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.

REPLY BRIEF FOR PETITIONER

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POINT I:

THIS IS A MATTER OF FIRST IMPRESSION THAT MUST BE DETERMINED BASED UPON AN ASSESSMENT OF ITS INDIVIDUAL FACTS AND CIRCUMSTANCES

First and foremost, it is imperative to note that the facts and circumstances at issue herein constitute a matter of first impression. Specifically, there is no case precedent to justify the extreme punitive sanction of removal from the bench for misconduct undertaken while engaged as an attorney, which misconduct was not only outside the scope of judicial duties, but restricted to private communications with a single-unit client over a limited period of time. Consequently, this honorable Court must conduct an "assessment of [the] individual facts, in relation to prevailing standards of judicial behavior and the prospect of future misconduct and continued judicial service." *Matter of Roberts*, 91 N.Y.2d 93 (1997). Upon such review, it is respectfully requested that the extreme sanction of removal be reduced to censure.

A. The Respondent's suggestion of a pattern of gender bias is not supported by the record and only serves to distract from the issues herein

The Respondent has skewed the facts at issue herein to suggest a pattern of gender bias in a transparent attempt to force this matter into a category of case precedent that would justify the Petitioner's removal from the bench.

First, the Respondent has made repeated reference to a Letter of Caution from nearly two (2) decades ago, drawing a speculative connection to the instant matter

based upon the mere presence of females in both instances. However, contrary to the Respondent's assertions, the Letter of Caution is of no import herein, particularly as it is devoid of any reference to gender bias and simply cautioned the Petitioner not to be discourteous to litigants appearing before him.

Moreover, the Respondent has grossly misrepresented the Petitioner's acceptance of accountability for the emails he sent as an admission that he "repeatedly made sexist and vulgar remarks to his clients." (Br 14). To the contrary, the Petitioner has always maintained, that the emails he sent were a departure from his normal course of conduct and were limited to a single-unit client. As to the content of said emails, such contained a total of six (6) inappropriate words – only one (1) of which had a gender-based connotation. With particular regard to the only inappropriate word that had such a gender-based connotation, the Respondent has taken the Petitioner's acknowledgment that the use of the term "cunt" may suggest "a bias against women or women lawyers" completely out of context. (R. 398). In its entirety, the Petitioner's testimony regarding this word is as follows:

> Q. Do you on reflection understand that a lawyer using language of this sort that we've just spoke [*sic*] about – the law – your adversary being a "Cunt on wheels" may suggest that you harbor a bias against women or women lawyers?"
> A. I certainly do which is why this is so hurtful to me, because this is anything but who I am. I am exquisitely sensitive to gender discrimination, to bias issues generally. I'm a member of the Women's Bar Association of the State of New York . . . .

(R. 398).

Regardless, although inappropriate, this particular term, which is the only term utilized by the Petitioner that has such a gender-based connotation, was written only once, which belies the allegation that the Petitioner has "repeatedly" made sexist remarks to his clients.

Ultimately, the Petitioner has never espoused animus or bias towards the female gender and the mere fact that females were involved in this matter was incidental, particularly as males were also involved. Thus, the suggestion of a pattern of gender bias is not supported by the record and only serves to distract from the issue herein, which is the appropriateness of the sanction imposed.

B. The instant matter is readily distinguished from the case law relied upon by the Respondent in support of removal

In a further attempt to force this matter into a category of case precedent that would justify the Petitioner's removal from the bench, the Respondent has relied upon *Matter of Assini*, *Matter of Cerbone* and *Matter of Shilling*. However, the Respondent's reliance upon this line of cases is misplaced, as such is based upon a generalization of this honorable Court's determinations, without due emphasis upon the underlying facts – all of which are readily distinguished from those at issue herein.

First, 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 26, 29 (1999). In contrast, in the instant matter, the inappropriate comments were contained within a private email exchange, written by the Petitioner in his capacity as an attorney and sent to a single-unit client over a limited period of time (*i.e.*, several months). Moreover, it is crucial to note that there is a marked difference between words uttered aloud for multiple bystanders to hear and those written for an intended recipient. Additionally, there is a marked difference between the disparagement of a colleague, with whom you are in league, to other employees and the disparagement of an adversary, whom you are against, to someone whose interests you are duty-bound to promote. To posit that an attorney must espouse the same impartiality as a judge would fly in the face of zealous advocacy, where positions are undoubtedly polarized; thus, while the use of disparaging language is inappropriate, the context in which it was applied is relevant in determining how such language would be received by the recipient. Thus, while the judge in *Matter of Assini* was removed from the bench, it was for misconduct readily distinguished from the misconduct at issue herein.

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 and was limited to private email communications that were never disseminated to the public. There is a marked difference between a judge's belligerence during an altercation in a public bar undermining respect for the judicial system and an attorney's use of the term such as "asshole" in an email sent to a client. At no point in time throughout any of the communication at issue herein did the Petitioner reference his role as a part-time judge or seek to couch his opinions regarding the case, his adversaries or the judiciary from role as a part-time judge. It stands to reason that the public response to a drunken judge engaged in a bar fight would be drastically different than a part-time judge engaged as an attorney sending a private email to his clients It further stands to reason that a drastically different response warrants a different sanction, as well. Thus, while the judge in *Matter of Cerbone* was removed from the bench, it was for misconduct readily distinguished from the misconduct at issue herein.

Moreover, in *Matter of Shilling*, the judge exploited his judicial role for personal gain when he repeatedly threatened to utilize his "political clout" to achieve a desired outcome for an association for which he was a trustee. 51 N.Y.2d 397. Contrastingly, the Petitioner herein never referenced, let alone exploited, his judicial role to achieve any outcome on behalf of himself or his clients. *Cf. 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"). Thus, while the judge in *Matter of Shilling* was removed from the bench, it was for misconduct readily distinguished from the misconduct at issue herein.

Collectively, aside from invoking the sanction favored by the Respondent, the aforementioned case precedent is not controlling herein as the facts and legal reasoning that warranted removal in those cases are readily distinguishable from the facts at issue herein. Therefore, it is respectfully requested that this honorable Court conduct an "assessment of [the] individual facts." *Matter of Roberts*, 91 N.Y.2d 93 (1997).

C. The case law regarding attorney discipline is not controlling herein

The Respondent has cited a string of case law regarding attorney discipline; however, such case law is not controlling herein as judicial grievances are determined according to a different canon of ethics and an entirely separate disciplinary process. Therefore, it is respectfully requested that these cases be disregarded in their entirety and afforded no merit herein.[1]

D. The Respondent's application of *Matter of Backal* and *Matter of Cunningham* is misplaced, and proper application of these precedents warrants imposition of sanction no greater than censure

The Respondent's application of *Matter of Backal*, 87 N.Y.2d 1 (1995), is misplaced as the facts and legal reasoning 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 where the judge arguably enjoyed some expectation of privacy, such misconduct was not limited merely to the 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

[1] To the extent, however, that the Court at all considers the Commission's arguments with respect to the application of attorney-disciplinary decisions, it is respectfully requested that the Court afford limited credit to such case-law in light of the fact that attorney disciplinary matters are often (and are here) inapposite in subject to judicial discipline matters, and that a part-time judge acting as an attorney can be subject to discipline for his conduct as a lawyer through such a separate process.

authorities." *Id.* In contrast, in the instant matter, select words, however inappropriate, culled from private attorney email cannot be deemed tantamount to the truly egregious misconduct in *Matter of Backal*, wherein the respondent judge in effect committed a crime by knowingly aiding and abetting the commission of a crime. Context aside, the conduct in *Matter of Backal* therefore doubtlessly rose to the predicate level of egregiousness where removal was warranted. In marked contrast, the conduct in the matter sub judice involved the use of concededly inappropriate language in misguided aid of private clients, but by no means so impugns public confidence in the judiciary to merit imposition of the same sanction as in *Matter of Backal*.

Additionally, contrary to the Respondent's assertion, this honorable Court's application in *Matter of Cunningham* is relevant herein. 57 N.Y.2d 270 (1982). To this end, while the Petitioner has acknowledged that the Colemans were members of the public, it remains uncontroverted that the emails sent by the Petitioner were limited to "the eyes of one person only," which was the key factor taken into consideration by this honorable Court in *Matter of Cunningham*. 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, constituting a single-unit client, out of hundreds of thousands of individuals over whose cases the Petitioner has presided 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 intended for their eyes only, and intended to be part of a confidential correspondence. 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. Indeed, the Petitioner has cultivated a reputation as a "fine judge" with "a good knowledge of the law" who "treats defendants fairly." (R. 284, 301-02) Therefore, as in *Matter of Cunningham*, it is respectfully submitted that censure is the most appropriate sanction herein.

POINT II:

THE PETITIONER HAS DEMONSTRATED SINCERE REMORSE, WHICH IS A MITIGATING FACTOR SUBJECT TO CONSIDERATION UPON REVIEW

That the Respondent has exploited the Petitioner's candid testimony to portray his acceptance of accountability and sincere remorse as validation for the extreme sanction of removal from the bench is grossly inequitable. In fact, the notion that the Petitioner sought to assume responsibility and to express how, in hindsight, he would have conducted himself differently demonstrates a level of vulnerability, self-reflection and candor that should be commended, not be used against him. Instead, the Petitioner's candor and expressions of remorse should be mitigate the sanction imposed upon him.

To this end, in a recent determination that dealt with conduct far more egregious than the conduct at issue herein, the Commission found that public censure was appropriate in light of the Petitioner's cooperation, admission of improper conduct, and demonstrated remorse. *Matter of Tawil* [December 12, 2019]. Respondent has improperly characterized the Petitioner's acceptance of accountability and sincere remorse as validation for the extreme sanction of removal, when – in actuality – such demonstrable remorse constitutes a mitigating factor in support of the reduction of the extreme sanction of removal.

Moreover, the casual disregard of the character evidence presented in support of the Petitioner is without due regard for the inherent authority of this honorable Court to

consider the Petitioner's good character and his reputation for honesty, integrity and judicial demeanor in the legal community in reaching a determination as to whether the sanction imposed was warranted. The Petitioner acknowledges that the character testimony offered in his support does not diminish any unprofessionalism; however, he maintains that it is a mitigating factor in considering the sanction to be imposed upon him.

As for the Petitioner's reference to the Colemans' lexicon, such was not intended to cast blame against the Colemans for the Petitioner's own transgression. Instead, the Petitioner sought to convey that the imitation of his client's lexicon was a momentary suspension of his better judgment and the result of a false comfort of camaraderie. Upon review of the Petitioner's testimony it is readily apparent that he has accepted responsibility for his own actions. Indeed, he testified as follows:

> 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)

Accordingly, it is respectfully requested that the Petitioner's sincere remorse be taken into consideration as a mitigating factor in reaching a determination as to the sanction to be imposed against him.

POINT III:

THE EXTREME SANCTION OF REMOVAL SHOULD BE REDUCED TO CENSURE

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 that 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.

The Court of Appeals has long-recognized the principle that "[r]emoval 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 "[c]ensure 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 light of the Petitioner's career as a whole, his lack of self-serving motivation for the misconduct in question, the non-public and limited nature and particulars of that misconduct, and the Petitioner's demonstrable remorse, 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

In light of the foregoing, 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.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York

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