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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF HONORABLE TERRENCE C.
O'CONNOR

No. 99

20 Eagle Street
Albany, New York
September 6, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

JONATHAN L. EDELSTEIN, ESQ.
EDELSTEIN & GROSSMAN
Attorney for Appellant
501 Fifth Avenue, Suite 514
New York, NY 10017

EDWARD LINDNER, ESQ.
NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT
Attorney for Respondent
Corning Tower, 23rd Floor
Empire State Plaza
Albany, NY 12223

Sara Winkeljohn
Official Court Transcribe



1 CHIEF JUDGE DIFIORE: This is appeal number 99 on
2 the calendar, Matter of the Honorable Terrence C. O'Connor.
3 Counsel.

4 MR. EDELSTEIN: Good afternoon, Your Honors. May
5 it please the court, I'm Jonathan Edelstein, and I
6 represent Judge Terrence O'Connor. With the court's
7 permission, I would like to reserve three minutes for
8 rebuttal.

9 CHIEF JUDGE DIFIORE: You may.

10 MR. EDELSTEIN: Your Honor, in the Kiley case
11 this court emphasized the need to quote, "Minimize the
12 risk" - - -

13 JUDGE RIVERA: Counsel, what steps did the judge
14 take to cooperate with the Commission's investigation?

15 MR. EDELSTEIN: He made a detailed written
16 response to the initial investigative letter, a
17 sufficiently detailed response that they used - - - the
18 Commission used part of it against him at the hearing as an
19 admission. And in fact, there were further details in that
20 response regarding, among other things, the right to be
21 heard and the imposition of the fees that were not entered
22 into the record before the Commission. And he did
23 participate via written submissions. Your Honor, I'm
24 certainly not saying that he handled this well. I think
25 that this case is proof that even a judge is not immune to



1 pro-se-litigant-itis.

2 JUDGE STEIN: Does - - - does he now accept
3 responsibility for his failings in regard to cooperation
4 with the Commission?

5 MR. EDELSTEIN: Well, Your Honor, I'm not sure
6 that that is - - - I mean I'm not sure that that's relevant
7 at this late date given that the record has been made. I
8 mean certainly in discussions with me he has acknowledged
9 that he hasn't - - - you know, he did not handle it well
10 and that he should have retained counsel sooner and that he
11 should have cooperated more fully in the process. But what
12 I would like to come back to, Judge, is that in the Kiley
13 case - - -

14 JUDGE FAHEY: But aren't you missing - - - the
15 real point here is leaving aside the individual allegations
16 against the judge; the point is that how can the
17 commissioner or any - - - any monitoring agency in dealing
18 with the judiciary come to any rational decision and make
19 any recommendation to us if there's no cooperation to begin
20 with? And that refusal to cooperate almost undermines our
21 ability to - - - to give you a judgment.

22 MR. EDELSTEIN: Well, Your Honor, I think you've
23 just outlined very clearly why non-cooperation is its own
24 punishment and also why the Commission has other remedies
25 in that circumstance. Non-cooperation can result in an



1 adverse inference. A - - - the Commission may treat
2 failure to respond to allegations as an admission. It did
3 not do that in this case, but it can and it has done in
4 other cases. In addition, failure to testify - - - again,
5 I'm - - - this is not a case of complete non-cooperation.
6 This is a case of failure to appear and testify. Also
7 results in lost opportunities - - -

8 JUDGE STEIN: Well - - - well, it may - - -

9 MR. EDELSTEIN: - - - for a judge - - -

10 JUDGE STEIN: It - - - to me it potentially goes
11 beyond failing to appear and testify because there - - -
12 there were a lot of - - - there was a lack of response to
13 written requests in a timely manner. There was just
14 providing information that - - - so not only did - - - was
15 there a failure to cooperate but there - - - and I think
16 the Commission certainly reached the conclusion that it was
17 an intentional attempt to delay and frustrate the process.
18 It wasn't just, you know, sit back and ignore it, I can't
19 deal with it, I - - - you know, it was - - - it was - - -
20 it was very intentional.

21 MR. EDELSTEIN: Well - - -

22 JUDGE STEIN: It certainly can be interpreted
23 that way.

24 MR. EDELSTEIN: Your Honor, I - - - I would, in
25 fact, suggest that there is not enough evidence to



1 interpret it that way. I know the Commission reached that
2 conclusion regarding the misaddressed envelope. And
3 regarding - - -

4 JUDGE STEIN: Well, but then there was also - - -

5 MR. EDELSTEIN: - - - the four - - -

6 JUDGE STEIN: There was also, you know, arguments
7 that he was waiting for an executor to be appointed and
8 that he couldn't proceed without - - - without certain
9 information which he never really explained what that
10 information was since he had all the information. And - -
11 - and he, you know, requested adjournments and then didn't
12 show up on adjourn dates so - - -

13 MR. EDELSTEIN: No - - -

14 JUDGE STEIN: - - - it's more than - - - than
15 just - - -

16 MR. EDELSTEIN: Your Honor, with respect to the
17 executor, I mean, it's not every day that a person's
18 attorney dies on them. And it's certainly a situation
19 where a client might be confused about what to do and where
20 to go. I mean he's not - - - certainly not a judge in the
21 - - -

22 JUDGE STEIN: He's not just a client. He's a - -
23 - he's a lawyer and he's a judge. And he's held to a
24 higher standard than the general public.

25 MR. EDELSTEIN: Yes, he is held to a higher



1 standard.

2 JUDGE RIVERA: Was there evidence that he asked
3 the decedent's firm for someone to be put on the case, to
4 get his file?

5 MR. EDELSTEIN: I believe at the March 7th
6 appearance there was some discussion of that. Certainly,
7 Your Honors, I think as a bottom line I think that it's
8 fair to say that there was not full cooperation here, that
9 it was reasonable for the Commission to find that Judge
10 O'Connor did not cooperate. But what I want to go back to
11 is when can non-cooperation be used to elevate a sanction
12 and particularly to elevate a censure to a removal which is
13 a huge step. It's a much bigger step than elevating an
14 admonition to a censure.

15 And the Kiley case spoke of lack of candor and
16 failure to cooperate as two sides of the same coin, that a
17 judge facing an investigation was in quote unenviable
18 position of either not speaking and - - - and being
19 penalized for failure to cooperate or testifying and
20 risking the Commission elevating a sanction for lack of
21 candor. And the Kiley case was the lack of candor side of
22 this whereas this case is non-cooperation. But I would
23 argue that the caution against elevating the sanction based
24 on the investigative process should apply equally. I mean
25 first of all, if it's a choice between - - -



1 JUDGE STEIN: But don't - - - don't we have to
2 look at all the circumstances? Don't we have to look at
3 the charges that - - - that were brought regarding his
4 conduct on the bench? Don't we have to look at his prior
5 censure? And can't we consider as a part of the totality
6 of the circumstances, if you will, and the public
7 confidence in the ability of this judge to do his job look
8 at it as a whole and so what - - - what you're suggesting
9 is is that the - - - that the lack of cooperation was, you
10 know, the one thing that - - - that resulted in a sanction.
11 But what if it's just a part of everything?

12 MR. EDELSTEIN: Well, Your Honor, I actually
13 think I'm on firm ground in saying that it is the one thing
14 that resulted in - - - in removal because the Commission
15 has effectively conceded as much. In the oral argument
16 before the Commission counsel said that without the non-
17 cooperation the benchmark would be censure. And in fact -
18 - -

19 JUDGE STEIN: But that's not - - - that's not
20 contrary to my point.

21 MR. EDELSTEIN: No, and - - - and I do agree that
22 the totality can and should be taken into account. But I
23 would submit as, you know, given the caution in the Kiley
24 case that when you're taking a step from censure to removal
25 unless the underlying conduct is very close to what would



1 have justified a removal - - -

2 JUDGE RIVERA: So let's say we agree with you
3 that partial non-cooperation is different in kind and
4 warrants a different sanction than complete failure to
5 cooperate, right. Why isn't a pattern of non-cooperation,
6 though of a different animal, why doesn't that equate with
7 just not cooperating at all? So is there a certain
8 intentionality as Judge Stein has - - - has noted that the
9 Commission found.

10 MR. EDELSTEIN: Well, because the purpose of any
11 sanction in any commission proceeding is not to punish the
12 judge. It is to vindicate the public right to have judges
13 on the bench that it can have confidence in and to gauge
14 judges' fitness.

15 JUDGE RIVERA: But how can there be public
16 confidence in a - - - in a member of the bench who
17 undermines and intentionally fails to cooperate with a body
18 tasked with determining whether or not the judge has
19 violated the law, ethical standards, is tasked with
20 deciding what would be an appropriate sanction under the
21 circumstances. Where - - - where can the public have
22 confidence in that particular member of the bench when they
23 don't abide by the rules themselves?

24 MR. EDELSTEIN: I'm - - - I'm not at all sure - -
25 - I'm not at all sure that the public would lose confidence



1 in a judge who remains silent. I mean the popular culture
2 is that you have a right to remain silent. And I
3 appreciate that there - - - this is a different kind of
4 case that in a civil proceeding or an administrative
5 proceeding such as before the Commission an adverse
6 inference can be drawn. But I - - - I think that a public
7 who is steeped in the culture of Miranda is not going to
8 view remaining silent in the face of accusation as some
9 sort of dereliction or moral failure.

10 JUDGE FAHEY: But we're still back then to our
11 original problem which is if the judge doesn't cooperate
12 how can the Commission do its work and how can we do our
13 job?

14 MR. EDELSTEIN: Well, Judge, the Commission did
15 its work in this case. It heard from many witnesses. It
16 heard in writing from the judge. In fact, you know, given
17 that the judge professed a lack of further recollection,
18 it's very doubtful that his oral testimony would have
19 really added to the written submission.

20 JUDGE FAHEY: Well, let - - - let me take it a
21 step further. Judge Stein was talking about the totality
22 of the circumstances which is a good point because here we
23 have a short time left in the judge's term, and how are we
24 not to view the delay as simply an attempt to run out the
25 clock before the judge leaves the bench? In other words,



1 it was a calculated strategy.

2 MR. EDELSTEIN: Judge, by the time - - - when the
3 - - - when the hearing was scheduled - - - I mean when this
4 alleged non-cooperation occurred, this was during the early
5 part of 2017. At that point, the judge's term had a year-
6 and-a-half to run. That it's very doubtful that miss - - -
7 misaddressing an envelope or requesting an adjournment from
8 March 7th 29th or from January to March is part of the
9 strategy to delay things all the way to the end of 2018.
10 And look where we are now, Judge. You know, we're - - -
11 we're not at the end of 2018 yet and it's already at this
12 stage. And certainly, I would also argue that any such
13 intent is undermined by the fact that counsel did appear in
14 - - - right before the hearing was scheduled. I mean
15 obviously - - -

16 JUDGE FAHEY: Asked for an - - -

17 MR. EDELSTEIN: - - - not as expeditiously - - -

18 JUDGE FAHEY: Excuse me. Asked for an
19 adjournment, right?

20 MR. EDELSTEIN: The counsel did. That wasn't - - -
21 - that wasn't Judge O'Connor asking for the adjournment.

22 JUDGE FAHEY: I see.

23 MR. EDELSTEIN: There is no suggestion by the
24 Commission that the counsel was at - - - counsel's reasons
25 for requesting an adjournment were anything other than bona



1 fide.

2 JUDGE RIVERA: Well, why - - - why didn't he just
3 show up and preserve his argument on the service?

4 MR. EDELSTEIN: Pro-se-litigant-itis, Judge. I'm
5 - - - I'm certainly not saying he's handled this well, but
6 what I am saying is this is not a removal case.

7 CHIEF JUDGE DIFIORE: Thank you, Mr. Edelstein.

8 MR. EDELSTEIN: Thank you, Judge.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MR. LINDNER: Good afternoon, Chief Judge
11 DiFiore; good afternoon, Your Honors. May it please the
12 court. As the Commission found, a Commission request that
13 a judge appear and give testimony during an investigation
14 is not an invitation. Judiciary Law 44(3) gives the
15 Commission the authority - - -

16 JUDGE STEIN: Is it in and of itself enough to
17 remove a judge?

18 MR. LINDNER: I think that that's what you should
19 hold. I think it's a red line, and if you look at the
20 Commission's cases, you see in cases like McAndrews in 2014
21 and McCall, we have judges who failed to cooperate
22 initially. We have judges who don't answer our letters.
23 It happens. But if a judge comes around and does appear
24 and give testimony, both McAndrews and McCall were
25 censures. The - - - the failure to initially cooperate was



1 an exacerbating factor, but it didn't result in a removal
2 as opposed to a - - -

3 JUDGE STEIN: So what if - - - what if there were
4 allegations made about a judge's conduct on the bench and -
5 - - and the Commission did its investigation and the judge
6 refused to cooperate, refused to cooperate, refused to
7 cooperate, and ultimately the investigation doesn't support
8 the allegations of - - - of misconduct on the bench. So
9 you - - - you wouldn't be inclined to - - - to bring other
10 charges.

11 MR. LINDNER: Understood. I'm not conceding that
12 - - -

13 JUDGE STEIN: Or - - - or minor things, there are
14 some - - -

15 MR. LINDNER: I'm not conceding that that's what
16 we have here.

17 JUDGE STEIN: No, no, no, no. I - - -

18 MR. LINDNER: But I understand the question.

19 JUDGE STEIN: It's a hypothetical.

20 MR. LINDNER: And I think the answer still is it
21 must be a removal. I can't stress enough how important a
22 judge's testimony is in a Commission's investigation.
23 Every year we have many - - -

24 JUDGE RIVERA: So even with a detailed response
25 it's the failure to come and testify - - -



1 MR. LINDNER: To come and test - - -

2 JUDGE RIVERA: - - - even if - - - even if he
3 would not say anything at the hearing?

4 MR. LINDNER: The - - - the statute doesn't
5 actually require a judge to answer our letters. That's
6 something that's required because of high standards of
7 conduct and - - - and cooperation that's expected of a
8 judge. But the statute specifically requires that a judge
9 appear and give testimony under oath. And as I started to
10 say, we have so many cases in which conduct that initially
11 looks troublesome - - -

12 JUDGE RIVERA: So if he provided a written
13 response that - - - you're saying that's not enough?

14 MR. LINDNER: I think that's not enough.

15 JUDGE RIVERA: Certified under oath.

16 MR. LINDNER: I think that's not enough. Any
17 lawyer will tell you that there's no substitute for live
18 testimony.

19 JUDGE RIVERA: But if his position is I'm not
20 going to answer any questions?

21 MR. LINDNER: I don't think that the statute
22 gives him the right to do that.

23 JUDGE RIVERA: To not - - - he must answer your
24 question? He can't take a position where he will not
25 answer a question?



1 MR. LINDNER: I do not believe that a judge can
2 do that. I don't think that you should hold that, no. I -
3 - - Kiley - - -

4 JUDGE RIVERA: What if he says I already answered
5 it and I - - - my answer doesn't change?

6 MR. LINDNER: Clearly, there are - - - are lines.
7 There are judges that can be evasive. There are judges
8 that - - - that flout the line between truth and lack of
9 candor.

10 JUDGE STEIN: What if they plead the Fifth
11 Amendment?

12 MR. LINDNER: Well, we have never - - - I'm
13 sorry. I take that back. We did have that happen once in
14 1981 in Matter of Carpenter there was a town judge who was
15 accused of taking funds from the court fund, and he refused
16 to answer questions and the took the Fifth Amendment in
17 that case. And he was removed for that. It doesn't happen
18 because the Commission's practice when a judge is subject
19 to a criminal charge, we've had that recently as you know,
20 is that we hold our investigation in abeyance. We don't
21 want to put judges in the position where they have to come
22 and assert the Fifth Amendment in order to keep their
23 rights in the criminal proceeding. So that's why you don't
24 see it. But really the fact that the - - - the - - -

25 JUDGE RIVERA: So if he had not responded at all



1 but he actually showed up for a hearing, that you would say
2 is he's come around.

3 MR. LINDNER: I still think so.

4 JUDGE RIVERA: He's going to answer questions
5 now, and he doesn't - - - well, he's not obstructionist at
6 the hearing.

7 MR. LINDNER: Right, because in the investigation
8 when the judge gives you testimony then you have the
9 opportunity to corroborate it. Yes, it's quite different.
10 And you removed a Judge Cooley in 1981 and look at your
11 cases in Rogers and Cooley. In 1980 there was a town
12 judge, Matter of Rogers, in which the judge failed to
13 answer three letters. He had some problems with
14 recordkeeping. The Commission removed him. This judge
15 reduced it to a censure. The next year you had Matter of
16 Cooley. The judge didn't respond at all, no letters,
17 refused two opportunities to come and testify under oath,
18 and you upheld that removal. And again, the underlying
19 misconduct in Cooley was more recordkeeping for town
20 judges. I do think that's a bright line. The - - - the
21 investigative testimony is so critical.

22 We do have cases that never make it to you
23 because conduct that looks bad is explained when the judge
24 puts it in context, but we also have cases like Bauer, most
25 recently Matter of Ayres, Matter of Young in which conduct



1 that may be borderline when we have the judge's testimony
2 we reveal a deeper problem that ultimately leads to
3 removal. And so you have cases where you look at judges'
4 lack of contrition or their failure to accept
5 responsibility as being exacerbating. A judge who just
6 tactically refuses - - - strategically refuses to appear
7 and give testimony deprives you of that record, deprives
8 the Commission of that record, and it deprives Commission
9 staff of the opportunity to prepare for a real hearing.
10 How do we know what witnesses to bring if we don't know
11 what the judge is going to say?

12 CHIEF JUDGE DIFIORE: Counsel, you care to
13 address the notice issue?

14 MR. LINDNER: He admits that he had actual notice
15 of the hearing date. He hasn't even tried to make an
16 argument to you that he - - -

17 CHIEF JUDGE DIFIORE: Did you comply with the
18 statutory - - -

19 MR. LINDNER: No.

20 CHIEF JUDGE DIFIORE: - - - requirements on
21 notice?

22 MR. LINDNER: He was given actual notice, and I
23 think that in your cases under our analysis that that's
24 sufficient. But we did not serve it by certified mail, and
25 we've never denied that.



1 CHIEF JUDGE DIFIORE: Why not? Why didn't you
2 comply with the - - - what's set forth in the statute?

3 MR. LINDNER: It's difficult for me to explain
4 what happened without talking to you about the Commission
5 usual practice and how we do hearing notices. That's not
6 in the record, although I'm happy to address it if the
7 court would find it helpful.

8 CHIEF JUDGE DIFIORE: Please do.

9 MR. LINDNER: In actual fact, we haven't sent a
10 hearing notice by certified mail in years, more than a
11 decade. No one can remember the last time we did. And the
12 reason for that is in the modern practice, we no longer
13 send the judge a demand letter and tell him or her to show
14 up on a date certain for their hearing. Our practice has
15 been for many, many years a referee is appointed. He or
16 she holds a pre-hearing conference.

17 The parties get together, they work out a
18 discovery schedule which is always more generous than
19 what's provided by statute, and everyone gets out their
20 calendars and we find dates that work for the referee, the
21 lawyers, and the witnesses. In that circumstance, a
22 certified letter is somewhat superfluous because the judge
23 or his counsel has participated in choosing the dates, so
24 the - - - the referee does what the referee did here which
25 is to send a follow-up email or a follow-up letter just



1 confirming what the parties have agreed to.

2 In this case, the referee tried to do that, and
3 the petitioner refused to participate in the conference.
4 We should have sent it by certified mail, but that's why it
5 didn't happen. Because it's been standard practice not to
6 do it for a long time. Note that the formal complaint, the
7 demand to show up for a hearing, those are also required to
8 be served by certified mail. Those were all served by
9 certified mail or personal in the normal course.

10 CHIEF JUDGE DIFIORE: Thank you, Mr. Lindner.

11 MR. LINDNER: Thank you, Your Honor.

12 CHIEF JUDGE DIFIORE: Counsel.

13 MR. EDELSTEIN: Your Honor, Counsel for the
14 Commission in his argument illustrated exactly why Kiley
15 should apply to failure to cooperate. Counsel argued that
16 sometimes the judge's testimony and what the Commission
17 views as his attitude of lack of contrition will - - - is
18 something that the Commission will use to elevate the
19 sanction, that the same underlying conduct becomes more
20 serious because the Commission doesn't feel that the judge
21 is - - -

22 JUDGE STEIN: So then aren't you - - -

23 MR. EDELSTEIN: - - - sorry enough.

24 JUDGE STEIN: Aren't you questioning the
25 underlying authority then of the Commission to require an



1 appearance and testimony?

2 MR. EDELSTEIN: I'm - - -

3 JUDGE STEIN: I mean if what - - - essentially,
4 you're - - - you're asserting a right to remain silent,
5 right. And - - - and - - - but that's not what our - - -
6 that's not how the system is set up here.

7 MR. EDELSTEIN: No, Judge, I - - - I am not
8 contesting that the Commission has the right to require a
9 judge to testify.

10 JUDGE STEIN: But if any - - - if everybody - - -

11 MR. EDELSTEIN: Also the same - - - oh.

12 JUDGE STEIN: - - - can ignore it then what's the
13 - - - then what's the point?

14 MR. EDELSTEIN: Well, as I've said, first of all,
15 the Commission has other remedies.

16 JUDGE STEIN: Well, maybe those remedies - - -

17 MR. EDELSTEIN: It can draw an adverse inference.

18 JUDGE STEIN: Maybe those remedies aren't
19 sufficient to enable it to do its - - - its statutory and
20 constitutional job.

21 MR. EDELSTEIN: Well, I - - -

22 JUDGE STEIN: In all cases.

23 MR. EDELSTEIN: Well, I think if there - - - I
24 think if there were a finding in a specific case that where
25 a judge failed to testify the Commission was unable to do



1 its job - - - for instance, if this was something where
2 there weren't other witnesses or where there was something
3 that only the judge knew and then where he failed to
4 testify and where that effectively had the effect of
5 concealing - - -

6 JUDGE RIVERA: Yeah, but they didn't have the
7 benefit of - - - they didn't have the benefit of the
8 testimony on the fees, right, on the orders related to the
9 fees, correct?

10 MR. EDELSTEIN: Correct, that - - -

11 JUDGE RIVERA: I know that your argument is that
12 that did not bode well for the judge. That worked against
13 him, and that should be enough punishment. But you could
14 see that that is an obstruction of the hearing process.

15 MR. EDELSTEIN: Judge, they had the testimony
16 from the attorney for the Rybak Firm, and they had the
17 orders themselves. And anything - - - I mean the only one
18 prejudiced by the judge not appearing and testifying
19 regarding whether or not he gave an opportunity to be heard
20 or what the reason for the - - - for the fees were, the
21 only one prejudiced by that was the judge. The Commission
22 certainly had everything it needed in order to make a
23 finding of misconduct which it did. You know, certainly as
24 we've discussed in the brief, we - - - our position is that
25 at most this was a harmless error of law and none of the -



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- -

JUDGE GARCIA: Counsel, should - - - you also - -
- the Commission also take into account it isn't only non-
cooperation it seems to me. It's when he did interact with
the Commission it was abusive in certain ways. I mean
there's an expletive used. He calls it a clown show. One
letter it says, "The blatant lies in your most recent
letter." I mean it's more than just I'm not going to show
up; isn't it?

MR. EDELSTEIN: Well, the Commission's
determination specifically disclaimed the clown show
comment as a basis of decision. Essentially, there was a
footnote in the Commission's determination that Judge
O'Connor was upset at the time. It may have been a
response to him feeling someone was following him, and
therefore the court is not considering that as part of the
failure to cooperate. And I believe the other - - -

JUDGE GARCIA: Talk about the blatant lies
comment.

MR. EDELSTEIN: - - - letter that you're
referring to - - - I believe that occurred during the - - -
after the formal written complaint and was not part of the
charge of failure to cooperate. I believe that's - - -
that to be the case. And I think once the Commission gets
beyond the four corners of the charge I think it's - - -



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that's something that there's ample case law that it is
forbidden to do, to go beyond the four corners of what it
alleged.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. EDELSTEIN: Thank you, Judge.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Honorable Terrence C. O'Connor, No. 99 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: September 13, 2018

