

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

FRANK M. MORA,

a Judge of the Poughkeepsie City Court,
Dutchess County

----- X

**RESPONDENT'S BRIEF TO COMMISSION TO
CONFIRM IN PART AND DISAFFIRM IN PART
REFEREE'S FINDINGS AND CONCLUSIONS**

DATED: May 19, 2026

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PRELIMINARY STATEMENT

Respondent, Frank M. Mora, (“Respondent”), by and through his counsel, O’Connell & Aronowitz P.C., submits this Brief to the Commission on Judicial Conduct (“Commission”) to confirm in part and disaffirm in part the findings and conclusions in the report of the referee dated April 9, 2026.

INTRODUCTION

Respondent is a judge of the Poughkeepsie City Court. He has held that position since 2011, and his current term expires on December 31, 2030.

The Commission served a formal written complaint against Respondent dated January 14, 2025, that contained three charges. Charge I concerns a visit by Respondent to Seeta Eye Center (“Seeta”) on December 28, 2021, and alleges that Respondent engaged in a discourteous confrontation with Stacey Koch, the manager of Seeta, over Respondent’s failure to wear a mask. Charge II alleges that Respondent commenced a defamation action against Ms. Koch on December 29, 2022, in retaliation for her having filed the complaint with the Commission. Charge III alleges that Respondent withheld or redacted material documents in response to the Commission’s requests for information.

Respondent filed an answer denying the charges.

Peter Bienstock (the “Referee”) was appointed by the Commission to conduct a hearing and report to the Commission. A hearing was held before the Referee on October 15, 16 and 17, 2025.

By report dated April 9, 2026 (the “Report”), the Referee made findings of fact and conclusions of law with respect to all three charges. He recommended that there was no basis for Charges I and III. He recommended that Charge II was sustained.

Respondent agrees with the Referee's conclusions that there is no basis for Charges I and III and contends that such conclusions with respect to those charges should be confirmed. Accordingly, those charges will not be discussed herein. Respondent disagrees with the Referee's findings and conclusions that Charge II was sustained and contends they should be disaffirmed.

**THE REFEREE'S CONCLSION THAT CHARGE II
WAS SUSTAINED IS FACTUALLY AND LEGALLY
ERRONEOUS AND SHOULD BE DISAFFIRMED.**

In his papers submitted to the Referee, Respondent explained that Count II must be dismissed for any and all of the following reasons: (1) Respondent relied in good faith on the advice of counsel in commencing the defamation action against Ms. Koch, (2) Ms. Koch waived whatever privilege may have arisen by virtue of her filing of the complaint with the Commission in disclosing both the filing of the complaint and the contents thereof to numerous third parties long before the defamation action was commenced, (3) Respondent's filing of the defamation action did not breach any confidentiality of the proceedings before the Commission because Ms. Koch had already breached such confidentiality by disclosing both the fact that she filed the complaint and the contents thereof to numerous individuals well before the defamation action was commenced and (4) Respondent did not commence the defamation action in retaliation for Ms. Koch's filing of the complaint with the Commission.

Respondent supported his position with significant case law along with citations to the testimony and exhibits offered at the hearing. Yet, the Referee rejected all of Respondent's arguments in a few cursory sentences with no discussion of any case law (in fact, the Referee did not even address Respondent's third argument). Respondent will demonstrate that the Referee's

summary conclusions are completely at odds with relevant case law and the proof introduced at the hearing

**A. Respondent Commenced the Defamation Action
In Good Faith on the Advice of Counsel.**

It is well established that good faith reliance on the advice of counsel is a recognized defense (*Gilbert v Burnside*, 13 AD2d 982, 983 [2d Dept 1961], *affd* 11 NY2d 960 [1962] [“Reliance upon advice of counsel is a good defense.”]; *see Blaustein v Pan American Pet. & Transp. Co.*, 293 NY 281, 299-300 [1944]; *Matter of Bank of N.Y. Mellon*, 127 AD3d 120, 126 [1st Dept 2015]). The person relying on the advice of counsel of defense simply needs to show that such reliance was reasonable (*Matsushita Elecs. Corp. v Loral Corp.*, 1995 U.S. Dist. LEXIS 12880 [SDNY 1995] [“the advice-of-counsel defense requires the defendant to establish that his reliance on the advice was reasonable”]; *see DSW Lenox, LLC v Rosetree on Lenox Ave., LLC*, 2014 N.Y. Misc. LEXIS 2302 [Sup Ct NY County 2014]; *Macnish-Lenox, LLC v Simpson*, 17 Misc3d 1118(A), 2007 N.Y. Misc. LEXIS 7138 [Sup Ct Kings County 2007]).

Even if it turns out that counsel’s advice was incorrect, that does not mean that the party’s reliance on such advice was unreasonable. For example, in *Blaustein v Pan American Pet. & Transp. Co.* (293 NY 281), a shareholder derivative action, the plaintiffs argued that the directors of the corporation breached their fiduciary duty by delaying for two years the opening of an oil production operation in the State of Texas. The directors argued that they made their decision in reliance on the opinion of an attorney that opening an oil production operation in Texas would violate Texas anti-trust laws. It was resolved two years later that doing so would not violate Texas anti-trust laws. The trial court, as here, found that the directors had no right to rely on the attorney’s advice. The Appellate Division reversed, holding:

[i]n that state of facts and with [attorney] Stephens' opinion concurred in by Pan Am's own general counsel we think the directors exercised their discretion honestly and in good faith and under all the facts and circumstances disclosed were justified in deferring at the time entrance of a Pan Am production company into Texas (263 App Div 97, 118).

The Court of Appeals affirmed the Appellate Division, holding:

[w]e find in the record substantial evidence which supports the findings of the Appellate Division that the defendant directors, in good faith, and in the honest exercise of their discretion, deferred until 1935 the organization of a Pan Am crude oil producing subsidiary to operate in Texas because of their honest belief that, in the circumstances, the Texas anti-trust laws made it unsafe, from a legal standpoint, for such a subsidiary to engage in the business of producing crude oil in Texas (293 NY at 300).

Thus, even though the legal advice relied on by the defendants turned out to be incorrect, the defendants' reliance on that advice was in good faith and constituted an absolute defense.

Predictably, a similar result was reached by the United States Court of Appeals, Second Circuit, in *Spirit v Bechtel* (232 F2d 241 [2d Cir 1956]), a shareholder derivative action that challenged actions of the corporation's directors as a conflict of interest. The directors relied on the advice of counsel that the challenged actions were not a conflict of interest. The court held:

[w]hether a conflict of interests existed was a question of fact, the answer to which turned on a question of law. Counsel's opinion as to the law (even though erroneous) should, in our opinion, protect the officers acting in reliance upon it (emphasis supplied) (*Id.* at 247).

As in *Blaustein*, the reliance on the advice of counsel was held to be a defense, even acknowledging that the advice was erroneous.

As another example, in *Haywood Lumber & Mining Co v Commissioner* (178 F2d 769 [2d Cir 1950]), the Second Circuit held that mistakes by a tax consultant cannot be imputed to the taxpayer who relied upon the professional advice of the accountant:

[w]hen a corporate taxpayer selects a competent tax expert, supplies him with all necessary information, and requests him to prepare proper tax returns, we think the taxpayer has done all that ordinary business care and prudence can reasonably

demand...he affirmatively requested the preparation by his consultant of proper returns. To require Mr. Sprague to inquire specifically about the personal holding company act nullifies the very purpose of consulting an expert. We doubt if anyone would suggest that a client who states the facts of his case to a lawyer must, in order to show ordinary business care and prudence, inquire specifically about the applicability of various legal principles which may be relevant to the facts stated (emphasis added) (*Id.* at 771).

The Commission has never claimed (nor could it) that Respondent, as a lawyer and judge, was knowledgeable regarding defamation, privilege or SLAPP lawsuits (Tr. pp. 413, 415, 417, 422, 502, 537). Indeed, Respondent testified both in his five-hour deposition and at the hearing that he was unaware of SLAPP when he commenced the defamation action and did not become aware of it until the motions to dismiss were filed (Tr. pp. 417-418). He had never handled a defamation case as a judge (Tr. p. 560). This testimony stands unrebutted.

Respondent retained Michael Sussman, Esq. ("Attorney Sussman") (Tr. pp. 412-413), who has initiated over eight hundred (800) lawsuits in the Federal District Court and was very familiar with defamation law (Tr. pp. 215-216). The Referee seriously understated Attorney Sussman's familiarity with defamation law by finding that he was "a prominent civil rights attorney who has handled defamation cases, but does not consider himself an expert on defamation" (Report at ¶ 3 on p. 23). In fact, Attorney Sussman was very familiar with defamation law, having handled 30 to 40 defamation cases (Tr. pp. 215-216). The fact that Attorney Sussman would not classify himself as an "expert" on defamation law is fully consistent with ethical rules that generally prohibit attorneys from referring to themselves as experts (Tr. p. 215; 22 NYCRR 1200.00 Rule 7.4[a]).

Respondent retained Attorney Sussman specifically to give him legal advice on whether he had a valid defamation claim against Koch (Tr. pp. 222-227, 250). Attorney Sussman testified that, based on the facts, he advised Respondent that he had such a valid defamation claim against

Koch (Tr. pp. 224-228) and that he had no doubt as to Respondent's veracity (Tr. p. 225). Respondent similarly testified that Attorney Sussman advised him that he had a viable defamation claim against Ms. Koch and that he relied on that advice (Tr. pp. 400, 417, 419-420, 504-505, 513, 551).

With respect to the issue of privilege, Attorney Sussman testified that, in his opinion, Ms. Koch did not have an absolute privilege (Tr. p. 236). Indeed, Respondent testified that, even after the defamation complaint was dismissed by Supreme Court Justice Rosa, Attorney Sussman was still of the firm opinion that Respondent had a viable defamation claim (Tr. pp. 422- 424). Attorney Sussman testified that he did not agree with the court's analysis and that he was still of the opinion that Justice Rosa was wrong (Tr. p. 231). He testified at the hearing that he recommended that Respondent appeal the decision, but Respondent decided to settle instead (Tr. pp. 231-232, 419).

There can be no serious argument that Respondent did not rely in good faith on the legal advice of Attorney Sussman in bringing the defamation lawsuit. The mere fact that Respondent is an attorney and judge does not change the analysis. No attorney is an expert on all areas of law, any more than a doctor is an expert in all areas of medicine. It is undisputed that Respondent was not an expert in defamation, privilege or SLAPP lawsuits. Attorney Sussman was quite familiar with these areas of law and, understandably, that is why Respondent hired him. Just like any non-lawyer client, Respondent was entitled to rely on the advice of an attorney knowledgeable in the field of law at issue. He did not lose the right to rely on Attorney Sussman's advice simply because he happens to be an attorney. Notably, Attorney Sussman told Respondent that he did not have claims against Ms. Koch for tortious interference or HIPAA violations (Tr. pp. 224, 251, 416), and Respondent followed Attorney Sussman's advice and did not include such claims in his complaint.

The testimony induced at the hearing, and the evidence, spells out that Respondent followed Attorney Sussman's advice, as follows:

Attorney Sussman advised Respondent that he could bring [REDACTED] for an eye exam

– **FOLLOWED** advice (Comm Ex 31, PDF p10 of 132)

Attorney Sussman drafted the Koch defamation complaint

– **FOLLOWED** advice and signed as drafted (Comm Ex 33, PDF p115, 123, and 132 of 939)

Attorney Sussman advised the amount of damages to seek, \$425,000

– **FOLLOWED** advice (Hearing transcript pages 237 and 520)

Attorney Sussman advised Respondent that he, "could also file a response and then withdraw."

– **FOLLOWED** advice (Comm Ex 31, PDF p31 of 132)

Attorney Sussman advised that Respondent had no HIPAA private right to sue

– **FOLLOWED** advice and it was not included in the suit (Hearing transcript page 416)

Attorney Sussman advised Respondent not to file a HIPAA complaint against Ms. Koch with the government

– **FOLLOWED** advice (Comm Ex 30, PDF p14 of 19)

Attorney Sussman advised Respondent that he had no Tortious interference with business claim

– **FOLLOWED** advice and it was not included in the suit (Hearing transcript page 416)

Attorney Sussman advised Respondent that they could defeat the motions to dismiss stating, "We can defeat it [the motions to dismiss]. It's – they're wrong." Attorney Sussman went on further to advise that, "he did the research and they're wrong; this is an exception outside of SLAPP, or anti-SLAPP ... and that we could defeat it [the motions to dismiss]."

– **FOLLOWED** advice and did not pursue withdrawal after Ms. Koch's attorney conditioned the withdrawal on several demands (Comm Ex 33, PDF p133, and 137 of 939)

Attorney Sussman advised Respondent to settle the attorney fees for \$20,000, not \$17,500

– **FOLLOWED** advice (Comm Ex 31, PDF p99 of 132)

Attorney Sussman advised JM that he could not sue Law360, as the press is immune from suit

– **FOLLOWED** advice (Comm Ex 31, PDF p127 of 132)

The referee's finding that Respondent, "rejected all other advice Mr. Sussman provided," is false, as shown above.

The ONLY time Respondent did not follow Attorney Sussman's advice was regarding the appeal. After Justice Rosa dismissed the matter, and after Attorney Sussman advised Respondent to appeal, Respondent did his own independent research. Respondent then believed that Attorney Sussman was wrong as to his advice regarding the viability of the matter, and that filing an appeal would result in the finding of filing a frivolous appeal. Respondent directed Attorney Sussman on May 1, 2023, "Please do not appeal Judge Rosa's decision. There is no way to win it, and both you and I will be subject to sanctions and attorney fees." (Comm Ex 31, PDF p89 of 132) It is important to point out that the Commission never introduced any expert proof that Attorney Sussman's advice was wrong or, more importantly, that Respondent did not have a right to rely on Attorney Sussman's advice, which Respondent did throughout the matter until the decision was issued. Once Respondent did his own research and acquired information that led him to believe that an appeal would be frivolous, he could not have reasonably, justifiably, or ethically relied on Attorney Sussman's advice to appeal and therefore directed him not to appeal. The referee is incorrect in finding that, after Justice Rosa dismissed the suit, Respondent, "'withdrew' (actually 'did not continue') the lawsuit, for religious reasons (Tr. 421) and successfully sought to settle the matter. (Commission's Ex. 16)" Not filing an appeal had nothing to do with religion, but in not appealing what Respondent believed, after doing his own independent research, that the suit was meritless. However, prior to the commencement of the suit, and every step along the way, Respondent believed the suit was viable, and reasonably relied upon Attorney Sussman's advice, as shown above. Before Justice Rosa's decision, Respondent relied solely and fully on Attorney Sussman's advice and did no research on his own. (Comm Ex 33, PDF p109 of 939)

The Referee concluded that Respondent did not, in fact, rely on the advice of Attorney Sussman because, although Attorney Sussman advised Respondent that he had a claim for defamation, Attorney Sussman also told Respondent that he should consider that “it doesn’t look good for a judge to sue the person who complained about him” (Report at ¶ 4 on p. 23). This conclusion is a misstatement of Attorney Sussman’s testimony, and it had absolutely nothing to do with retaliation as the Referee well knew.

As an initial matter, Attorney Sussman testified that the discussion about whether it looked good for a judge to sue a person who complained about him did not occur prior to the commencement of the lawsuit, but, rather, was in an email dated February 13, 2023, almost two months after the lawsuit was commenced, as part of a discussion whether the lawsuit should be withdrawn based on Judge Mora’s religious beliefs, which had nothing to do with Justice Rosa. Justice Rosa was not involved on this date. The settlement conference in front of Justice Rosa was on March 27, 2023, a full six (6) weeks after the email was sent. There is no testimony from Mr. Sussman, or from anyone, and there is no documentary evidence that Respondent was made aware that Justice Rosa was hostile to the suit prior to her decision on April 5, 2023. (Tr. pp. 255-256).

The referee’s finding that, “when he [Mr. Sussman] learned of the Supreme Court Justice Maria G. Rosa’s hostility toward the defamation case, he advised Respondent that he could still withdraw it” is erroneous. (Report at ¶ 4 on p 23). Again, there was no testimony or any evidence produced at the hearing regarding this.

More importantly, it is clear that the discussion about whether it looked good for a judge to sue a person who complained about him was not legal advice, but practical advice. The Referee failed to make this distinction and concluded that Attorney Sussman gave Respondent two forms of legal advice, and Respondent accepted one and rejected the other.

The Referee's conclusion is also plainly wrong because it is undisputed that Attorney Sussman's legal advice to Respondent was that Ms. Koch did not have an absolute privilege and that Respondent had a legitimate defamation claim against her. The Referee agreed, and found this fact as one of his findings of fact (Report at ¶ 5 on p. 23). Attorney Sussman then gave Respondent practical advice that it did not look good for a judge to sue a complainant. That practical advice did not in any way diminish Mr. Sussman's legal advice that Respondent had a legitimate defamation claim against Ms. Koch.

Attorney Sussman stressed this distinction in his testimony when discussing the February 13, 2023, email, and the Referee himself stated on the record that he understood the distinction:

A. The email you showed me and Judge Mora and the issue of my comments about withdrawing and the prudence of that. I just didn't want that to be understood as based on the nonviability of the claim. That's not what I was telling him. It was a prudential consideration that I thought I would share with him because I thought he deserved my view of that. But that wasn't the same as saying the case was frivolous or the case didn't have viability. It's a different kind of concern, and I just want to make that clear.

Q. Okay.

A. I don't want it to be construed as that was an advice saying, "You don't have a case, you better stop it." That wasn't what I was telling them. I was saying something else –

MR. BIENSTOCK: I think we understand that.

THE WITNESS: -- of a different nature.

MR. BIENSTOCK: I think we understand that.

(emphasis supplied) (Tr. p. 262).

It is abundantly clear from this exchange that Attorney Sussman's legal advice to Respondent was that he had a viable defamation claim against Ms. Koch. The discussion regarding the optics of a judge suing a person who complained against him was not legal advice but, as Attorney Sussman

described it, simply a prudential consideration. It is also clear from the Referee's statements on the record (Tr. p. 262) that he understood that distinction.

The Referee concluded that Respondent rejected Attorney Sussman's "advice" that "it doesn't look good for a judge to sue a complainant" by claiming "judges aren't really concerned with optics" (Report at p. 32). The Referee simply cherry picked a portion of Respondent's testimony out of context.

In response to the question by the Commission's attorney "...you didn't follow Mr. Sussman's advice that it doesn't look good for a judge to sue the person who complained about him, right?" Respondent answered:

That's not telling me not to bring a lawsuit. That's telling me -- he went through a whole diatribe, if you will, and talked about this *Levy* case v. some sheriff, and they're difficult, and optics -- I said, "Listen I'm a judge. Judges don't rule -- don't base their decisions on" -- I didn't -- the word optics is sum and substance. We base our decisions on law and facts, and that's how I make all my decisions.

So optics for a judge -- we don't even look at optics because one side is going to like the optics. The other side is going to not like them because both sides can't win, especially when I rule in landlord-tenant matters. If the landlord wins, the landlord's happy. If the tenant wins, the tenant's happy. The optics on the opposite side are, "Judge, you're no good". So I don't rule based on that (Tr. pp. 503-504).

Respondent later confirmed in his testimony that judges are not concerned with optics but are concerned with the law and the facts (Tr. p. 505).

When Respondent's full answer is read, as opposed to the snippet cherry picked by the Referee in order to support his conclusion, it is clear that his testimony was that judges are required to decide cases before them based on the facts and the law and are not to make their decisions based on how the decision may appear to the parties. Respondent's explanation was absolutely correct. Judges must be unbiased and must decide matters before them based on the applicable facts and law and not on how the decision may appear to an outsider. Indeed, any judges who do

not agree with this principle should themselves be the subject of an investigation by this Commission.

Similar to the optics issue, Attorney Sussman testified that he advises all of his clients, prior to bringing defamation lawsuits, about the practical effect of bringing the lawsuit, as opposed to their legal right to do so:

Q. ... Mr. Sussman, did you ever warn Judge Mora about the perils of bringing a defamation lawsuit?

A. I remember saying -- I remember saying to Judge Mora what I say to all defamation clients. Which is that when you bring a defamation case, you run the risk of spreading more broadly than was already spread, whatever the alleged defamatory comment is. So I do remember having that kind of conversation. I think I have that with every defamation -- potential defamation client.

Q. And did you ever tell Judge Mora that it may be best just to move on?

A. I mean, it is possible I said to Mr. Mora -- because again, I say to many clients, not only defamation clients, that litigation is difficult, time consuming, emotionally draining process. And that any client should consider that in the context of -- and obviously, in this particular instance, it would be artificial to not consider Mr. Mora had another piece of litigation, which I viewed as a major Constitutional and statutory challenge related to his employment.

And if you would ask me, which would -- you know, which was the primary focus for both of us, it had to be on that one. But on the other hand, I think he did feel strongly about the defamation he believed Ms. Koch had engaged in. And you know, I think the emails reflect that in the November time period. And I didn't I didn't view that as problematic or unusual. Many people who are defamed, frankly, feel that way. So I, you know, wasn't anything unusual, honestly (Tr. p. 249).

As was the case with Attorney Sussman's discussion of the optics of a judge suing a person who filed a complaint against him, this testimony simply shows that Attorney Sussman advised

Respondent, like he advised all of his defamation clients, of the practical difficulties in bringing a defamation case.

It is apparent that Respondent did, in fact, rely on Attorney Sussman's legal advice that he had a viable defamation claim against Ms. Koch. Indeed, the only legal advice given by Attorney Sussman that Respondent did not follow was Attorney Sussman's advice that the order dismissing the defamation complaint was incorrect and that Respondent should take an appeal (Tr. pp. 231-232, 419). Respondent decided, instead, to settle.

While the Referee concluded that the defamation lawsuit was meritless (Report at ¶ 15 on p. 25, p. 31), this conclusion has no bearing on the reliance on the advice of counsel defense. As explained above, the mere fact that Justice Rosa, in another context, dismissed the defamation complaint, even accepting that Attorney Sussman's advice was wrong, does not mean that Respondent was not entitled to rely on Attorney Sussman's advice (*see Blaustein v Pan American Pet. & Transp. Co.*, 293 NY at 300; *Spirit v Bechtel*, 232 F2d at 247).

Moreover, it cannot even be said that the defamation suit was meritless or that Attorney Sussman's advice was wrong. One of the primary factual bases of Justice Rosa's decision (which, significantly, was made before any discovery was conducted) is her statement that Ms. Koch had not published her statements to anyone other than the Commission and that, "until [Respondent] filed this lawsuit, [Koch's] statements and the Commission's proceedings with respect thereto were confidential and non-public" (Comm. Ex. 15 at p. 4). It later became clear that these statements were manifestly incorrect. The proof introduced at the hearing before the Referee established that Ms. Koch had indeed published the fact that she filed the complaint with the Commission and the contents thereof to a large number of parties well before Respondent commenced the defamation action. For example, she disclosed her complaint to the Mayor of the

City of Poughkeepsie within a day or two after she filed it with the Commission (Tr. pp. 190-191, 284-287) and conceded that, in so doing, she overtly made the complaint public (Tr. p. 287). In fact, on the contrary, she made no attempt to keep it private. In addition, Ms. Koch also admitted that she published the fact that she filed the complaint with the Commission and the content thereof to Michael Brown, her co-employee (Tr. pp. 285, 313-315, 319, 337), Jessica Feather (Tr. pp. 41-44, 285) and Karen Monteverdi (Tr. pp. 80-81) along with her husband, her boss, her brother and others (Tr. pp. 286, 289).

Based on the above discussion, it is apparent that Respondent relied in good faith on Attorney Sussman's advice in bringing the defamation lawsuit, and the mere fact that Justice Rosa dismissed the lawsuit, whether she was correct or not, does not vitiate that defense.

**B. Ms. Koch Waived Whatever Privilege She May
Have had by Disclosing the Contents of the
Complaint to Numerous Individuals Before
The Defamation Action was Commenced.**

In his papers submitted to the Referee, Respondent explained that Count II must be dismissed for the further reason that Ms. Koch waived whatever privilege she may have had by publishing the fact that she filed the complaint and the contents thereof to numerous individuals long before the defamation action was commenced. The Referee refused to consider this argument, claiming that the issues of whether Ms. Koch had an absolute privilege or waived the privilege would necessarily involve relitigation of the dismissal of the defamation action which is barred by the doctrine of collateral estoppel (Report at p. 32). The Referee is incorrect.

Initially, it must be pointed out that Respondent did not raise before the Referee the issue of whether Ms. Koch had a privilege. Respondent's argument is that, even assuming Ms. Koch had such a privilege, she waived it by publicly disclosing the fact that she filed the complaint and the contents thereof.

The doctrine of collateral estoppel “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity” (*Ryan v New York Tel. Co.*, 62 NY2d 494 [1984]). Thus, for collateral estoppel to apply, the issue must have been “clearly raised” in the prior action.

Respondent’s argument that the privilege was waived by public disclosure was not raised or ruled on in the decision dismissing the defamation action. Indeed, Justice Rosa’s decision was expressly based on the fact that she was led to believe that Ms. Koch had not made any public disclosures.

During the oral argument of the motion to dismiss, Ms. Koch’s attorney conceded that the complaint was required to be kept confidential by statute (Comm. Ex. 14 at p. 6). Importantly, the Commission’s attorney stated, “[i]t’s ironic to think that the only way the public has learned about this allegation is the plaintiff has chosen to bring this suit” (Comm. Ex. 14 at p. 10). Justice Rosa specifically asked the Commission’s attorney “[b]ut as far as you know, the only reason it’s out in the community has nothing to do with any action by the defendant [Ms. Koch], correct?” and the Commission’s attorney responded “[t]hat’s correct, Your Honor. And not by The Commission. That I can state unequivocally” (Comm. Ex. 14 at p. 11). The statements made to Justice Rosa were false because Ms. Koch admitted that, within a day or two after she filed her complaint with the Commission, and well before Respondent filed the defamation action, she disclosed the complaint to the Mayor of Poughkeepsie and conceded that, in doing so, she made the complaint public (Tr. pp. 190-191, 284-287). Further, she admitted that she discussed the complaint with Mr. Brown and others well before the defamation complaint was filed.

Justice Rosa relied on what she was told by the attorneys for Ms. Koch and the Commission because she stated in her decision:

It was further admitted during oral argument on this matter, and as supported by the affirmation of counsel for the Commission, that Defendant [Ms. Koch] did not publish the statements to anyone else; and until Plaintiff [Respondent] filed this lawsuit, Defendant's [Koch's] statements and the Commission's proceedings with respect thereto were confidential and non-public" (Comm. Ex. 15 at p. 4).

Justice Rosa also held:

there can be no abuse of the absolute privilege in the submission of a confidential complaint to the Commission, because the only persons to whom the complaint is published are public officials (Judiciary Law §41) charged with "receiv[ing], initiat[ing], investigat[ing] and hear[ing] complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge" (Judiciary Law §44), and who are bound by law to keep such complaints and related proceedings confidential (Judiciary Law §§ 45-46; *Weiner*, 22 NY2d at 332) (Comm. Ex. 15 at p. 6).

Finally, Justice Rosa also observed that:

[t]he purpose of keeping the Commission's proceedings confidential is to protect not only the Judge involved but to protect the public by providing a safe forum in which to have the complaints addressed. As counsel for the Commission stated, the absolute privilege and the confidentiality of the proceedings before it are critical to the Commission's investigation and to maintaining public confidence in the integrity of the Judiciary (Comm. Ex. 15 at pp. 6-7).

Thus, it is abundantly clear that the waiver issue was not raised or decided in the decision dismissing the defamation action. On the contrary, the entire basis of Justice Rosa's decision was her incorrect assumption, based on what she had been advised by the attorneys for Ms. Koch and the Commission, that Ms. Koch's complaint was confidential and had not been disclosed to the public prior to the filing of the defamation action.

The waiver issue was not raised by Respondent in opposition to the motion to dismiss the defamation action for the simple reason that it was not known until the hearing before the Referee that, well before Respondent commenced the defamation action, Ms. Koch had violated the confidentiality provisions of Judiciary Law § 45(1) by making her complaint and the contents thereof public by revealing it to the Mayor of the City of Poughkeepsie.

Because the issue of whether Ms. Koch waived the privilege, if it existed, was not raised or ruled on in the decision dismissing the defamation action, it is not barred by the doctrine of collateral estoppel, and Respondent is not seeking to relitigate the dismissal of the defamation action.

Turning to the merits of Respondent's argument that Ms. Koch waived her privilege, it is well established that a party waives a privilege by disclosing the privileged information to a third party (*see Ambac Assur. Corp. v Countrywide Home Loans*, 27 NY3d 616 [2016] ["a client waives the privilege if a communication is made in confidence but subsequently revealed to a third party"]; *Delta Fin. Corp. v Morrison*, 13 Misc 3d 441, 444-445 [Sup Ct Nassau Co. 2006] ["disclosure of attorney-client communication to a third party or communications with an attorney in the presence of a third party, not an agent or employee of counsel, vitiates the confidentiality required for asserting the privilege"]). Notably, these cases concern the attorney-client privilege which is an absolute privilege (*see Spectrum Sys. Int'l. Corp. v Chem. Bank*, 78 NY2d 371, 376-377 [1991]), like the privilege claimed by the Commission in the instant case.

In *Ambac Assur. Corp.*, the Court of Appeals explained why disclosure of the privileged information to a third party waives the privilege:

[t]he rationale for these rules is to ensure that the privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principle" (8 John Henry Wigmore, *Evidence* § 2291 at 554 [McNaughton rev 1961]). A lack of confidentiality and subsequent disclosure also destroy the privilege as a matter of fairness: "when [the privilege holder's] conduct touches a certain point of disclosure, fairness requires that the privilege shall cease whether he intended that result or not" (*id.* § 2327 at 636) (*Ambac Assur. Corp. v Countrywide Home Loans*, 27 NY3d at 624).

The burden of proof on the issue of whether a privilege was waived by disclosure to a third party is on the party asserting the privilege (*Oakwood Realty Corp. v HRH Constr. Corp.*, 51 AD3d 747, 749 [2d Dept 2008]; *John Blair Comm. v Reliance Capital Group*, 182 AD2d 578, 579 [1st

Dept 1992]). Thus, the burden is on the Commission staff to prove that Ms. Koch did not waive the claimed privilege.

It is undisputed that, soon after filing her complaint with the Commission on December 29, 2021 (Comm. Ex. 6), and long before Respondent commenced the defamation action on December 29, 2022 (Comm. Ex. 8), Ms. Koch disclosed the fact that she had filed the complaint and the contents thereof to numerous third parties. Ms. Koch admitted that within a day or two of filing her complaint with the Commission, she mailed a copy of it to the Mayor of the City of Poughkeepsie (Tr. pp. 190-191, 284-287). Also, it is extremely significant that Ms. Koch conceded that, in so doing, she intentionally made the complaint public (Tr. p. 287).

In addition, Mr. Brown, a co-worker of Ms. Koch who witnessed the incident, testified that, the day after Ms. Koch filed her complaint with the Commission, she told him that she had filed the complaint as well as the substance of the complaint (Tr. pp. 313-315, 319, 337). Mr. Brown testified that Ms. Koch told him that she was going to “go after Respondent” (Tr. P. 311) and that Ms. Koch “bragged” that:

she’s going to do everything she can to get him removed from the bench. Because he’s some kind of—I don’t know what you call people who don’t get vaccines or whatever, but that’s what she was saying about him, and he’s that kind of person and entitled (Tr. pp. 312-313).

Ms. Koch admitted that she told Mr. Brown that she had filed the complaint and that she “probably” also told him that she hoped that Respondent would be removed (Tr. p. 285).

Ms. Feather, a co-worker of Ms. Koch, testified that Ms. Koch told her that she filed the complaint and the substance of the complaint (Tr. pp. 41-42). Ms. Feather testified that Ms. Koch initiated the conversation and that it was not a confidential conversation (Tr. pp. 42-44). Ms. Koch admitted that she “absolutely” told Ms. Feather that she had filed the complaint and that “of course” she told Ms. Feather what she had stated in the complaint (Tr. p. 285).

Ms. Monteverdi, a co-worker of Ms. Koch, testified that Ms. Koch told her that she filed the complaint and the substance of the complaint (Tr. pp. 80-81) and that Ms. Koch did not tell her not to tell anyone else about the conversation (Tr. p. 81).

Ms. Koch also admitted that she told Dr. Modi (who was her boss), her husband and her brother about the complaint (Tr. p. 286). In response to questions whether she told any additional people about the complaint, Ms. Koch replied “[o]f course, because it was very upsetting” and “of course I would have talked about it amongst my friends. Absolutely” (Tr. p. 286). Ms. Koch testified that “I would probably tell anyone who would listen that day” (Tr. p. 287). She also testified that she did not warn the people she told not to tell anyone else (Tr. p. 286-287).

The Referee had no choice but to expressly find that Ms. Koch had disclosed the complaint to others (Report at p. 9). Yet, he failed to address the express waiver. It appears that the only thing Ms. Koch did not do was call a press conference. By not addressing the significance of this, the referee has abdicated his role and duty as a referee.

Despite the Referee’s reckless disregard to address it, Ms. Koch’s statements and her own self-retaliatory conduct were put in full public view by her well before Respondent filed the defamation complaint. It is apparent from the undisputed facts that Ms. Koch waived whatever privilege she may have had arising from her filing of the complaint with the Commission by disclosing the fact that she filed the complaint and the contents thereof to numerous third parties well before Respondent commenced the defamation action. Indeed, she waived the privilege within a day or two after she filed the complaint when she sent a copy of it to the Mayor of Poughkeepsie. Any confidentiality was destroyed at that point.

It should be noted that much of the case law regarding waiver of privilege by disclosure concerns inadvertent disclosure during discovery. There can be no question that the disclosures by

Ms. Koch were not inadvertent because she made it clear in her testimony that she felt she had the right to tell anyone she chose about her complaint and the contents thereof, and she admitted that she would have told anyone who would listen (Tr. pp. 286-287).

The Commission's attorney suggested at the hearing that the fact that Ms. Koch sent the complaint to the Mayor of Poughkeepsie before Respondent commenced the defamation action was irrelevant because Respondent was not aware of that fact when he commenced the action. There is no merit to the Commission's suggestion because it is a clear waiver of confidentiality and privilege.

A privilege "is waived upon disclosure to a third party where there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality" (*People v Kozlowski*, 11 NY3d 223, 246 [2008], *cert denied* 556 US 1282 [2009], quoting *Bluebird Partners v First Fid. Bank, N.J.*, 248 AD2d 219, 225 [1st Dept 1998]). Ms. Koch admitted that, when she sent the letter to the Mayor of Poughkeepsie, the matter became public (Tr. p. 287) and that she wanted to make the mayor "aware of what [Respondent] is doing" (Tr. p. 284). Thus, there certainly was a likelihood that the communication would be revealed to Respondent and, further, the conditions under which Ms. Koch sent the letter to the mayor were inconsistent with a desire to maintain confidentiality. The privilege that the Commission claims Ms. Koch enjoyed was waived by her when she intentionally disclosed the complaint and the contents thereof to numerous people well before the defamation action was commenced. Whether Respondent was aware of all of the disclosures by Ms. Koch has no bearing on the fact that Ms. Koch intentionally chose to waive any privilege.

Moreover, it is undisputed that Respondent was aware that Koch had revealed the contents of the complaint to Michael Brown prior to the commencement of the defamation action. Indeed,

it was the fact that he learned of Koch's disclosure to Brown that caused Respondent to bring the defamation action (Tr. p. 498). Thus, it is undisputed that Respondent was aware that Koch had disclosed the complaint and the contents thereof to at least one third party before he commenced the defamation action.

It is apparent from the undisputed proof that whatever privilege Ms. Koch may have had by reason of her filing the complaint with the Commission was waived by her when she intentionally and knowingly disclosed the complaint and the contents thereof to numerous individuals well before Respondent commenced the defamation action. Further, it is clear that Ms. Koch intentionally and knowingly violated the confidentiality provisions of Judiciary Law § 45(1) by making the above-described disclosures.

C. Respondent Did Not Breach the Confidentiality Requirements of Judiciary Law § 45(1) When He Filed the Defamation Action Because Ms. Koch Had Already Made the Contents of the Complaint Public.

The Commission's argument, and the the foundation of the Referee's Report (Report at ¶¶ 6 and 8 on p. 24), was that it was Respondent who made the contents of the complaint public by filing a defamation action. This is simply not true. As described above, almost immediately after filing the complaint, Mr. Koch wrote to the Mayor of the City of Poughkeepsie regarding the complaint and then proceeded to tell numerous people including Mr. Brown, Ms. Feather, (Tr. pp. 41-44, 285), Ms. Monteverdi (Tr. pp. 80-81), her boss (Dr. Modi), her husband and her brother (Tr. p. 286) about the complaint. All of this occurred well before Respondent commenced the defamation action. Thus, it was Ms. Koch, not Respondent, who violated Judiciary Law § 45(1) and made the complaint public. Yet the prosecution is attempting to punish Respondent for Ms. Koch's misconduct.

These unlawful disclosures by Ms. Koch are not a trivial matter. As stressed by the Commission's attorney, both to Justice Rosa in the defamation action and to the Referee at the hearing, proceedings before the Commission are confidential (Judiciary Law § 45[1]). As observed by Justice Rosa in her decision dismissing the defamation complaint (Comm. Ex. 15 at pp. 6-7), that confidentiality protects both the complainant and the judge regarding whom the complaint is made. In *Wiener v Weintraub* (22 NY2d 330), the case relied on by the Commission for its position that Ms. Koch is entitled to an absolute privilege, the court observed that the confidentiality requirement for complaints against attorneys protects the attorney with respect to unwarranted complaints:

[a] lawyer against whom an unwarranted complaint has been lodged will surely not suffer injury to his reputation among the members of the Grievance Committee since it is their function to determine whether or not the charges are supportable. Any other risk of prejudice is eliminated by the provision of the Judiciary Law (§ 90, subd. 10) which declares that "all papers * * * upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney * * * shall * * * be deemed private and confidential" (*Id.* at 332).

Here, not only did Ms. Koch waive the privilege protecting her when she disclosed the complaint to third parties long before the defamation action was commenced, she also violated the confidentiality that Respondent was entitled to rely on.

What is more troubling is that the Commission staff and counsel were aware prior to the hearing before the Referee that Ms. Koch had publicly disclosed the complaint and the contents thereof, and, thus, had destroyed the confidentiality of the proceedings, yet not only failed to advise the Referee or Respondent of that fact but affirmatively proceeded at the hearing as if they were unaware of that fact.

Ms. Koch admitted on cross-examination that she advised Commission staff, including its attorney, Ms. DiPalo, prior to the hearing that she had disclosed her complaint to the Mayor of

Poughkeepsie (Tr. pp. 294-296). Thus, the Commission staff and its attorney were aware prior to the hearing that Ms. Koch had not only waived any privilege but also had violated the confidentiality provisions of Judiciary Law § 45(1). Notwithstanding that knowledge, the Commission's attorney stated in her opening statement that "it was Judge Mora who made Koch's private statements about him public when he publicly filed his defamation lawsuit and attached a copy of Ms. Koch's complaint to the lawsuit" (Tr. p. 14). This is untrue. It is extremely troubling because the Commission's attorney knew when she made that statement that Ms. Koch had destroyed the confidentiality of the proceedings because she made the statements public well before the filing of the lawsuit by intentionally disclosing the information to the Mayor of Poughkeepsie. Shockingly, the Commission's attorney then questioned Respondent during the hearing suggesting that he violated the confidentiality of the Commission's proceedings by filing the complaint (Tr. pp. 553-555) when she was well aware that it was Ms. Koch who had violated the confidentiality of these proceedings long before Respondent commenced the defamation lawsuit.

By making these false statements to this Commission, the prosecution violated Rule 3.3 of the New York Rules of Professional Conduct. Rule 3.3(a) states, "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; and (3) offer or use evidence that the lawyer knows to be false."

Although Respondent raised the issue of Ms. Koch's violation of Judiciary Law § 45(1) and the Commission staff's knowledge of her conduct, the Referee made no conclusions with respect to this issue other than his finding that Ms. Koch disclosed her complaint to others (Report

at p. 9). By declining to address the legal significance of that violation, or the staff's awareness of it, the referee effectively abdicated his responsibility to confront an uncomfortable, but essential, issue. His silence on a material issue reflects not an exercise of judgment, but a failure to make one.

D. The Mere Fact that Respondent Commenced the Defamation Action Does Not Mean that it was Retaliatory.

The Referee concluded that, because Respondent was angry with Ms. Koch, the commencement of the defamation action was retaliatory (Report at p. 31). In essence, the Referee held that the mere commencement of the action automatically makes it retaliatory. There is no support for this holding.

The mere fact that a lawsuit is commenced against a party who engaged in protected activity by filing a complaint does not automatically mean that the lawsuit was in retaliation for the filing of the complaint. For example, it is unlawful to retaliate against a person for filing a human rights complaint (*see* Executive Law § 296[7]). To establish retaliation, a complainant must not only show that he or she engaged in protected activity and that the opposing party took adverse action against the complainant, but the claimed aggrieved party must also establish a causal connection between the protected activity and the adverse action, thus showing that the adverse action was retaliatory (*see Rosen v Price Chopper*, 239 AD3d 1132, 1135 [3d Dept 2025]). A plaintiff establishes that an action was retaliatory by showing that the defendant was motivated, in whole or in part, by an impermissible motive (*see Bilitch v New York City Health & Hosps. Corp*, 194 AD3d 999, 1005 [2d Dept 2021]).

Applying these principles to the instant case, if a judge under investigation commences a lawsuit against the complainant solely because the complainant filed a complaint, such a filing would obviously be retaliatory. But that is not what occurred in the instant case.

The testimony shows that Respondent did not commence the defamation action immediately after he learned that Ms. Koch filed the complaint. Rather, he filed the defamation action only after he learned from Mr. Brown that Ms. Koch had (1) misstated the events in the complaint,¹ (2) told Mr. Brown that she filed the complaint to “go after Judge Mora” because of his position on vaccines (Tr. pp. 311-313) and was “trying to destroy [Respondent]”(Tr. p. 410),² and (3) published the fact that she filed the complaint and the contents thereof to numerous third parties in violation of Judiciary Law § 45(1).

The timeline of the relevant dates in question supports Respondent’s testimony that the lawsuit was not brought in retaliation for Ms. Koch’s complaint filed with the Commission:

- 12/29/2021 – Ms. Koch files complaint against Respondent with Commission.
- 4/12/2022 – Respondent is made aware of complaint by email from Commission.
- 8/25/2022 – Ms. Koch testifies before Commission.
- Sept. 2022 – Mr. Brown tells Respondent that Ms. Koch told him about contents of her complaint and brags to him that she is going to get Respondent fired.
- Nov. 2022 – Respondent seeks counsel from Attorney Sussman regarding potential defamation claim.
- 12/29/2022 – Respondent files defamation action on the last day of the Statute of Limitations.

When asked whether he intended to bring a lawsuit against Ms. Koch prior to his conversation with Mr. Brown, Respondent testified “[t]here was no thought in my mind of bringing a lawsuit against Ms. Koch up until that call from Mr. Brown” (Tr. p. 410). Attorney Sussman confirmed in

¹ Ms. Koch’s description of the incident was contrary to the testimony of both Respondent and Mr. Brown, and, importantly, the Referee found that Mr. Brown’s testimony was credible (Report at P. 21). Further, when compared to the testimony of Ms. Feather and Ms. Monteverdi, Ms. Koch’s description of the incident was, at best, an exaggeration.

² Ms. Koch admitted that she told Mr. Brown that she had filed the complaint and that she “probably” also told him that she hoped that Respondent would be removed (Tr. p. 285).

his hearing testimony that his consultation with Respondent regarding the possible defamation claim against Ms. Koch occurred between November 9 and 13 of 2022 (Tr. p. 240).

If Respondent's intent had been to retaliate against Ms. Koch for filing the complaint with the Commission – as the Referee somehow concluded – he would not have waited more than eight months after he found out about her filing the complaint, and four months after she testified before the Commission, before commencing the defamation lawsuit or seeking the independent advice of an attorney with respect to a defamation action. If Respondent wanted to intimidate or silence Ms. Koch, logic dictates that he would have filed the lawsuit before she testified before the Commission. It is apparent that the mere filing of the complaint with the Commission was not the triggering event for the commencement of the defamation lawsuit.

The fact that Respondent is a judge does not prohibit him from commencing a lawsuit. Opinion 12-96 (Respondent's Ex. G) provides that:

the Rules Governing Judicial Conduct do not preclude a judge from exercising the same rights as any other citizen when appearing as a litigant. For example, the Committee has advised that a judge may commence an action in a court of competent jurisdiction, whether proceeding pro se or through counsel (*see* Opinions 12-41; 09-12; 93-05 [Vol. X]; 90-11 [Vol V] (*Id.*)).

The Referee tried to infer a retaliatory intent from the fact that Respondent was angry at Ms. Koch (Report at p. 31). Of course he was angry. As the Referee found, Ms. Koch's allegations regarding the incident were baseless or, at best, a gross exaggeration. The fact that Respondent may have been angry with Ms. Koch does not mean retaliation for the filing of the complaint was the sole reason Respondent filed the lawsuit—or even one of the reasons.

There is no proof that Respondent desired to go after Ms. Koch simply because Ms. Koch filed the complaint. On the contrary, he testified that he had no intention of commencing any action against her after he learned that she had filed the complaint but before he spoke to Mr.

Brown (Tr. p. 410). Respondent was willing to let it go until Ms. Koch publicly announced her intention to destroy him. At that point, Respondent's personal and professional reputation had been put in jeopardy. What he was understandably angry about was Ms. Koch's stated intention to destroy him, her gross misrepresentation of the facts regarding the incident and her publication of the complaint and the contents thereof to numerous third parties, which was in clear violation of the confidentiality requirements of Judiciary Law § 45(1). It can hardly be said that Respondent should not have been upset with this highly inappropriate conduct on the part of Ms. Koch or that Respondent could not defend himself. To suggest otherwise is absurd.

The fact that Respondent sought money damages in the defamation action does not mean the lawsuit was retaliatory. Ms. Koch slandered and libeled Respondent. Obviously, every lawsuit is, in some sense, retaliatory in that the plaintiff feels that he or she was wronged by the defendant and seeks damages that were occasioned by the defendant's wrongful conduct.

E. The Commencement of the Defamation Action Did Not Have a Chilling Effect.

The Referee noted that a judge suing a person who filed a complaint with the Commission could dissuade a person from filing a meritorious complaint (Report at pp. 31-32). While that may generally be true, Respondent's commencement of the defamation action in the instant case could not create such a chilling effect. On the contrary allowing this kind of behavior to remain unchecked sends a clear message that judges are fair game.

In a typical case, a person files a complaint with the Commission and an investigation takes place. During that time, the confidentiality requirements of Judiciary Law § 45(1) protect the complainant, the judge and the process as a whole (*see Weiner v Weintraub*, 22 NY2d at 332). In such a case, it can readily be seen that the judge commencing a lawsuit against the complainant

solely because the complaint was filed would indeed have a chilling effect. That is not what happened in the instant case.

Ms. Koch not only filed a complaint, but she stated to Mr. Brown that her purpose in doing so was to go after Respondent because of his position on vaccines (Tr. pp. 311-313, 410), clearly not a proper purpose.

Even more importantly, instead of complying with the confidentiality provisions of Judiciary Law § 45(1), Mr. Koch immediately wrote to the Mayor of the City of Poughkeepsie regarding the complaint, which she admitted made the complaint public (Tr. 190-191, 284-287) and then proceeded to tell numerous people including Mr. Brown, Ms. Feather, (Tr. pp. 41-44, 285), Ms. Monteverdi (Tr. pp. 80-81), her boss (Dr. Modi), her husband, her brother and others (Tr. p. 286) about the complaint. Further, Ms. Koch admitted that such disclosure was not inadvertent but was intentional. When asked whether she told any additional people about the complaint, Ms. Koch replied “[o]f course, because it was very upsetting” and “of course I would have talked about it amongst my friends. Absolutely” (Tr. p. 286). Ms. Koch testified that “I would probably tell anyone who would listen that day” (Tr. p. 287). She also testified that she did not advise the people she spoke to not to tell anyone else (Tr. p. 286-287).

None of this conduct by Ms. Koch was proper conduct in connection with an investigation being done by the Commission. Further, Ms. Koch certainly was not chilled by the defamation action because she had engaged in all of this improper conduct well before the defamation lawsuit was commenced. Ms. Koch was very animated and aggressive during her testimony, bragging about how many people she told, thereby showing she was not chilled.

As discussed above, what is even more troubling is the Commission staff’s apparent acquiescence of Ms. Koch’s improper conduct. Ms. Koch admitted that she advised Commission

staff, including its attorney, prior to the hearing that she had disclosed her complaint to the Mayor of Poughkeepsie (Tr. pp. 294-296), which disclosure was a violation of Judiciary Law § 45(1). Despite being aware of that fact, the Commission's attorney did not promptly advise Respondent or the Referee of Ms. Koch's conduct. Instead, in her opening statement, she misstated that it was Respondent who violated the confidentiality provision by commencing the defamation action and making Ms. Koch's statements public (Tr. p. 14). Similarly, she questioned Respondent suggesting that he violated the confidentiality of the Commission's proceedings by filing the defamation complaint (Tr. pp. 553-555) when she was well aware that Ms. Koch had destroyed the confidentiality of these proceedings long before Respondent commenced the lawsuit. If there was any chilling effect from what occurred in this case, it would be on judges who may be the subject of complaints to the Commission in the future. Those judges cannot safely rely on the confidentiality requirements of Judiciary Law § 45(1) because they will legitimately fear that the Commission staff will turn a blind eye to violations of such statutorily-mandated confidentiality requirements.

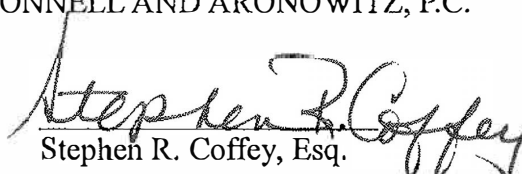
CONCLUSION

The Referee's recommendation that there is no basis for Charges I and III should be confirmed. The Referee's recommendation to sustain Charge II should be disaffirmed because (1) Respondent relied in good faith on the advice of counsel in commencing the defamation action, (2) Ms. Koch waived whatever privilege she may have had by disclosing both the filing of the complaint and the contents thereof to numerous third parties long before the defamation action was commenced, (3) the filing of the defamation action did not breach any confidentiality because Ms. Koch had already breached the confidentiality of the proceedings before the Commission and (4) Respondent did not commence the defamation action in retaliation for Ms. Koch's filing of the complaint with the Commission.

Dated: May 19, 2026

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