) the rights and interests involved in a Commission proceeding, including the possibility of removal from office, are sufficiently weighty that Judge O'Connor's failure to retain counsel at an earlier time should not be construed as a waiver of his rights. This Court should hence vacate the determination and remit the matter to the Commission for further

proceedings.

POINT III

THE CONDUCT UNDERLYING CHARGES II THROUGH IV CONSTITUTED AT MOST ERRORS OF LAW RATHER THAN JUDICIAL MISCONDUCT

Third, assuming that this Court declines to vacate the determination on the ground that Judge O'Connor's procedural rights were not complied with (which it should, see Points I and II), it should find that Charges II through IV were improperly sustained, because the conduct underlying those charges either was not improper or at most constituted isolated errors of law.

It is well settled that this Court's review of a Commission determination is plenary, and that this Court "is not restricted to reviewing the proceedings below for errors of law alone but, on the contrary, [is] required to review the findings of fact made by the commission. Thus, in essence, there is a determination *de novo*." Matter of Cunningham, 57 N.Y.2d 270, 274 (1982). In making this determination, this Court should not confuse errors of law with willful misconduct. See Matter of Richter, 409 N.Y.S.2d 1013, 1015 (Ct. Jud. 1977). While petitioner acknowledges that legal error and misconduct "are not mutually exclusive," this Court has held that "a pattern of *fundamental* error" must be shown in order to rise to the level of misconduct, see Matter of Jung, 11 N.Y.3d 365, 373 (2008) (emphasis added), and it is particularly chary of finding misconduct where the errors in question were

harmless, see Richter, supra. Petitioner submits that, under this standard, a *de novo* review of the record should result in dismissal of Charges II through IV.

As to Charge IV, there is conflicting evidence as to whether there was any error of law at all. The gravamen of this charge is that Judge O'Connor awarded fees to defense counsel without affording the plaintiff the opportunity to be heard and without a basis for awarding any particular amount. But Judge O'Connor's written response dated September 22, 2016, which was part of the record before the Commission, states that he *did* make the Rybak Firm aware of his intention to award fees and that he determined the amount by asking opposing counsel for an estimate of their time. (53). This creates an issue of credibility vis-à-vis the testimony of Dinsmore Campbell, whose memory of the cases was sketchy – at one point, before being shown the relevant orders, he stated that he "possibly" represented the Rybak Firm at the relevant proceeding, and even afterward, stated only that it was "more than likely" that he was there based on his custom and practice and testified as to what he would "typically" do. (435-37).

Neither the referee nor the Commission resolved this issue of credibility, and petitioner submits that in light of (a) the sketchiness of Mr. Campbell's recollection, and (b) the candid admissions contained elsewhere in the September 22, 2016 response in which Judge O'Connor admitted to striking testimony because of attorneys prefacing their questions with the word "okay," this Court

should find on plenary review that Judge O'Connor did give counsel an opportunity to be heard before assessing fees and that he had a sufficient basis for the amounts thereof. Moreover, the orders in question set forth the reason why the petitioners' conduct was sanctionable (failure to comply with discovery orders, pursuing a claim that was barred by res judicata, and/or failure to comply with a condition precedent to suit), and even Mr. Campbell did not dispute that such sanctionable conduct occurred. This Court should thus find, on plenary review, that the conduct underlying Charge IV was entirely proper.

But even if this Court were to find that Judge O'Connor did not give counsel an opportunity to be heard before assessing fees, such failure amounts merely to an isolated, harmless error of law. As the Commission itself acknowledged, awards of fees need not conform to any "rigid fashion" and that it is sufficient where a short-form order makes clear "that the court found the plaintiff's conduct to be frivolous for the same reasons it gave for directing dismissal of the complaint." See Liang v. Wei Ji, 155 A.D.3d 1018, 1020 (2d Dept. 2017). In the instant case, the orders made clear what conduct Judge O'Connor viewed as frivolous, Mr. Campbell did not dispute that the sanctionable conduct took place, and therefore, there is no reason to believe that the result would have been any different if an opportunity to be heard had been granted. As such, the award of fees was at most harmless error rather than "fundamental" error, which under Richter, supra, does

not constitute misconduct, and in any event, the award of fees on three occasions close in time does not constitute a significant pattern of fundamental error.

As to Charge III, petitioner acknowledges that he gave pointed, and even harsh, admonitions to counsel in the underlying cases. But in each case, as discussed in the Statement of Facts, he had legitimate reasons to deliver such admonition.

In the 57th Avenue Assocs., case, for instance, it is undisputed that counsel Michaelson had never answered on behalf of his client and attempted to file an unsigned, unverified answer on the date of trial, and thus arguably forfeited any right to contest an award of eviction. Mr. Michaelson acknowledged at the hearing that oral motions to include current rent were routinely granted and thus that his opposition to such motion verged on frivolous. Moreover he actually agreed with Judge O'Connor that his motion would likely multiply the litigation if granted by answering "yes" when the judge asked whether forcing further litigation on the current rent would make him more money.

During subsequent proceedings in the case, Mr. Michaelson sought to call witnesses after the case had been closed, providing a sufficient reason for Judge O'Connor to question whether he understood how a trial was conducted – a reason that he further compounded by answering a question along with a witness and objecting to cross-examination on the ground of leading. It is further noted that,

although Judge O'Connor admonished Mr. Michaelson, he did allow the case to be reopened so Mr. Michaelson could call his witness, and he listened to both sides during the several colloquies in the case and allowed the parties to make their arguments.

In the Haberman case – concerning which Ms. Chamboukas, the supposed victim of Judge O'Connor's misconduct, did not testify in the hearing – it was likewise legitimate for the judge to question whether Ms. Chamboukas was wasting everyone's time by offering irrelevant documents concerning other premises. For a judge to note that counsel might be wasting time is not an over-the-top comment; indeed, such comments are made routinely in this State's courtrooms. In any event, Judge O'Connor did allow the document into evidence so that Ms. Chamboukas could make her record.

As to Judge O'Connor's further comment in the case that Ms. Chamboukas needed to "do something right," it is noted that, by this time, Ms. Chamboukas had made speeches in front of her witness during direct examination and had moved to her rebuttal case without indicating which witness she intended to call. These, again, are not circumstances where it is improper for a judge to admonish an attorney. Moreover, Judge O'Connor's lack of animus is shown by the fact that he ultimately ruled in favor of Ms. Chamboukas' client as well as making certain evidentiary rulings in her favor.

And in the Waldman case, when Judge O'Connor accused Mr. Lepikh of engaging in delaying tactics, there was every reason to believe that Mr. Lepikh was doing just that. The case was scheduled for trial; Mr. Lepikh had short-served a dispositive motion the previous day even though the case had last been on a month before; and his client, who was a squatter, had every reason to want to delay the proceeding to wait out the legitimate tenant. Moreover, although Mr, Lepikh sought an adjournment on the basis that he was unprepared, once his bluff was called and the matter proceeded to trial, he cross-examined the petitioner effectively and had at hand all the documents necessary to make his client's case. It was thus not improper in the least for Judge O'Connor to accuse counsel of delaying.

Moreover, although Judge O'Connor's comment regarding Mr. Lepikh getting an A in rudeness would have been better not said, this Court should note that, at the time, Mr. Lepikh was not only texting on a cell phone without asking Judge O'Connor's permission but was doing so *while the judge was talking to him.* This is a circumstance under which most judges would be angry. The remark was thus, at most, an isolated instance of error in the tens of thousands of cases overseen by Judge O'Connor rather than being part of a pattern of willful misconduct.

What the incidents underlying Charge III illustrate is that Judge O'Connor

was, in the words of Judge Esposito, someone who "rarely suffered a fool and he was very meticulous and he had an old-fashioned way about him and he held the lawyers to a very high standard and people will differ on how they handle their court." Judges are entitled to insist on decorum and basic competence in their courtrooms and to admonish counsel for breaches thereof, and it is clear that in the three cases underlying Charge III, such breaches occurred. It no doubt would have been better if Judge O'Connor had not raised his voice and had phrased his admonitions in more deliberate terms, but in the rough and tumble of Civil Court landlord-tenant litigation, the fact that he made such statements in the face of substantial provocation should be classified as isolated errors rather than willful misconduct.

Finally, while Charge II is the closest call, petitioner submits that the same result should apply. Petitioner acknowledges that the use of "okay" to preface a question is not leading, given that a leading question is one that suggests its own answer and the use of the phrase "okay" does not suggest what the answer to the next question should be. For Judge O'Connor to strike the testimony of witnesses because their attorneys said "okay" was an error of law. But it was no more than that. It is clear from the record that Judge O'Connor did, however mistakenly, believe the use of "okay" to be leading – he said so both on the transcripts at issue and in his written response to the Commission's inquiry – and it is also clear from

Mr. Lepikh's testimony that, when attorneys complied with instructions to avoid the use of "okay," Judge O'Connor did not take the issue any further. There is no evidence in the record that Judge O'Connor made the rulings he did out of animus or vindictiveness toward any attorney or party, nor did he use such rulings deliberately as a bludgeon (as evidenced by the fact that, when Mr. Lepikh stopped saying "okay," no sanction was applied); instead, he did so, on two isolated occasions, due to a mistaken belief about what the law was. His error in doing so cannot be characterized as "fundamental," nor was it a significant pattern, and thus, under Richter, supra, this Court should vacate and dismiss the finding of misconduct as to Charge II as well as Charges III and IV.

POINT IV

JUDGE O'CONNOR'S CONDUCT IN THE UNDERLYING CIVIL CASES, EVEN IF IT WAS MISCONDUCT AS OPPOSED TO ERROR OF LAW, DID NOT WARRANT THE DRASTIC SANCTION OF REMOVAL

Fourth, even if this Court finds that Charges II through IV were properly sustained, they did not warrant the extreme sanction of removal from the bench. "Removal of a Judge is a drastic sanction which should only be employed in the most egregious circumstances." Matter of Cohen, 74 N.Y.2d 272, 278 (1989). Moreover, "removal should not be ordered for conduct that amounts solely to poor judgment, even extremely poor judgment." See Matter of Skinner, 91 N.Y.2d 142

(1997); Matter of Cunningham, 57 N.Y.2d 270, 275 (1982).

To be sure, "poor judgment" must be "[m]easured with due regard to the higher standard of conduct to which judges are held." Matter of Restaino, 10 N.Y.3d 577, 590 (2008). But even under this standard, removal is inappropriate where "[n]othing in the record suggests that petitioner acted to advance his own interests over those of the defendants or that he was vindictive, biased, abusive or venal." Matter of LaBelle, 91 N.Y.2d 350 (1998); see also Matter of Kiley, 74 N.Y.2d 364, 370 (1989) (removal not warranted where "[p]etitioner was not motivated by personal gain, and totally absent from his conduct was any element of venality, selfish or dishonorable purpose"); Matter of Kuehnel, 413 N.Y.S.2d 809 (Ct. Jud. 1978) (removal not warranted where no corruption or venality was shown and no attempt was made to conceal the conduct at issue).

In the instant case, Judge O'Connor handled thousands of cases on the Civil Court, and these charges relate to just a few of them.[6] There is no evidence in the record – not even a suggestion – that Judge O'Connor had any venal or corrupt

[6] Although Judge Esposito testified that other complaints had been made about Judge O'Connor, (a) he acknowledged that many of these complaints were made by disgruntled litigants and reflected dissatisfaction with the judge's rulings; and (b) such complaints were uncharged and there was no evidence before the Commission that Judge O'Connor committed misconduct with respect to any of them. Moreover, to the extent that Judge Esposito reassigned Judge O'Connor from the landlord-tenant part to the no-fault part, he testified that this was done to prevent bad chemistry between Judge O'Connor and a particular group of lawyers rather than as an act of punishment or discipline. (466-67).

motive for the conduct at issue. There is not even a hint that this conduct resulted in personal gain. There is also no evidence of vindictiveness; as discussed above, Judge O'Connor made other rulings in favor of the complaining attorneys, the same attorneys appeared in front of him subsequently without repercussions, and Pamela Smith, who was on the autism scale, acknowledged that Judge O'Connor did not know this. And as discussed at length in Point III, (a) frivolous conduct did occur in the cases where Judge O'Connor awarded fees; (b) his harsh language in the cases underlying Charge III was in response to legitimate provocation; and (c) his rulings in the "okay" cases were based on sincere belief rather than animus, vindictiveness or bias. In sum, petitioner's conduct in these cases was at most a misguided effort to maintain decorum, prevent waste of time, and/or sanction genuinely frivolous conduct. Judges, including Judge O'Connor, are human.

This is thus not a case like Matter of Simon, 28 N.Y.3d 35 (2016), in which the judge went beyond "garden-variety" discourtesy to "ethnic smearing and name-calling," physical altercation, and threats to hold attorneys in contempt without cause "so common that they became a joke." Instead, it is more akin to ordinary cases of discourtesy that have resulted at most in censure. During oral argument, for instance, counsel for the Commission cited the prior case of Matter of Uplinger, 2007 Ann. Rep. 145 (CJC 2006), in which discourtesy resulted in censure. Matter of Sena, 1981 Ann. Rep. 117 (CJC 1980), where the record was "replete" with

instances of rude and arbitrary behavior in which the judge raised his voice and "questioned the competence, honesty and good faith" of counsel, likewise resulted in censure rather than removal where such outbursts were prompted by "misguided notions of the law," and Matter of Rice, 1998 Ann. Rep. 155 (CJC 1997), in which a judge told an attorney *inter alia* that he had "verbal diarrhea," resulted in nothing more than an admonition. The incidents underlying Counts II through IV does not rise to the level where it goes beyond "poor judgment" and warrants removal from office.

Nor does Judge O'Connor's prior censure in Matter of O'Connor, 2014 Ann. Rep. 174 (CJC 2013) warrant a different conclusion, given that this prior discipline involved completely dissimilar conduct. In the prior proceeding, it was alleged (and Judge O'Connor agreed) that petitioner delayed winding up guardianship matters that he had taken on before becoming a judge and that, years before taking the bench, he did not disclose a pending foreclosure proceeding when applying for guardianships. In other words, the prior proceeding related to his conduct as a lawyer rather than a judge, none of the allegations involved discourtesy and/or improper awards of fees, and it was not alleged that Judge O'Connor acted venally or was derelict in his fiduciary duties. As such, nothing in the prior proceeding indicates a propensity to commit conduct such as that alleged in this proceeding, and nothing about that proceeding was such as to engender a "heightened

sensitivity" to the sort of provocations that resulted in the conduct underlying Charges II through IV.

Indeed, as acknowledged by counsel to the Commission during oral argument and as noted by the concurring opinion, even the Commission's counsel acknowledged that the "benchmark" for Charges II through IV was censure, not removal, and the Sena case indicates that the benchmark might be lower still. This Court should thus find, based on the totality of the record, that Judge O'Connor's conduct in Charges II through IV, even if it rises beyond the level of legal error, does not warrant removal.

POINT V

IN LIGHT OF THE ADVERSARIAL NATURE OF COMMISSION INVESTIGATIONS, THIS COURT'S ADMONITION AGAINST USING THE INVESTIGATIVE PROCESS TO GENERATE MORE SERIOUS SANCTIONS, AND THE FACT THAT NONCOOPERATION IS ITS OWN PUNISHMENT, JUDGE O'CONNOR'S ALLEGED FAILURE TO COOPERATE IS AN INSUFFICIENT AGGRAVATING FACTOR TO JUSTIFY REMOVAL FROM OFFICE

Finally, contrary to the Commission's determination, this Court should reject its conclusion that Judge O'Connor's failure to cooperate with the investigation is not such an overwhelming aggravating factor as to make an admonition or censure case – which is all that the underlying conduct warrants, see Point IV – into a removal case. As detailed below, there are several reasons for this: (a) that Judge

O'Connor did participate in the investigation, albeit not fully, and there was little that his oral testimony could add to his written response; (b) that a Commission investigation is fundamentally adversarial and that this Court has cautioned against using the investigative process to justify more serious sanctions; and (c) that, because noncooperation can result in an adverse inference and deprives the judge of an opportunity to explain or defend his conduct, it is its own punishment.

This Court has, in previous cases, "take[n] note of the significance of petitioner's failure to cooperate with the investigation by the commission." See Cooley v. State Commission on Judicial Conduct, 53 N.Y.2d 64, 66 (1981). But the cases in which this Court has done so have evinced either dishonesty (see, e.g., Matter of Mason, 100 N.Y.2d 56, 60 (2003), in which the judge gave "inconsistent and evasive explanations... at different points in the proceeding"), or a more complete failure to cooperate than took place in the instant case. In Cooley, for instance, the judge "failed and refused to submit an answer in response to the commission's charges," see Cooley, 53 N.Y.2d at 66, whereas in this case, as the Commission's counsel acknowledged (333), Judge O'Connor did submit written responses to both the September 2016 inquiry and the formal complaint. Similarly, in Matter of Lenney, 71 N.Y.2d 456, 459 (1988), the judge sent a letter to the wrong zip code *and then did not respond to further Commission inquiries*, whereas here, Judge O'Connor did respond to the Commission's inquiries following his

misaddressed letter and gave a valid explanation – that he was away – for not doing so earlier.

Similarly, the unappealed Commission decision in Matter of Lockwood, 2007 Ann. Rep. 123 (CJC 2006), upon which counsel relied heavily in oral argument and which was cited in the Commission's determination, involved a judge who did not make any submissions at all to the Commission, either written or oral. Here, again, it was acknowledged that Judge O'Connor made a written submission which was sufficiently detailed for the Commission to put in evidence at the hearing and use as proof against him in the "okay" cases.[7]

Certainly, the Judiciary Law empowered the Commission to seek Judge O'Connor's testimony and his refusal to testify under oath cannot be condoned. However, in this case, such refusal did not significantly impede the Commission's investigation in light of the fact that he made a detailed written submission and that, because he lacked personal recollection of the cases beyond what he attested in that submission (51-53), there was little if anything that his testimony could have added. At most, if Judge O'Connor had given sworn testimony on March 7 or March 29, 2017, he would have orally repeated the answers he gave in his

[7] The other unreviewed cases cited in counsel's memorandum to the Commission – Matter of Tiffany, 1995 Ann. Rep. 140 (CJC 1994) and Matter of Carney, 1997 Ann. Rep. 78 (CJC 1996) – similarly involve cases where the judge in question made no responses to the Commission's inquiries whether written or oral.

written statement.

Likewise, while Judge O'Connor did misaddress a letter to the Commission containing his counsel's contact information, it is undisputed that when he returned to court, he responded further and informed the Commission of his counsel's death. And although the Commission characterized Judge O'Connor's subsequent conduct with respect to his attorney's estate as "absurd," it is far from clear that this was the case; it is not often that an attorney dies during the pendency of a matter, and the procedures to be followed when this occurs are not common knowledge. Judge O'Connor's apparent confusion about how to get Attorney DiBlasi's files does not bear the weight of the sinister interpretation that the Commission put on it. And, yet again, any alleged failure to cooperate in this regard must be weighed in the context of Judge O'Connor's detailed written answers to the September 2016 inquiry, his written participation in the proceedings, and the fact that, at most, a two-year proceeding was delayed for a couple of months.

Given such partial participation, and given that Judge O'Connor's written answers "did not... reflect dishonesty or evasiveness," Matter of Skinner, 91 N.Y.2d 142, 144 (1997), this Court should find that, while not to be condoned, petitioner's conduct during the investigation was not so egregious as to require removal where the underlying conduct does not otherwise warrant it.

There are several other factors that militate in favor of the same conclusion. First, although the initial, pre-complaint phase of a Commission proceeding is termed an investigation, it is fundamentally adversarial: such investigations are conducted in response to claims of misconduct, and judges who are the subject of such investigations are summoned to appear before the same body that might judge them later on and be cross-examined by the same counsel who might ultimately prosecute them. The position of a judge during this phase is roughly equivalent to that of a criminal defendant whose case is being investigated by a grand jury.

This Court in Matter of Kiley, 74 N.Y.2d 364 (1989), recognized the delicacy of this situation:

> As justification for removal, the Commission relied on petitioner's alleged lack of candor in the Hopkins investigation. In addition to disagreeing with the Commission's conclusion that petitioner lacked candor, we find the Commission's reliance on this factor, in the circumstances presented, particularly troubling...
>
> *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... This result is both undesirable and unnecessary. While a Judge's dishonesty

> or evasiveness before Commission investigators is not to be condoned, the use of a Judge's "lack of candor" as an aggravating circumstance should be approached cautiously *to minimize the risk that the investigative process itself will be used to generate more serious sanctions*.

Id. at 370-71 (citations omitted) (emphasis added); accord Skinner, 91 N.Y.2d at 144 (citing Kiley).

The instant case involves the opposite of the situation in Kiley – one in which Judge O'Connor, faced with the same Hobson's choice that Judge Kilely did, "refus[ed] to speak." Just as "lack of candor" should be approached with caution for a judge who does speak to the Commission, "failure to cooperate" should be approached with similar caution for a judge who does not, lest "the investigative process itself... be used to generate more serious sanctions."

As a further factor counseling in favor of such caution, noncooperation is its own punishment. The failure to testify or present evidence permits the Commission to draw an adverse inference, see Matter of Reedy, 64 N.Y.2d 299 (1985). And as acknowledged during oral argument, Judge O'Connor's failure to testify deprived him of an opportunity to address the handwriting discrepancies on the fee orders and/or to present evidence that the Rybak Firm was given an opportunity to be heard, thus depriving him of a defense to charges that might otherwise have been defended.

What appears to have happened in this case is that, when confronted with

complaints of judicial misconduct, Judge O'Connor reverted to the outlook of a pro se litigant (which he effectively was), including the zealous standing on procedural rights that such litigants often display. This is certainly not to be condoned. But in light of the factors set forth above – and in light of the fact that the underlying conduct manifestly does not warrant the extreme sanction of removal – this must be viewed at most as additional "poor judgment" of the type that this Court has warned should not lead to that sanction.[8]

Indeed, this occurred in two of the very cases cited by the Commission, Matter of McAndrews, 2014 Ann. Rep. 157 (CJC 2013) and Matter of Burstein, 1994 Ann. Rep. 57 (CJC 1993). In each of these cases, although the Commission viewed the judges' failure to testify and to submit written responses as an aggravating factor, it imposed a lesser sanction than removal (censure in McAndrews and admonition in Burstein) where the underlying conduct did not justify such sanction. The same result should obtain in this case. Here, too, the conduct enumerated in Charge I, while not to be excused, does not convert conduct that would otherwise at most justify censure into conduct warranting removal, and this Court should therefore reject the Commission's proposed sanction and

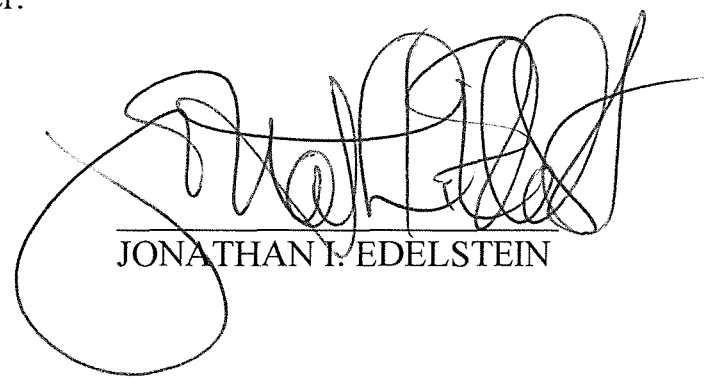
[8] Petitioner also notes that his term on the bench will end approximately two months after this case is decided and that he is not eligible for re-election, and given that the purpose of judicial discipline is to protect the public rather than to punish the judge, there would seem to be little sense in revoking a term in office that has such a short time to run.

substitute a lesser one.

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
June 20, 2018



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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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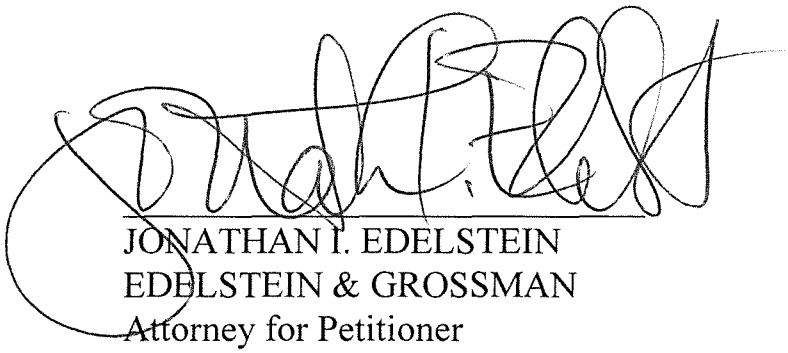

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