To be Argued by:
DAVID H. BESSO
(Time Requested: 20 Minutes)

JCR-2019-00005

Court of Appeals
of the
State of New York

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

PAUL H. SENZER,

a Justice of the Northport Village Court, Suffolk County,

Petitioner.

BRIEF FOR PETITIONER

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QUESTION PRESENTED

QUESTION I: Whether the record before this honorable Court supports the extreme punitive result of removal from the bench.

Answer: No, the record before this honorable Court does not support the extreme punitive result of removal because the evidence of misconduct adduced in the proceeding below has not so impugned the judiciary as to satisfy this Court's standard of egregiousness as predicate for removal, thus warranting a less severe sanction.

STATEMENT OF FACTS

The Record for Review is comprised of a complete recitation of the facts and circumstances underlying the above-captioned matter; accordingly, in an effort to conserve this honorable Court's valuable time and resources, such facts will be reiterated herein only to the extent necessary for amplification.

A. The Petitioner's professional background

Over the past thirty-five (35) years, the Petitioner, Paul H. Senzer, has been an active, dedicated member of the legal community in a variety of capacities. (R. 319-325).

From 1981 until 2015, the Petitioner was engaged in private practice, focusing primarily on criminal defense and appeals; and, to a lesser extent, civil litigation, family law, probate and real estate. (R. 319-320, 323)

Additionally, between 1994 and 2018, the Petitioner was seven (7) times elected part-time Northport Village Justice, during which he presided over approximately 100,000 cases (7,000 of which were criminal matters); conducted approximately 1,000 hearings and trials; and wrote approximately 350 decisions. (R. 320-321) Throughout his tenure, the Petitioner had the opportunity to engage with attorneys and litigants of varied racial and ethnic backgrounds, all of whom were treated by the Petitioner with respect. (R. 325)

Moreover, from 2011 to present, the Petitioner has worked as an adjunct professor in the Criminal Justice Department at State University of New York at Farmingdale. (R. 322-323)

Further, in 2013, the Petitioner was appointed as a District Court Hearing Officer at the Suffolk County Traffic and Parking Violations Agency ("TPVA"). (R. 321, 462) Initially, the Petitioner's appointment was part-time; however, throughout 2014 and 2015, his obligations increased. (R. 321, 323) As a result of the increased demand upon his time, the Petitioner voluntarily wound down his private practice in early 2015. (R. 323)

Over the span of three-and-a-half decades, the Petitioner has encountered numerous clients, attorneys, litigants and students from varied racial and ethnic backgrounds. (R. 319-325) Throughout this time, the Petitioner has thrived in each sphere of his profession. (R. 391-325)

B. The Petitioner's relationship with the Complaining Witnesses

For a period of approximately five (5) years, from 1990 through 1995, one of the complaining witnesses, Jennifer Coleman (hereinafter "Ms. Coleman") was engaged as a housekeeper and pet-sitter for the Petitioner's family. (R. 326, 463)

In November 2013, prior to the Petitioner's voluntary winding down of his private practice, Ms. Coleman retained the Petitioner to represent her before the New York State Division of Human Rights in a gender discrimination action against the

Cold Spring Harbor Central School District where she had been employed as a part-time custodian. (R. 203-205, 325-326, 463) Upon the conclusion of trial, Ms. Coleman was unsuccessful in her gender discrimination action. (R. 463) Regardless, in 2014, Ms. Coleman and her husband, Walter Coleman, also a complaining witness herein (hereinafter collectively referred to as "the Colemans"), retained the Petitioner to represent them in a Family Court matter wherein they sought visitation with their grandchild. (R. 207-210, 326, 463)

Throughout the Petitioner's representation of the Colemans they maintained a friendly relationship beyond that of a strictly professional attorney-client relationship. (R. 143-144) By way of limited example, during the Petitioner's campaign for public office, the Colemans offered their support by attending fundraising events held on the Petitioner's behalf and volunteering to place promotional signs around town on multiple occasions. (R. 206-207) However, when the Colemans discontinued their Family Court matter on the advice of the Petitioner, their relationship deteriorated. (R. 463, 471)

C. The events precipitating the investigation against the Petitioner

Subsequent to the conclusion of the Petitioner's representation of the Colemans, Christopher Cassar, Esq. (hereinafter "Cassar") filed a federal lawsuit against Suffolk County, the judiciary, and prosecutors of the TPVA, alleging racial discrimination. (R. 464) Although once avid and active supporters of the Petitioner's

role in the judiciary, the Colemans had clearly become disgruntled following the discontinuance of their Family Court petition. (R. 471) Consequently, upon reading of Cassar's federal lawsuit in the local newspaper, the Colemans unilaterally provided Cassar with access to the private email correspondence between them and the Petitioner. (R. 464) It is crucial to note that such private email correspondence needed to be recovered by a technician. (R. 464) Thereafter, Cassar contacted Suffolk County District Administrative Judge C. Randall Hinrichs (hereinafter "Justice Hinrichs"), alleging that such email correspondence contained derogatory references regarding women of Hispanic descent. (R. 64) Although the emails were actually devoid of such derogatory references, the allegation instigated an investigation against the Petitioner before the Commission on Judicial Conduct (hereinafter the "Commission"). (R. 137-140) Ultimately, Cassar's federal lawsuit was dismissed as it applied to the Petitioner. (R. 465)

Nevertheless, the Commission determined that the petitioner's conduct demonstrates that he lacks fitness for judicial office and that his behavior has irredeemably damaged public confidence in his ability to continue to serve as a judge. Accordingly, the Commission determined that removal from the bench is the appropriate sanction. However, for the reasons detailed further herein, this Court should modify the Commission's determination as to sanction.

THE CHARGE

Upon review of the aforementioned private email correspondence, the Commission filed a single charge against the Petitioner. (R. 464) Specifically, the Commission alleged that, in connection with his representation of the Colemans, the Petitioner failed to observe the high standards of conduct and otherwise undermined public confidence in the judiciary. (R. 464)

Throughout the course of the Petitioner's representation, the Colemans elected to utilize a shared email account as their principal means of communication with the Petitioner. (R. 205-206) Throughout his thirty-five (35) year career in private practice, the Petitioner had rarely utilized this means of communication with other clients. (R. 110) That the Petitioner made this exception for the Colemans, with whom he had a congenial relationship, is further emblematic of the distinction between his representation of the Colemans and his representation of the rest of his clientele.

Due to the frequency of the Colemans' emails, the Petitioner often responded quickly in a manner he termed as being in a "very conversational and anecdotal and almost chatty." (R. 327, 469) Due to the rapidity of communication exchanges and his familiarity with the clients, who often resorted to such inappropriate language, the Petitioner testified that he "became far too conversational and far too familiar in

resorting to particular words that I think reflect very poorly on me as an attorney and obviously, as a judge." (R. 327, 469)

Aside from these communications, the Petitioner testified that it is not his practice to resort to inappropriate language, either professionally or personally. (R. 328, 383-385). Moreover, the Petitioner explicitly testified that he has never used inappropriate language from the bench or in his capacity as a judge. (R. 328) To this end, it is crucial to note that the Petitioner's testimony rendered it difficult for the Referee to believe he had resorted to such inappropriate language. (R. 468)

The Petitioner explained that inappropriate terms were often utilized by the Colemans and his own vernacular devolved accordingly. (R. 469) The Petitioner further explained that inappropriate terms had been discussed at great length as such terms were the subject of Ms. Coleman's gender discrimination case. (R. 335-336, 390-391) Additionally, inappropriate terms had been discussed at great length as the Colemans' daughter had used such terms in the presence of their grandson, as fully set forth in their Family Court Petition. (R. 335-336, 390-391) Consequently, as inappropriate terms were germane to both cases, the Petitioner's own vernacular assimilated. (R. 373-376, 469) The Petitioner testified that in the absence of such inappropriate terms being germane to both cases he never would have utilized those terms. (R. 373-376, 469)

Ultimately, the Petitioner testified that he considered these email exchanges to have been private and confidential, between him and the Colemans; and, that he never anticipated that they would be viewed by anyone other than the Colemans. (R. 326-327, 330) In fact, the record reflects these remarks were made by Petitioner in the course of guiding clients who needed frank advice. (R. 101) Notably, the Petitioner's communications with the Colemans were never disseminated to the public (nor were they intended to be), but were published only by the lawyer who sued Petitioner and others at the TPVA and in the instant proceeding. (R. 326-327, 330) Thus, the alleged appearance of impropriety has been limited only to the Colemans, the attorneys and members of the Commission and judiciary tasked with reviewing these matters.

THE SANCTION

Taking into consideration the Petitioner's thirty-five (35) year career, during which time he has been an active, dedicated member of the legal community in a variety of capacities, it is readily apparent the inappropriate language employed in the email exchange was an unfortunate departure from the Petitioner's otherwise professional demeanor and therefore does not serve to render him unfit to continue to act as a judge. Yet, without any prevailing standard and with a disregard for the facts and circumstances at issue herein, the Commission imposed the most severe sanction at its disposal – the Petitioner's removal from the bench.

The Petitioner concedes the facts as found by the referee and the Commission's determination of misconduct; however, he adamantly contends that the measure of discipline imposed upon him was unduly excessive. As fully set forth hereinafter, the record before this honorable Court does not support the extreme punitive sanction of removal from the bench. First, it is crucial to note that this case is a matter of first impression. Specifically, there is no precedent for the extreme punitive sanction of removal from the bench regarding misconduct undertaken while engaged as an attorney, which misconduct was not only outside the scope of judicial duties, but limited to private communications. Moreover, it is crucial to note that in reaching its determination, the Commission failed to consider several mitigating factors, such as the Petitioner's reputation for honesty, integrity and judicial demeanor, as well as his sincere remorse. Finally, the Commission unreasonably determined the extreme punitive result imposed herein in that it failed to consider the fact that the misconduct herein did not constitute a pattern of misconduct and was contained to private communications with a single-unit client, which limited both the severity of the misconduct and its effect upon the judiciary. Summarily, the misconduct at issue herein was a stark departure from a judicial career otherwise deemed as "impeccable." Therefore, based upon the argument set forth hereinafter, the Petitioner respectfully requests that the Determination of the Commission be modified on this record and that he receive a sanction no greater than public censure.

ARGUMENT

POINT I:

THE RECORD BEFORE THIS HONORABLE COURT DOES NOT SUPPORT THE EXTREME PUNITIVE SANCTION OF REMOVAL FROM THE BENCH

A. The prevailing standard for removal does not support the extreme punitive result imposed by the Commission herein

The Court of Appeals has found that: "Judicial misconduct cases involve 'institutional and collective judgment calls based on assessment of their individual facts, in relation to prevailing standards of judicial behavior and the prospect of future misconduct and continued judicial service. . . .' " *Matter of Simon* (State Commn. on Jud. Conduct), 28 N.Y.3d 35 (2016) (quoting *Matter of Roberts*, 91 N.Y.2d 93 (1997)).

With regard to the prevailing standards of judicial behavior, it is well-settled that improper conduct by a judge while on the bench will likely warrant discipline. *See, e.g.*, *Matter of Agresta*, 1985 Ann Rep 109 (Commn. on Jud. Conduct, July 5, 1984). Likewise, this honorable Court has found that improper conduct by a judge while off the bench, but in the course of judicial duties, will likely warrant discipline. *See, e.g.*, *Matter of Assini*, 94 N.Y.2d 26 (1999). This honorable Court has even found that improper conduct by a judge, while off the bench and unrelated to the course of judicial duties, but in the public sphere, may warrant discipline. *Matter of Cerbone*, 61 N.Y.2d 93 (1984). However, none of these cases are controlling herein.

First, the Commission's reliance upon *Matter of Assini* and *Matter of Cerbone* was misplaced as the facts at issue therein are readily distinguished from the facts at issue herein. Specifically, in *Matter of Assini*, this honorable Court found that the derogatory comments "were uttered in the course of [the judge's] official duties;" that the judge "repeatedly disparaged his judicial colleague in vile terms to various court employees and also to a member of the . . . Town Board;" and, that such improper conduct occurred over a protracted period of time (*i.e.*, over the course of several years). 94 N.Y.2d at 29. Additionally, in *Matter of Cerbone*, the judge used inappropriate language while engaged in a physical and verbal altercation, at which time he "loudly proclaimed that he was a judge." 61 N.Y.2d at 95. Not only did this altercation occur in a public sphere, during which time "a number of witnesses" observed the judge's misconduct, but it required law enforcement intervention. *Id.* In contrast, in the instant matter, the Petitioner's improper conduct occurred while he was engaged as an attorney, without any reference, let alone nexus, to his judicial duties; was limited to private email communications that were never disseminated to the public; were not intended for public view; and, spanned a limited period of time (*i.e.*, four (4) months).[1]

[1] As noted above, the question at issue here—whether removal is warranted where an elected part-time judge used vulgar language in the course of representing legal clients in his capacity as an attorney, off of the bench, and out of public view—is a matter of first impression before this Court. In any case, it is respectfully submitted that this result is inappropriate as both a matter of law as well as public policy. Indeed, with respect to the law and applicable precedent, removal is unwarranted for the reasons discussed throughout this brief, including this Court's jurisprudence

Moreover, the Commission's reliance upon *Matter of Backal*, 87 N.Y.2d 1 (1995) was misplaced as the facts at issue therein are readily distinguished from the facts at issue herein. Specifically, while the misconduct at issue in *Matter of Backal*, did occur in the privacy of the judge's home, such misconduct was not limited to the

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relating to the predicate standard (aside from in cases of abuse of power) for this most severe penalty—egregious misconduct, which relates to the circumstances attendant to the particular conduct in question. *See, e.g.*, *Matter of Simon*, 28 N.Y.3d 35, 38–39 (2016) (holding removal appropriate on the ground of egregious misconduct where "petitioner used his office and standing as a platform from which to bully and to intimidate" because the conduct in question "exceeded all measure of acceptable judicial conduct"). Moreover, it is submitted that sound public policy militates against this Court's exercise of the removal power on these facts. While each judicial conduct determination involves fact-sensitive analysis and individualized assessment of appropriate sanction, numerous facts relating to the instant matter command that removal here would hazard an unsound policy detrimentally affecting several aspects of statewide judicial and public concern. As an initial matter, the Petitioner, like thousands of other judges around this State, has served in a part-time elected position existing by virtue of New York's constitutional and statutory doctrines of home rule. Through these auspices, the judicial officers of New York's part-time judiciary are permitted to engage in other, non-judicial employment, including, but not limited to, the practice of law. Without a doubt, all of New York's judges—full and part-time—should be held to a high standard of decorum in their judicial duties and be required to comport themselves in a manner befitting their offices on and off the bench. For part-time judges, however, context is key. In connection with their outside employment, these judges may operate in different capacities—a fact that should be accounted for in determining whether conduct commands removal—such as that of a lawyer ministering confidentially and candidly to the needs of a client. To this end, the decision to impose the gravest penalty—removing a part-time judge for using profanity in such a separate, distinct, and private context—would cast a chill over that part of this State's judiciary that serves part-time and relies on outside employment to make a living. Indeed, faced with the prospect of removal and personal ruination under such circumstances, local judicial offices would likely sit vacant as qualified candidates simply forego the electoral process, rather than give up their outside professional activities—an unworkable requirement. Moreover, to the extent that removal is extended to these facts, an unacceptable burden on both state and local public resources will likely result, with the Commission inundated with complaints by disgruntled litigants and others (diminishing its ability to focus on more serious offenses) and small municipalities made to hold special elections to replace ousted officials, frustrating the local administration of justice in the process in a manner that lesser sanctions do not. Simply stated, the costs of extending established removal doctrine to the facts here are far too high. Rather, this Court should adhere to established doctrine concerning the appropriate circumstances for removal, and impose a lesser sanction where, as here, those circumstances are not established.

utterance of inappropriate language, but to "advising a known lawbreaker on preserving the fruits of his crime and furnishing a hiding place for those fruits." *Id.* at 7-8. As well, the judge then accepted a "cash gift for participating in the wrongdoer's concealment efforts and agreeing to mislead law enforcement authorities." *Id.* In contrast, in the instant matter, however inappropriate, select words culled from private attorney email cannot be deemed tantamount to the truly egregious misconduct in *Matter of Backal*, wherein the judge in effect, knowingly aided and abetted a crime.

Ultimately, noticeably absent from the Commission's prior decisions is even a single matter wherein a judge was disciplined for improper conduct undertaken in his or her role as an attorney, which improper conduct occurred outside the course of judicial duties and was limited to private communications never disseminated to the public. Consequently, the determination herein is a matter of first impression. Therefore, it is respectfully requested that this honorable Court determine this matter based upon an "assessment of their individual facts" presented herein. *Matter of Roberts*, 689 N.E.2d 911 (1997).

B. The Commission improperly disregarded mitigating factors before imposing the extreme punitive result herein

i. The Petitioner has demonstrated a reputation for honesty, integrity and judicial demeanor in the legal community

This honorable Court has long-recognized that a judge's reputation for honesty, integrity and judicial demeanor in the legal community is a key factor properly considered as mitigating evidence in a judicial conduct proceeding. *Matter of Shilling*, 51 N.Y.2d 397 (1980). To this end, several attorneys and a judge appeared to testify on the Petitioner's behalf. Collectively, these witnesses had been admitted to practice law in the State of New York from fifteen (15) to thirty-two (32) years and had experience in varied capacities (*i.e.*, prosecution, defense and judicial). Moreover, the witnesses had practiced before and presided beside the Petitioner from seven (7) to sixteen (16) years. As well-established members within the legal community, with firsthand knowledge of the Petitioner's participation therein, the witnesses who appeared to testify on the Petitioner's behalf were in the best position to attest to his reputation for honesty, integrity and judicial demeanor in the legal community.

Notably, Suffolk County Assistant District Attorney William Reynolds, Esq. ("ADA Reynolds") – an attorney who was admitted to practice in 1998 and assigned as a prosecutor in the Petitioner's part in the Northport Village Court one (1) night per week for seven (7) years – described the Petitioner as a "fine judge" with "a good

knowledge of the law" who "treats defendants fairly." (R. 284, 301-302) ADA Reynolds further testified that the Petitioner had an "impeccable" reputation in the legal community and was considered to be "very fair and . . . impartial." (R. 285, 301-302) ADA Reynolds further testified that he had never heard the Petitioner make any disparaging or ethically charged remarks. (R. 283-284, 301).

Next, Deborah Monastero, Esq. ("Ms. Monastero") –a defense attorney who was admitted to practice in 2004 and who appeared for the Suffolk County Legal Aid Society in the Northport Village Court once or twice per month – testified:

> I've never heard anything unkind about him or anything disparaging or in any way that he is, in any form, but fair with the people that stand before him with respect to attorneys, with respect to defendants…. Since 2007, he has never been disrespectful to me or my clients and I have represented during that period of time some characters, I mean, along the way. And I have always been treated as a professional and my clients have always been treated with respect.

(R. 289-291, 295-296)

Ms. Monastero further testified that she has never heard the Petitioner make any disparaging remarks to any litigant of any race or ethnic background. (R. 295)

Further, the Hon. Debra Urbano-Disalvo ("Judge Urbano-Disalvo") – who has been admitted to practice law since 1986; engaged as a full-time Village Attorney for the Village of Hempstead since 2002; presided as an elected judge in the Village of Amityville and an Administrative Law Judge for the TVPA alongside the Petitioner since its inception – testified that litigants appearing before the TPVA are

drawn from "every demographic, every age, every sex, race [and] religion." (R. 303-304, 306-308) With regard to the Petitioner's reputation in the legal community, Judge Urbano-Disalvo testified that the Petitioner acts "fairly and justly." (R. 309) Judge Urbano-Disalvo further testified that she has never heard of the Petitioner making disparaging remarks about anyone. (R. 309)

Upon review of the witnesses' testimony, the Referee's Report found that the Petitioner "[c]learly . . . has an excellent reputation for truthfulness and honesty." (R. 471) To this end, the Commission noted that: "When the record supports a referee's findings, the Commission accords deference to the referee's findings because he or she is in a position to evaluate the credibility of witnesses firsthand." (R. 11-12 (citing *In re Mulroy*, 94 N.Y.2d 652 (2000)). Collectively, it is readily apparent that the Petitioner's reputation for honesty, integrity and judicial demeanor in the legal community sufficiently constitutes a mitigating factor that should have been taken into consideration by the Commission. Yet, notwithstanding the fact that the Referee had found the witnesses to be credible in presenting testimony that the Petitioner had a reputation for honesty, integrity and judicial demeanor in the legal community, the Commission failed to properly credit this testimony, concluding that the Petitioner is unfit to hold judicial office and, after nearly three decades, must now be ousted from a seven (7) term local elected post. The Commission's

Determination is devoid of any reference, let alone reliance, upon this compelling mitigating evidence, and constitutes a patently unfair abuse of discretion.

ii. The Petitioner has demonstrated sincere remorse

The Court of Appeals has found that: "A judge's 'fail[ure] to recognize the inappropriateness of his actions . . .' is a significant aggravating factor on the issue of sanctions." *Matter of Hart* (State Commn. On Jud. Conduct), 7 N.Y.3d 1, 10 (2006) (quoting *Matter of Aldrich*, 58 N.Y.2d 279 (1983)); *see also In re Watson*, 100 N.Y.2d 290, 303 (2003) (finding that the judge's demonstrable remorse was "relevant in weighing the appropriate sanction"). To this end, the Petitioner has demonstrated his deep regret for resorting to inappropriate language and has acknowledged that such reflected poorly upon the legal profession. Notably, the Petitioner testified:

> I have a profound and deep regret for using the words that – that were deployed in those emails because, quite frankly, that's not who I am. That's not how I was brought up. That's not how I conduct myself as an attorney in public and certainly never as a judge in public. I realize that as a judge my obligation is a – is a 24/7 obligation. I'm always a judge wherever I am and in whatever I do. It just didn't dawn on me, I'm sorry to say, that when I was sending emails to clients in connection with legal advice that that somehow had a nexus or a connection to my judicial persona but I've learned the hard wa[y] that [it] certainly does."

(R. 327-328, 468)

Yet, notwithstanding the fact that the Petitioner was not only cooperative, but remorseful, the Commission's Determination is devoid of any reference, let alone reliance, upon this mitigating evidence, which was an abuse of discretion.

C. In light of the circumstances, the Commission unreasonably determined the extreme punitive result imposed herein

In pertinent part, the Preamble to the Rules provide:

> The text of the rules in intended to govern conduct of judges and candidates for elective judicial office and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

Preamble to Code of Judicial Conduct (current through March 15, 2019).

The Court of Appeals has echoed this principle, finding that: "[W]e have long defined the purpose of a judicial disciplinary proceeding not in terms of punishment for its own sake, 'but [for] the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents.' " *Matter of Simon*, 28 N.Y.3d at 37 (quoting *Matter of Restaino* (State Commn. On Jud. Conduct), 10 N.Y.3d 577 (2008); *Matter of Duckman*, 92 N.Y.2d 141 (1998)); *see also Matter of Waltemade* (State Commn. On Jud. Conduct), 37 N.Y.2d (A) (1976). Likewise, in the dissenting opinion of *Matter of George* (State Commn. On Jud. Conduct), Justice Weinstein

noted that "[t]o maintain a fair system, there should be some semblance of equality of sanctions." 22 N.Y.3d 323 (2013) (Weinstein, J., dissenting).

First, as to the seriousness of the transgression, it is crucial to note that any inappropriate language utilized by the Petitioner was limited to private email communications between him and the Colemans – who were a single-unit client. Moreover, while inappropriate, the language contained within these private emails was inconsequential to the outcome of the Colemans' legal matters, which, incidentally, were both unsuccessful. Further, the language contained within these private emails did not bestow any personal gain upon the Petitioner. *Cf. Matter of Steinberg*, 57 N.Y.2d 74 (1980). Therefore, while admittedly inappropriate, the seriousness of the Petitioner's transgression was limited to potentially offending the only two (2) individuals who were privy to the private emails at issue herein.

Moreover, in pertinent part, the term "pattern" is defined in two (2) respects: 1) "a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group or institution"; and, 2) "frequent or widespread incidence." MERRIAM WEBSTER DICTIONARY, "Pattern," https://www.merriam-webster.com/dictionary/pattern (last visited Dec. 12, 2019). As previously set forth, the testimony elicited demonstrated that the Petitioner's use of inappropriate language was uncharacteristic. (R. 283-284, 295, 301, 309). Further, the Referee's Report explicitly provides that, in light of the Petitioner's testimony, it was difficult

to believe he had resorted to such inappropriate language. (R. 468) Consequently, the inappropriate conduct at issue herein cannot reasonably be considered as "a reliable sample of traits, acts, tendencies, or other observable characteristics" of the Petitioner, sufficient to constitute a "pattern of conduct." Further, viewed in light of the Petitioner's thirty-five (35) year legal career, it cannot be reasonably adduced that one (1) letter of caution from seventeen (17) years ago, coupled with select emails sent to a single-unit client over a four (4) month period, five (5) years ago, amounts to "frequent or widespread incidence" sufficient to constitute a "pattern of conduct." Therefore, rather than a pattern of conduct, the Petitioner's misconduct herein was a stark departure from his normal course of conduct.

Finally, as to the effect of the Petitioner's inappropriate language, such was limited to individual words, selectively culled from a handful of attorney emails privately shared with a single-unit client in the context of candid advice and banter. In the heat of litigation, this speech was meant not to be insulting or hurtful, but solely for emphasis; to persuade and motivate.

Taking the aforementioned into consideration, it is readily apparent that the measure of discipline imposed upon the Petitioner was unreasonably determined and unnecessarily harsh. To that end, and as fully set forth hereinafter, to protect the public it is respectfully submitted that the career-ending sanction of removal from the bench is unwarranted on this record. Thus, as fully set forth hereinafter, it is

respectfully requested that this honorable Court modify the Determination of the Commission as to sanction and that the Petitioner be disciplined with nothing greater than public censure.

POINT II:

THE SANCTION SHOULD BE REDUCED TO CENSURE

The Court of Appeals has long-recognized the principle that: "Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances. . . . Indeed . . . removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment." *Matter of Cunningham*, 57 N.Y.2d at 275 (internal citations omitted). Pursuant to Judiciary Law § 44(9), this honorable Court has the discretionary authority "to accept or reject the sanction determined by the commission, impose a different sanction, or impose no sanction at all." *Id.* at 274. When appropriate, such discretionary authority has been utilized by this honorable Court to reduce the harsh sanction of removal to the less severe, but nonetheless grave, public sanction of censure. *See, e.g.*, *Matter of Skinner*, 690 N.E.2d 484, 667 N.Y.S.2d 675 (1997); *Matter of Edwards*, 492 N.E.2d 124, 501 N.Y.S.2d 16 (1986). To this end, the Court of Appeals has found that: "Censure has generally been employed when a judge's conduct is so inconsistent with the role of judge or amounts to an abuse of judicial power." *Matter of Hart*, 849 N.E.2d 946, 816 N.Y.S.2d 723 (2006).

In reducing the offending party's sanction of removal to a sanction of censure, the Court of Appeals has considered the following factors: 1) the offending party's career as a whole; 2) the offending party's motivation for engaging in misconduct; and, 3) candor. *Matter of Skinner*, 690 N.E.2d 484, 667 N.Y.S.2d 675 (1997). In the instant matter, it is readily apparent that over the past thirty-five (35) years, the Petitioner has been an active, dedicated member of the legal community in a variety of capacities. In his capacity as a judge, the Petitioner has presided over 100,000 cases; and, in doing so, has cultivated an "impeccable" reputation in the legal community, where he is considered to be "very fair and impartial." (R. 285, 301-302) In a limited instance, where the Petitioner was acting in the role of an attorney, off the bench, and in private conversation, his vernacular uncharacteristically devolved. However, the record is devoid of any indication that the Petitioner was motivated by any personal gain. Instead, it can only be inferred that in the course of zealous advocacy and under the apparently false comfort of camaraderie with the Colemans, the Petitioner's better judgment was momentarily suspended. To that end, the Petitioner has expressed sincere remorse for his uncharacteristically inappropriate language and has fully cooperated in the investigation against him throughout this matter.

Ultimately, the inappropriate language utilized by the Petitioner was limited to private communications with a single-unit client. To that end, in reaching its

determination that censure was a more appropriate sanction, in *Matter of Cunningham*, the Court of Appeals did consider the fact that the improper communication was limited to "the eyes of one person only". 57 N.Y.2d 270 (1982). Notably, this honorable Court found that:

> [T]hese letters were meant only for Judge Sardino's eyes and were not to be nor were they disseminated publicly. This, of course, does not excuse the improper conduct, but to the extent that Judge Cunningham's misconduct consisted of creating the appearance of impropriety, it is of some moment that the possible perception of this improper conduct was limited to the eyes of one person only.

Matter of Cunningham, 57 N.Y.2d at 275.

Likewise, in the instant matter, the Colemans were but two (2) litigants out of hundreds of thousands over whose cases the Petitioner has presided and/or represented throughout a legal career spanning more than three (3) decades. Accordingly, any appearance of impropriety that may have resulted from the Petitioner's private email communication with the Colemans was limited to their eyes only. In light of the Petitioner's entire career, both on and off the bench, it is readily apparent that any inappropriate conduct with regard to his private email communication with the Colemans is far outweighed by the professional and judicious way he has carried himself throughout the course of his career to cultivate a reputation as a "fine judge" with "a good knowledge of the law" who "treats defendants fairly." TR p. 85; 102 – 103.

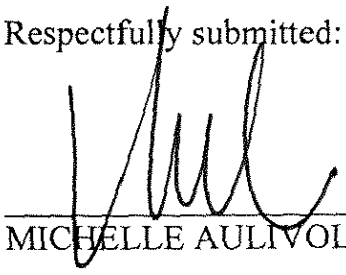
In light of the Petitioner's career as a whole, his lack of self-serving motivation and his demonstrable remorse herein, it is respectfully contended that the Petitioner remains fit to act as a judge. Therefore, it is respectfully submitted that censure is the most appropriate sanction herein.

CONCLUSION

Based upon the aforementioned, it is respectfully requested that the Determination of the Commission on Judicial Conduct be modified and that the Petitioner be given the sanction of censure, together with such other and further relief as this Court may deem just and proper.

Dated: December 17, 2019

Respectfully submitted:



MICHELLE AULIVOLA, ESQ.

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