To Be Argued By
Edward Lindner, Esq.
Time Requested: 15 Minutes

JCR-2019-00005

Court of Appeals of the State of New York

In the Matter of the Request of
PAUL H. SENZER,
a Justice of the Northport Village Court
Suffolk County,

Petitioner,

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

Respondent.

BRIEF FOR RESPONDENT STATE COMMISSION ON JUDICIAL CONDUCT

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PRELIMINARY STATEMENT

While acting as an attorney in a judicial proceeding, Petitioner repeatedly used obscene and vulgar language – including gender-specific slurs – in emails to his clients. Petitioner's emails (1) described his female opposing counsel as a "cunt on wheels" and "eyelashes," (2) referred to the female court attorney referee as an "asshole" and (3) referred to his clients' daughter as a "bitch", "asshole" and "scumbag."

Discipline in this case is not predicated on the occasional use of vulgar or sexist language. Rather, as the Commission found, Petitioner should be removed from office for "a pattern of statements that undermines respect for women and the legal system as a whole" (R13). That pattern of offensive language created the unmistakable appearance of gender bias and contempt for officers or participants in judicial proceedings which, taken together with his prior caution for making sarcastic and disrespectful comments to two women who appeared before him in court, warrants his removal.

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review a Commission determination pursuant to NY Constitution Article VI, § 22(d) and Judiciary Law Article 2-A, §§ 44(7) and 44(9), which empower the Court to review the Commission's findings of fact

and conclusions of law and to accept the sanction of removal, to impose a lesser sanction, or to impose no sanction.

While the Commission's determination is afforded due deference, *Matter of Sims*, 61 NY2d 349, 353 (1984), "[t]his Court has plenary power to review the legal and factual findings of the Commission as well as the sanction imposed." *NYS Comm'n on Judicial Conduct v Rubenstein*, 23 NY3d 570, 579 (2014).

PROCEDURAL HISTORY

A. The Formal Written Complaint

Pursuant to Judiciary Law § 44(4), the Commission authorized a Formal Written Complaint, dated October 13, 2017, containing one charge (R65-82). The complaint alleges that from October 24, 2014, to on or about February 22, 2015, Petitioner undermined public confidence in the judiciary when, while representing clients, he used racist, sexist, profane and otherwise degrading language (R67).

Petitioner is a justice of Northport Village Court, Suffolk County (R66, ¶4).[1] The complaint alleges that in or about November 2013, Jennifer Coleman retained Petitioner to represent her in an employee discrimination matter (R67, ¶6). In or about November 2014, Petitioner represented Ms. Coleman at a hearing in the matter before an Administrative Law Judge (ALJ) and during a recess Petitioner

[1] Petitioner was reelected in 2018 and his current term expires March 31, 2022 (R3). As a part-time judge, Petitioner is permitted to practice law (R3).

referred to the ALJ, who is African-American, as "that fucking nigger" and/or "that nigger" (R67, ¶7).

The complaint further alleges that in the fall of 2014, the Colemans retained Petitioner to represent them in a Family Court matter in which they sought the right to visit their grandchild (R67, ¶8). Between October 24, 2014 and February 22, 2015, Petitioner communicated with his clients via emails in which he referred to: (1) the Colemans' daughter as a "bitch" on three different occasions (R67, ¶9; R68, ¶¶14-15); (2) their daughter's attorney as a "cunt on wheels" (R67-68, ¶10); (3) people who work in schools as "assholes" (R68, ¶11); (4) the Coleman's daughter as an "asshole" (R68, ¶12); (5) the Coleman's daughter and her ex-husband as "scumbags" (R68, ¶13); (6) their daughter's attorney as "eyelashes" (R68, ¶16), and (7) the "judge" presiding over the Family Court matter as an "asshole" (R69, ¶18).

B. <u>Petitioner's Answer & Motion to Dismiss</u>

Petitioner filed an Answer dated December 12, 2017. Petitioner admitted that in or about November 2013 he was retained by Jennifer Coleman to represent her in an employee discrimination matter (R83, ¶4) and that in or about November 2014 he represented her at a hearing before an Administrative Law Judge (R83, ¶5). Petitioner admitted that he spoke with Mr. and Ms. Coleman about the case

during a recess but denied the allegations that he called the Administrative Law Judge that "fucking nigger" and/or "that nigger" (R83-84, ¶5).

Petitioner admitted that in or about the fall of 2014, the Colemans retained him to represent them in a Family Court matter and admitted that he sent all the vulgar emails attached to the Formal Written Complaint (R84, ¶6).

At the time he filed his Answer, Petitioner also filed a Motion to Dismiss and/or Motion for Summary Determination arguing, *inter alia*, that the Formal Written Complaint should be dismissed because the statements were made while he was acting as an attorney and were contained in private emails with his clients (R155-90). By Decision and Order dated March 16, 2018, the Commission denied Petitioner's motion in all respects and referred the matter to a Referee for an evidentiary hearing (R191-92).

C. <u>The Hearing</u>

On March 29, 2018, the Commission designated Judge John Collins as Referee to hear and report proposed findings of fact and conclusions of law (R193). A hearing was held in New York City on August 6 and 7, 2018 (R194-348. Commission Counsel called two witnesses (R195) and introduced 14 exhibits (R349-99). Petitioner testified on his own behalf and called four character witnesses (R279).

D. The Referee's Report

On January 26, 2019, the Referee issued a report (R462-74) separating the Commission's single charge of misconduct into two parts "1A" & "1B" (R467-68).

In "1A," the Referee sustained the allegations that Petitioner used profane, obscene and vulgar language such as "cunt," "bitch," "asshole," "scumbags," and "eyelashes" in emails to Mr. and Mrs. Coleman (R469) and concluded that Petitioner violated the Rules Governing Judicial Conduct (R472-74).

In "1B," the Referee found that the Commission did not sustain by a preponderance of the evidence that Petitioner referred to an Administrative Law Judge as "that fucking nigger" and/or that "nigger" (R472).

The Referee found that Petitioner's "use of such vulgar language and a reference of a sexual character diminish (sic) the esteem of the judiciary and the dignity of judicial office" (R472) and that Petitioner's conduct, "reflects adversely on his appreciation of the role and responsibility of a Judge, whether full time or part time" (R473).

E. The Commission's Determination

On October 9, 2019, the Commission rendered a determination that Petitioner used "profane, vulgar and sexist terms" to "repeatedly [denigrate]" litigants and officers of the court in a legal proceeding, warranting his removal from judicial office (R7).

The Commission found that in email communications over a period of months, Petitioner used "crude and derogatory epithets referring to various individuals involved in [his clients'] case" (R7). Petitioner

> referred to the clients' daughter and her former husband … as "the two scumbags," and referred to the daughter as an "asshole" and a "bitch" (or 'that bitch") on multiple occasions. Cautioning his clients not to contact their grandchild's school, he used the same profanity referring to the school's staff ("You should know by now that people who work in schools are assholes"). Referring to the daughter's lawyer, respondent's language was equally vulgar and sexist ("a cunt on wheels" and "eyelashes"). His profane insults extended even to the court referee ("you may have noticed that the 'judge' is an asshole. An 'asshole' can issue a warrant for your arrest").

(R7-8).

The Commission noted that while "[t]he impropriety of such language requires little discussion," neither "criticism of individuals" nor "the use of profanity" was at issue in this case (R8). Rather, Petitioner's conduct violated the rules because, "as [this Court] has held, using crude language that reflects bias or otherwise diminishes respect for our system of justice, even off the bench, is inconsistent with a judge's ethical obligations" (R8).

"At a minimum, gender-based slurs, which denigrate a woman's worth and abilities and convey an appearance of gender bias, should have no place in a judge's vocabulary" (R8).

The Commission rejected Petitioner's argument that his communications did not rise to the level of misconduct because they were "private," finding: (1) that a judge "carries the mantle of his esteemed office" wherever he goes, quoting *Matter of Steinberg,* 51 NY2d 74, 81 (1980), (2) that a judge "must conduct his everyday affairs in a manner beyond reproach," quoting *Matter of Kuehnel,* 49 NY2d 465, 469 (1980) and (3) that misconduct is not mitigated even when it occurs "where [the judge] may have had an expectation of privacy," quoting *Matter of Backal,* 87 NY2d 1, 8 (1995) (R9-10).

The Commission also rejected Petitioner's argument that his conduct was "unrelated to his role as a judge" (R9), find that "both the context and substance of respondent's off-the-bench statements were inextricably connected to his judicial role" (R10). Petitioner was "was communicating with [his clients] as an officer of the court, … and as a judge himself, he personified the legal system" (R10). "By denigrating and insulting [opposing counsel] and the court referee in obscene and vulgar terms, he conveyed disrespect and disdain for the legal process itself, which was inconsistent with his role as a judge" (R10).

A majority of the Commission accepted the Referee's conclusion that Petitioner's alleged use of a racial epithet to describe an African-American administrative law judge was not sustained (R11, 535-42).

With respect to sanction, the Commission rejected Petitioner's contention that he used such "profane and sexist" language because it was language used by his client herself (R12). The Commission found "nothing in the record to support [Petitioner's] claim about his client's vocabulary" (R12) and held that even if his client had used such language, "it would be all the more imperative to set an appropriate tone by acting with dignity and decorum, instead of responding in kind" (R13). The Commission also observed that although the Referee found Petitioner showed "sincere contriteness" for his conduct, the record reflected that he "also attempted to rationalize [his conduct] and offered excuses" (R13 n4).

Given Petitioner's "multiple, serious derelictions confirmed by the record … as well as [his] prior caution," the Commission found that Petitioner was unfit to remain on the bench (R13).

Three Commission members dissented as to dismissal of Petitioner's alleged utterance of a racial epithet (R13). Commission Chair Joseph W. Belluck, Esq., wrote an opinion dissenting in part, joined by Appellate Division Justice Angela M. Mazzarelli, opining that Petitioner's "liberal use of such profoundly crude and blatantly sexist language to describe his clients' daughter and her female lawyer makes utterly credible the allegation that he used racist language of a similarly extreme nature in reference to the administrative law judge" (R15). Commission

Vice-Chair Paul B. Harding, Esq., also dissented as to the dismissal of the racial epithet charge, without opinion (R13).

THE FACTS

Jennifer Coleman met Petitioner in or about 1989, when a client of her cleaning service referred her (R201). Ms. Coleman cleaned Petitioner's home for approximately 5 years and later occasionally took care of Petitioner's cats (R202). Her only other contact through the years was seeing him on occasion in the Village and waving to him (R202-03). After the cat-sitting ended job, Ms. Coleman had no substantive conversations with Petitioner until 2013, when she retained him to represent her in an employment discrimination case before the Division of Human Rights (DHR) against the Cold Spring Harbor School District (R204-05, 222).[2]

During the course of the DHR matter, the Colemans asked Petitioner to handle a Family Court matter in which their daughter, Kelly Martino, sought an order of protection to limit contact with their grandson (R208-09). Petitioner was unable to take on the new matter because he was running for District Court judge,[3] so Ms. Coleman hired another attorney, and the order of protection was vacated

[2] A majority of the Commission members did not sustain paragraph 7 of the Formal Written Complaint alleging that Petitioner uttered a racial epithet during a recess in Ms. Coleman's employment discrimination case. As a result, the facts related to that allegation will not be discussed in this brief. The Court can find summaries of the hearing evidence related to that allegation in the briefs submitted to the Referee (R400-460).

[3] The Colemans supported Petitioner's campaign by putting up signs, attending a fundraiser and contributing $200 (R206-07).

(R208-09). By late November 2014, the Colemans had retained Petitioner to represent them on a new Family Court petition seeking visitation with their grandson (R217; R349-359).

The main form of communication between the Colemans and Petitioner was by email (R205). From October 24, 2014 through February 22, 2015, Petitioner sent the Colemans emails containing the following language:

- In an email on October 24, 2014, Petitioner referred to Kelly Martino, the Colemans' daughter, as a "**bitch**" (R214-15; R349) (emphasis added).
- In an email on November 25, 2014, Petitioner referred to Karen McGuire, the daughter's attorney as a "**cunt on wheels**" (R217; R350) (emphasis added).
- In another email on November 25, 2014, Petitioner referred to the people who work in schools as "**assholes**." (R221-22; R351) (emphasis added).
- In an email on January 13, 2015, Petitioner referred to Kelly Martino as an "**asshole**." (R224; R352) (emphasis added).
- In an email on January 22, 2015, Petitioner referred to Kelly Martino and her ex-husband as "**scumbags**." (R227; R353) (emphasis added).
- In an email on February 10, 2015, Petitioner again referred to Kelly Martino as a "**bitch**" (R229-30; R354) (emphasis added).
- In an email on February 11, 2015, Petitioner again referred to Kelly Martino as a "**bitch**" (R232; R356) (emphasis added).
- In a second email on February 11, 2015, Petitioner referred to the Colemans' daughter's attorney as "**eyelashes**" instead of using her name. (R233; R357) (emphasis added).

- In an email on February 22, 2015, Petitioner referred to the "judge" – court attorney-referee Colleen Fondulis – in the Family Court matter as an "**asshole**" (R235; R359) (emphasis added).[4]

A. Petitioner's Written Responses to the Commission

During the Commission's investigation of the matters herein, Petitioner readily admitted that he sent all the above emails to the Colemans (R360, 373). He said he described Karen McGuire as a "cunt on wheels" because she was an "aggressive matrimonial practitioner in Suffolk County, known for sharp lawyering" (R361, 366). He conceded having "no valid explanation to justify using [the] epithet" "scumbags" to describe the Colemans' daughter and her ex-husband (R361, 366).

Petitioner acknowledged that his crude language depicting others in the justice system, including an adversary lawyer, a party respondent, and a referee, "coarsens and potentially denigrates everyone" (R362) and that his conduct violated the Rules (R362, 366-67; R393-94).

B. Petitioner's Hearing Testimony

Following his admission to the practice of law in 1981, Petitioner began work at a local firm doing criminal defense (R319-20). In 1984 he opened his own private practice and maintained that practice doing criminal defense, appeals and

[4] Petitioner explained that the "judge" in the matter was court attorney-referee Colleen Fondulis (R361).

some civil litigation until the "end of 2014, beginning of 2015," when he wound down his practice (R320, 323). Petitioner was elected in 1994 as Northport Village Justice (R320). He is also a part-time judicial hearing officer for the Suffolk County Parking Traffic and Violations Agency and teaches at Farmingdale State College (R321, 322).

Petitioner has known Ms. Coleman since the mid-1990's, when she worked as a housecleaner for his family for a few years and occasionally would also look after their cats (R326).

In 2013, Petitioner was retained by Ms. Coleman to assist her in connection with her employment discrimination action and she paid him an initial retainer of $7,500 (R330). The employment discrimination matter ultimately went to trial and she paid another $5,000 (R330). The Colemans paid Petitioner $4,500 for his representation on the grandparent visitation petition in Family Court (R330-31).

According to Petitioner, Ms. Coleman was a "needy" client who "lived on her iPhone, on her laptop, on her computer," and email was an expedient way for them to communicate (R327). He testified that he exchanged numerous emails with Ms. Coleman and acknowledged that his tone became "too conversational" and "far too familiar" (R327).

Petitioner admitted that he used profane language in email communications with his client (R326) and that it was unprofessional to do so (R327). He testified

that it is not "appropriate for any attorney to … denigrate him[self] or herself or the profession in any way … by using language that reflects poorly on the profession" (R327).

Petitioner acknowledged that the word "cunt" is sexist (R336) and that it is a derogatory term used specifically against women (R342). Petitioner admitted that he would have never said the word to Ms. McGuire's face (R340-41). Petitioner also conceded that it "showed a lack of sensitivity" for him to use the word "cunt" in an email to Ms. Coleman since that word was the "centerpiece" of her petition in the discrimination matter – it was the same word used by Ms. Coleman's supervisor, who "would laugh at her in the presence of other employees quoting and requoting that word" (R334-36).

Petitioner testified that at the time it "didn't dawn on him" that sending these emails to his client "somehow had a nexus or a connection to his judicial persona," but he had "learned the hard way that it certainly does" (R328). He acknowledged that this language showed a lack of respect for his clients (R342).

ARGUMENT

POINT I

PETITIONER VIOLATED THE RULES WHEN HE USED THE WORDS "CUNT," "BITCH," "ASSHOLE," "SCUMBAGS," AND "EYELASHES" TO REFER TO A FEMALE ATTORNEY, FEMALE LITIGANT AND FEMALE COURT REFEREE WHILE ACTING AS AN ATTORNEY IN A JUDICIAL PROCEEDING.

Petitioner concedes, as he must, that he committed judicial misconduct when he repeatedly made sexist and vulgar remarks to his clients in a legal proceeding about a female attorney, a female litigant and the female court referee (Br 9).[5]

The Rules Governing Judicial Conduct "exist to maintain respect toward everyone who appears in a court and to encourage respect for the operation of the judicial process at all levels of the system." *Matter of Roberts,* 91 NY2d 93, 97 (1997). A judge is required to observe "high standards of conduct" and to act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Rules 100.1, 100.2(A). While representing clients as an officer of the court, a judge is required to act in a manner that does not "cast reasonable doubt on the judge's capacity to act impartially" or "detract from the dignity of judicial office," and to proceed in a way that is "not incompatible with judicial office." Rules 100.4(A)(1)(2)(3).

[5] References to "Br" refer to Petitioner's brief to this Court.

Thus, this Court has repeatedly sanctioned judges for sexist or profane language uttered while off-the-bench. *See e.g. Matter of Assini,* 94 NY2d 26 (1999) (judge used profane language in argument with fellow judge over court staff); *Matter of Cerbone,* 61 NY2d 93 (1984) (judge used abusive and profane language during altercation in a bar); *Matter of Shilling,* 51 NY2d 397 (1980) (judge used vulgar and profane language in confrontation in courthouse corridor).

POINT II

PETITIONER SHOULD BE REMOVED FROM OFFICE FOR USING SEXIST AND PROFANE LANGUAGE THAT CREATED THE APPEARANCE OF GENDER BIAS AND UNDERMINED RESPECT FOR THE JUDICAL SYSTEM.

Discipline in this case is not predicated on the occasional use of vulgar or sexist language. Rather, as the Commission found, Petitioner should be removed from office for a contemptuous "pattern of statements that undermines respect for women and the legal system as a whole" (R13).

The Commission found that "gender-based slurs, which denigrate a woman's worth and abilities and convey an appearance of gender bias, should have no place in a judge's vocabulary" (R8). "[C]rude language that reflects bias or otherwise diminishes respect for our system of justice, even off the bench, is inconsistent with a judge's ethical obligations" (R8).

Petitioner's multiple violations of these fundamental precepts, taken together with his prior caution for making sarcastic and disrespectful comments to two women who appeared before him in court, warrant his removal.

A. Petitioner's egregious gender-based slur, coupled with his additional profane remarks directed at female participants in a Family Court matter, created an unacceptable appearance of gender bias.

Certain language manifests "an impermissible bias that threatens public confidence in the judiciary." *Matter of Mulroy*, 94 NY2d 652, 657 (2000). In this matter, Petitioner's repeated use of crude, vulgar and sexist language to refer to various female participants in a legal proceeding created the unacceptable appearance of gender bias and warrants his removal.

The gender-based slur directed at Petitioner's opposing counsel is particularly egregious. This Court has described the term as "obscene and sexist," "vulgar and offensive," "vile" and "reprehensible." *Matter of Assini,* 94 NY2d 26, 29 (1999).[6] *See also Matter of Aldrich*, 58 NY2d 279, 281 (1983) (describing the term as "obscene and vulgar").[7]

"'Cunt,' referring to a woman's vagina, is the essence of a gender-specific slur." *Reeves v CH Robinson Worldwide, Inc,* 594 F3d 798, 812 (11th Cir 2010).

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[6] In *Assini*, the judge referred to a fellow jurist as a "fucking cunt" and "fucking bitch." *Matter of Assini,* 2000 Ann Rep 95, 97 (Commn on Jud Conduct, March 4, 1999).

[7] In *Aldrich,* the judge referred to the Dutchess County Executive as a "cunt" and "pussy." *Matter of Aldrich*, 1983 Ann Rep 75, 76-77 (Commn on Jud Conduct, Sept 17, 1982).

"[T]he sexual epithets … 'curb side cunt,' and 'bitch' 'have been identified as intensely degrading to women.'" *Dyke v McCleave,* 79 F Supp2d 98, 106 (NDNY 2000) *citing Winsor v Hinckley Dodge, Inc,* 79 F3d 996, 1000 (10th Cir.1996).

It is especially troubling that Petitioner used the word "cunt" to convey that his female adversary was "aggressive" and "persistent" (R336; 361, 366). Applied to a male attorney, such attributes are generally intended as compliments. But rather than use words that might signal respect for the abilities of his opposing counsel,[8] Petitioner chose a word he concedes is a "sexist" and "derogatory term used specifically against women" (R336, 342).

During the Commission's investigation, Petitioner conceded that his use of the slur "cunt on wheels" "may suggest that [he harbors] a bias against women or women lawyers" (R398). This Court has previously held that even "isolated instances" indicating such sexist bias are "highly inappropriate," "completely antithetical to the role of a Judge," and "cast doubt on a Judge's ability to be impartial and fair-minded." *Matter of Duckman,* 92 NY2d 141, 152 n4 (1998).

The appearance of gender bias is further exacerbated here by the vulgar and profane epithets that Petitioner used to describe other female participants in the legal proceeding. Petitioner called the female court referee an "asshole" (R235;

[8] It is telling that at the hearing, Petitioner referenced quotes from Ms. McGuire's professional website asserting that she provided "zealous representation" and had a "reputation as a skilled divorce litigator" as evidence that "supports" "what [he] tried to convey to [his] clients" (R120).

359).[9] He repeatedly referred to the Colemans' daughter – a litigant in the Family Court proceeding – as a "bitch" (R215; 349; 229-30; 354; 232; 356). And in a separate email, Petitioner referred to opposing counsel as "eyelashes" instead of using her name (R233; 357). As the Commission found, "[t]he impropriety of such language requires little discussion" (R8).

Finally, beyond the appearance of gender bias, Petitioner's use of the word "cunt" in an email to Ms. Coleman was especially insensitive given his own testimony that her supervisor in the school discrimination case "used that very word against her" and "would laugh at her in the presence of other employees quoting and requoting that word" (R335-36).

Significantly, unlike other judges removed for similar conduct, Petitioner's vile language was not spontaneously blurted out in a heated confrontation or under the influence of alcohol, as in *Assini* or *Aldrich, supra.* His "offensive words were not thoughtless slips. They were included in emails he composed to his clients, where he had an opportunity to consider his written words before sending messages that could be preserved and shared" (R8-9). Indeed, that Petitioner wrote "don't quote me" to his clients when he called opposing counsel a "cunt" (R350) makes clear he well knew the impropriety of his language at the time he used it.

[9] In his written response to the Commission's inquiry letter, Petitioner explained that the "judge" in the matter was court attorney-referee Colleen Fondulis (R361).

B. Petitioner's vulgar and profane language diminished respect for the judicial system as a whole.

In *Matter of Assini, supra,* this Court found that a judge who "repeatedly disparaged his judicial colleague in vile terms … undermined not only the dignity of a fellow Justice, but also the stature and dignity of petitioner's court and the judicial system as a whole." *Id.* at 29. Petitioner engaged in similar conduct here.

It is important to note that Petitioner did not use these vulgar and profane terms in casual conversation; he used all of them in the course of representing a client in a judicial proceeding. As the Commission found, Petitioner

> was communicating with [the Colemans] as an officer of the court … and as a judge himself, he personified the legal system. His crude language disparaging others involved in his clients' case, including other officers of the court, reflected poorly on himself as a representative of the legal system. By denigrating and insulting their adversary's lawyer and the court referee in obscene and vulgar terms, he conveyed disrespect and disdain for the legal process itself[.]

(R10).

Contrary to Petitioner's claim (Br 11-12 n1), removal in this case would not "cast a chill" over part-time judges' ability to engage in "outside employment to make a living." It is self-evident that Petitioner's use of profane and sexist epithets was not a necessary or desirable element in his provision of competent legal representation. Indeed, the Appellate Division has not hesitated to discipline attorneys for using vulgar or sexist language, even when such conduct did not

occur in the courtroom. *See e.g., Matter of Bloom,* __ AD3d __, 2019 WL 6884947 (2d Dept 2019) (attorney disciplined for referring to female ADAs as "sluts" in conversation outside the courtroom); *Matter of Johnson*, 149 AD3d 124 (4th Dept 2017) (attorney disciplined for sending "vulgar and profane" emails to attorney adversary); *Matter of Brecker*, 309 AD2d 77 (2d Dept 2003) (attorney disciplined for *inter alia* leaving "vulgar and profane" messages on his client's answering machine); *Matter of McDonald,* 241 AD2d 255 (2d Dept 1998) (attorney disciplined for leaving telephone messages containing "vulgar and threatening language"); *Matter of Schiff*, 190 AD2d 293 (1st Dept 1993) (attorney disciplined for "vulgar, obscene, and sexist epithets" directed at female adversary's "anatomy and gender" in deposition).

Moreover, as Petitioner conceded, he could have effectively communicated with his clients without using profanity. Instead of calling his opposing counsel a "cunt on wheels," he could have written that she was "flamboyant, aggressive, persistent" (R336). Rather than refer to the Colemans' daughter and her husband as "the two scumbags" – a term this Court disapproved of as "profane and disparaging" in *Matter of Romano,* 93 NY2d 161, 163 (1999)[10] – Petitioner acknowledged that he should have said "adversaries," "enemies" or simply "your

[10] In *Romano*, the the judge referred to a detective as a "scumbag" and an "asshole." *Matter of Romano,* 1999 Ann Rep 133, 134 (Commn on Jud Conduct, August 7, 1998).

daughter" (R361, 384, 386). As for his decision to call the court referee an "asshole," Respondent conceded that he could have used the word "autocrat" but claimed that word was "probably not in the Colemans' lexicon," thus blaming his clients for his own inability to find a suitable synonym (R361).

Petitioner's use of vulgar and profane epithets to describe a court referee, opposing counsel and litigants diminished respect for our system of justice. Such conduct is "inconsistent with proper judicial demeanor," and "subjects the judiciary as a whole to disrespect." *Matter of Kuehnel,* 49 NY2d 465, 469 (1980).

C. Petitioner's prior caution for making disrespectful comments to two women who appeared in his court is a significant aggravating factor.

Failure to abide by a prior Commission caution is a "significant aggravating factor." *Matter of George,* 22 NY3d 323, 329 (2013). *See also Matter of Assini*, 94 NY2d at 30-31 (1999).

In 2002, Petitioner was cautioned for making "several sarcastic, rude and otherwise inappropriate remarks" to a female defendant and her mother (R550-53). When Petitioner learned that the defendant's mother was not in court, he said he would "direct the clerk to call [her] mother and direct her to appear here tonight. *She has no choice in the matter. Or I'll send a police car to get her."* (R551). At the time, Petitioner told the Commission that he was "deeply ashamed" of having made this "ill-mannered wisecrack" (R551).

In addition, Petitioner was cautioned for having said "almost married doesn't count" in the presence of the defendant's mother, when he learned that the man the defendant called her "stepfather" was in fact her mother's fiancé (R551). With respect to those remarks, Petitioner told the Commission that he "winced a little" when he spoke those words and realized that his words unintentionally conveyed a "deeper, moralistic message about the mother's marital status" (R551).

Significantly, the Commission found that Petitioner was "[n]ot only … repeatedly sarcastic and disrespectful throughout the proceeding," but that he made "recurrent detours off the record" suggesting he was "well aware of what [he was] doing at the time and [was] being careful not to leave a transcribed record of [his] snide comments" (R551). That finding is echoed in this record, where Petitioner emailed his clients using a gender-based slur, followed by the words, "don't quote me" (R350).

D. Petitioner's arguments in mitigation and his claim that the Commission ignored relevant evidence are unavailing.

Petitioner's arguments in mitigation and his claim that the Commission ignored evidence in mitigation of his misconduct (Br 14-20) are unavailing.

1. The Commission did not "ignore" Petitioner's expressions of remorse.

Petitioner's claim that the Commission's determination "is devoid of any reference" to his expression of remorse (Br 18) is simply untrue. The Commission

explicitly referenced the Referee's findings as to remorse (R5-6) and weighed those findings against Petitioner's repeated attempts to blame his clients for his conduct (R13 n4).

At the hearing, Petitioner testified that he used obscene language because Ms. Coleman herself used profanity and he "was pandering or patronizing her in trying to bring myself down to that level" (R339). The Commission explicitly rejected that argument, finding "nothing in the record to support [Petitioner's] claim" that his profanity was "the kind of language [Ms. Coleman] used herself" (R12).[11]

Yet Petitioner continues to argue in his brief to this Court that his clients "often resorted to such inappropriate language" (Br 6), and that "inappropriate terms were often utilized by the Colemans and his own vernacular devolved accordingly" (Br 7). As the Commission found, even if the Colemans did use the kind of profanity that Petitioner admittedly used here, "it would be all the more imperative to set an appropriate tone by acting with dignity and decorum" (R13).

Petitioner's continuing attempt to blame his clients for his use of "vile" and "reprehensible," *Matter of Assini,* 94 NY2d at 29, gender-based slurs makes clear that he still does not accept responsibility for his conduct. "In some instances

[11] To the contrary, Ms. Coleman testified that she found the word "cunt" "upsetting" and that it made her "uncomfortable" (R217-18).

contrition may be insincere, and in others no amount of it will override inexcusable conduct." *Matter of Bauer,* 3 NY3d 158, 165 (2004).

2. Petitioner's character evidence was largely inadmissible and wholly unpersuasive.

Contrary to Petitioner's argument (Br 16), the Commission did not "[fail] to properly credit" the testimony of Petitioner's character witnesses. The Commission heard Petitioner's argument regarding his character testimony (R39, 55) and appropriately gave it the weight it deserved.

Indeed, the character evidence on which Petitioner most relies – testimony that these witnesses never heard Respondent use offensive language (Br 15-16) – is "the type of propensity evidence that lacks probative value concerning any material factual issue, and has the potential to induce the [finder of fact] to decide the case based on evidence of defendant's character." *Mazella v Beals,* 27 NY3d 694, 710 (2016). *See also People v. Kuss*, 32 NY2d 436, 443 (1973) ("reputation is the only proof which the law allows" and neither party "may introduce evidence of particular acts"). Yet even if that testimony were properly admitted and accepted as true, it would hardly refute the Colemans' testimony that Petitioner used vulgar or sexist language on occasions when his character witnesses were not present.

Petitioner's argument that the Commission "failed to properly credit this testimony" (Br 16) rests on the "misguided … suggestion that general reputation testimony … make[s] the findings of the … commission against the weight of the

evidence." *Matter of Shilling,* 51 NY2d 397, 402 (1980). *See also, Matter of Shaw,* 96 NY2d 7, 9-10 (2001) (rejecting claim that the Commission ignored testimony of 14 character witnesses). The Commission properly considered the testimony of Petitioner's character witnesses and found nonetheless that he is unfit to remain in judicial office.

3. Petitioner's argument in mitigation that his communications were "private" is wrong on the law and the facts.

Petitioner's argument that he should not be removed because his communications with the Colemans were "private" (Br 19) is without merit.

This Court has long held that "a Judge cannot simply cordon off his public role from his private life and assume safely that the former will have no impact upon the latter." *Matter of Steinberg,* 51 NY2d 74, 81 (1980). "Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect." *Matter of Kuehnel*, 49 NY2d 465, 469 (1980).

In *Matter of Backal,* 87 NY2d 1 (1995), this Court rejected the very argument that Petitioner makes here, holding that

> [t]he facts that petitioner's misconduct occurred ... where [he] may have had an expectation of privacy and that [his] statements were made to a person [he] considered to be a close associate do not mitigate the wrongfulness of [his] conduct ... Our ethical codes and precedent set forth with no equivocation that Judges are accountable "at all times" for their conduct – including their conversation – both on and off the Bench.

Id. at 8 (citation omitted) (emphasis added).

As the Commission found (R11), this Court's decision in *Matter of Cunningham,* 57 NY2d 270 (1982) (Br 23) does not require a different result. *Cunningham* involved two letters sent by a judge to a fellow jurist that "came to public attention result[ing] from certain bizarre circumstances which could not have been anticipated, the responsibility for which cannot be attributed to [the] Judge." *Id.* at 276 (emphasis added). In contrast here, Petitioner conceded that the Colemans themselves

> are members of the public. I mean, yes, they were clients of mine at that particular point in time but they are members of the public. If they are overhearing someone who's a judge refer to someone else who's involved in the justice system with foul language, then those words can travel.

(R398).

Similarly, in his written response to the Commission's inquiries, Petitioner wrote that the Colemans

> remain part of the public. To the extent they knew I was a village justice – and they did – the use of crude language to depict others in the justice system (an adversary lawyer; parties respondent; a referee) coarsens and potentially denigrates everyone. This is especially dangerous in an internet age.

(R362).

As the Commission found,

> the Colemans were members of the public in addition to being respondent's legal clients and, as is evident here, clients can become disgruntled and relationships can fray. Every judge must be mindful of the duty to avoid any conduct or statements, even off the bench, that undermine public confidence in the judiciary or respect for our system of justice as a whole.

(R11).

Petitioner's repeated use of sexist and profane terms in emails with his clients warrants his removal.

CONCLUSION

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

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New York, New York

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 500.13 (C) (1)

I certify that this brief was prepared using Microsoft Word 2013 and that the total word court for the body of the brief is 5977 words.

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