

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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

**DETERMINATION**

GILBERT L. ABRAMSON,

a Judge of the Family Court,  
Saratoga County.

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair  
Stephen R. Coffey, Esq., Vice Chair  
Honorable Rolando T. Acosta  
Joseph W. Belluck, Esq.  
Joel Cohen, Esq.  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Elizabeth B. Hubbard  
Nina M. Moore  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk and Thea Hoeth, Of Counsel)  
for the Commission

Robert P. Roche for the Respondent

The respondent, Gilbert L. Abramson, a Judge of the Family Court,  
Saratoga County, was served with the first Formal Written Complaint dated June 17,

2008, containing seven charges. The first Formal Written Complaint alleged that in six matters respondent violated the due process rights of defendants appearing before him by failing, *inter alia*, to advise them of the right to counsel and to afford an opportunity to be heard, notwithstanding that he had been issued a Letter of Dismissal and Caution for failing to advise litigants of the right to counsel. Respondent filed an Answer dated December 3, 2008.

By Order dated November 28, 2008, the Commission designated Paul A. Feigenbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 9, 2009, in Albany; the hearing exhibits included a stipulation of facts as to Charges I through VII (Ex. 1). The referee filed a report on July 21, 2009.

Respondent was served with the Second Formal Written Complaint dated July 7, 2009, containing three charges (numbered as Charges VIII through X). The Second Formal Written Complaint alleged that respondent made offensive remarks of a sexual nature to and about a litigant and failed to advise another litigant of the right to counsel notwithstanding having been issued the above-mentioned Letter of Dismissal and Caution. Respondent filed an Answer dated July 20, 2009.

On August 14, 2009, the Administrator moved for summary determination with respect to the Second Formal Written Complaint. Respondent opposed the motion in papers filed on September 21, 2009, and the Administrator filed a reply on September 22, 2009. By Decision and Order dated September 24, 2009, the Commission denied the

motion for summary determination and, on the same date, designated Philip C. Pinsky, Esq., as referee to hear and report proposed findings of fact and conclusions of law with respect to the Second Formal Written Complaint. A hearing was held in Albany on December 2, 7 and 8, 2009, and January 12 and 13 and March 2, 2010. The referee filed a report dated June 28, 2010.

The parties submitted briefs with respect to the referee's reports and the issue of sanctions. Commission counsel recommended the sanction of removal, and respondent's counsel opposed the recommendation. Oral argument was waived. On September 29, 2010, the Commission considered the record of the proceedings and made the following findings of fact.

1. Respondent has been a Judge of the Family Court, Saratoga County, since 2000. His current term expires on December 31, 2010. Prior to serving as a judge, respondent served as chief counsel to the New York State Senate Committee on Children and Families and as deputy county attorney for Saratoga County dealing with Family Court matters.

As to Charge I of the Formal Written Complaint:

2. On February 11, 2003, the Saratoga County Support Collection Unit, on behalf of Laurie Beaulac, filed a petition for violation of a child support order by Daniel Eddy. Mr. Eddy was never personally served with that petition. On the request of the Support Magistrate, respondent issued a warrant for Mr. Eddy's arrest on April 9,

2003. No evidentiary hearing on the petition was held by the Support Magistrate.

3. On February 3, 2005, Mr. Eddy voluntarily appeared before respondent in response to the April 9, 2003 warrant and on his own petition for modification of support, which was filed on November 22, 2004. The modification petition requested relief from the support order due to Mr. Eddy's physical and mental limitations, and the petition was signed and submitted by his power of attorney due to those same physical and mental limitations. Respondent knew that Mr. Eddy was under the care of a doctor due to a stroke, was in rehabilitation therapy, was unable to read or write and in general had physical limitations. At this appearance, respondent also proceeded on a petition for violation of a support order filed by the Support Collection Unit on behalf of Colleen Van Patten.

4. At the February 3, 2005 court appearance, Mr. Eddy's attorney questioned whether Mr. Eddy had been properly served with the petitions, and he advised respondent that no evidentiary hearing had been held with respect to the violation petition in *Beaulac* and that Eddy had not had an opportunity to show that he was incapable of paying due to his limitations.

5. Without reviewing the affidavits of service, granting an evidentiary hearing on either of the violation petitions or the modification petition, or granting a hearing on Mr. Eddy's ability to pay, respondent imposed two consecutive sentences of 180 days for the alleged violations with respect to the *Beaulac* and *Van Patten* matters and committed Mr. Eddy to the county jail.

6. By letter dated February 4, 2005, Mr. Eddy's attorney again requested that respondent review the issue of proper service and grant Mr. Eddy a hearing based upon his physical and mental deficiencies. On February 24, 2005, after Mr. Eddy had served 21 days in the county jail, respondent restored the matter to the court calendar. Upon review of the affidavit of service, respondent determined that Mr. Eddy had not been personally served, and released him from jail. Respondent remanded the violation petitions and the modification petition back to the Support Magistrate.

7. Specifically with respect to whether a hearing should have been held on Mr. Eddy's capacity to pay in the *Beaulac* and *Van Patten* matters, respondent acknowledges that he should have granted Mr. Eddy a hearing in both proceedings and that he should have reviewed the affidavit of service prior to sentencing.

As to Charge II of the Formal Written Complaint:

8. On September 9, 2004, respondent presided over *Jennifer McGrath v. Carmen LaFalce*, which concerned confirmation of the Support Magistrate's determination finding Mr. LaFalce in willful violation of the support order. Respondent confirmed the findings of the Support Magistrate and committed Mr. LaFalce to a term not to exceed six months' incarceration, until such time as Mr. LaFalce paid arrears of \$15,391.32 and paid his current weekly support obligation. The sentence was suspended on the condition that on or before December 9, 2004, Mr. LaFalce pay the set arrears and his current weekly support obligation to the petitioner or Support Collection Unit.

9. On December 9, 2004, the matter came on to be heard by respondent

regarding Mr. LaFalce's compliance with the September 9, 2004 court order. Initially, respondent signed a corrective order to reflect a 90-day suspended sentence in place of the six-month suspended sentence. Respondent then found that Mr. LaFalce had paid \$18,200 to purge the condition in the suspended sentence, the increase being additional support that had accumulated since the last court appearance. Based upon discussions with Mr. LaFalce's attorney regarding the suspended sentence and future findings of willfulness, respondent issued a new 90-day order of commitment, suspended unless Mr. LaFalce failed to pay his weekly support and there was a finding that this failure to pay was willful.

10. At the December 9, 2004 proceeding, respondent stated that in order for Mr. LaFalce to be committed under the order "there will have to be a finding of willfulness and the willfulness, if a sentence is imposed, it will have to be confirmed by me. So, there's due process that applies."

11. On April 4, 2005, respondent presided over *McGrath v. LaFalce*, which concerned an affidavit filed by the Support Collection Unit alleging Mr. LaFalce's failure to pay support and requesting the vacatur of the suspended sentence issued on December 9, 2004. At this court appearance, respondent sentenced Mr. LaFalce to 90 days in jail. Respondent did not comply with the terms of his December 9, 2004 order and his assurances of due process; no finding of willfulness was made, and no hearing was held. Mr. LaFalce paid the purge amount and was released that day.

12. Respondent further failed to grant Mr. LaFalce a hearing with

respect to his ability to pay, even though he was advised by Mr. LaFalce's attorney that Mr. LaFalce was "without means to pay the current order of support."

13. Respondent knew on April 4, 2005, that on June 28, 2004, Mr. LaFalce had filed a petition to modify support, based upon his inability to pay, that had not yet been heard.

14. At the hearing before the referee, respondent testified that he signed the commitment order in order "to persuade" Mr. LaFalce to pay support and that respondent had done the same thing a year earlier and "it worked."

As to Charge III of the Formal Written Complaint:

15. On April 11, 2002, Saratoga County Family Court Judge Courtney Hall issued an order of commitment against Henry Allen, sentencing him to 270 days in jail for failure to pay two separate support orders. Judge Hall suspended the sentence so long as Mr. Allen complied with the support orders.

16. On April 28, 2005, respondent presided over *Saratoga County Support Collection v. Henry Allen*, which concerned a request to vacate the suspended sentence set by Judge Hall.

17. During this appearance, Mr. Allen stated that he "would like to get an adjournment to get a lawyer."

18. Respondent denied the request, telling Mr. Allen, "No, you've already been sentenced." Respondent did not advise Mr. Allen of the right to an attorney or give Mr. Allen time to confer with an attorney, as he had requested.

19. Respondent sentenced Mr. Allen to jail for 270 days in the absence of counsel and without a hearing. Mr. Allen served 268 days in jail based upon respondent's ruling.

20. Respondent acknowledges that Mr. Allen had the right to an attorney and the right to an adjournment to consult with an attorney prior to sentencing.

As to Charge IV of the Formal Written Complaint:

21. On April 5, 2005, the Support Collection Unit, on behalf of Traci Brown, filed a petition for violation of a child support order against Anthony Brown. Mr. Brown appeared before the Support Magistrate on May 3, 2005, and the matter was scheduled for further proceedings on July 7, 2005. Mr. Brown failed to appear on that date, and the Support Magistrate made a finding on default of a willful violation of the support order. The matter was referred to respondent for confirmation and sentencing on August 18, 2005.

22. The Support Magistrate did not sign the order of default and willful violation until August 15, 2005, the same day the summons regarding the confirmation was mailed to Mr. Brown. Mr. Brown's 35-day statutory right to file objections to the findings of the Support Magistrate did not expire until September 19, 2005.

23. On August 18, 2005, respondent presided over *Saratoga County Support Collection v. Anthony Brown*. Mr. Brown initially was not present in court. Respondent confirmed the findings of the Support Magistrate, imposed a sentence of incarceration of 180 days and issued a warrant for Mr. Brown's arrest. Twenty minutes

later, Mr. Brown appeared, and respondent recalled the matter.

24. Respondent failed to advise Mr. Brown of his right to counsel prior to restating the imposition of the 180-day sentence of incarceration, failed to grant a hearing and failed to adjourn the matter until after Mr. Brown's right to file objections had run. At the conclusion of the proceeding, respondent stated:

“THE COURT: So, you should be used to jail. You've been there before.

MR. BROWN: I'm not used to jail, your honor.

THE COURT: Well, get used to it. Be current on your payment or sit in jail. I don't have a high tolerance for it.”

25. Mr. Brown spent 177 days in jail based upon respondent's commitment order.

26. Respondent acknowledges that Mr. Brown had the right to counsel, the right to a hearing and the right to file objections. At the hearing, respondent testified as to his handling of this matter, “I absolutely fell down. I failed in my responsibility.”

As to Charge V of the Formal Written Complaint:

27. On May 26, 2005, the Support Magistrate found John Grizzard to be in willful violation of a child support order, and the matter was referred to respondent for confirmation and sentencing.

28. On July 7, 2005, respondent confirmed the findings of the Support Magistrate, sentenced Mr. Grizzard to 30 days' incarceration and suspended the order of commitment on the condition that Mr. Grizzard pay his support. Respondent did not

advise Mr. Grizzard of his right to counsel or assigned counsel prior to confirming the findings and imposing sentence.

29. Respondent acknowledges that prior to the imposition of the suspended sentence, Mr. Grizzard should have been advised of his right to counsel and to assigned counsel if qualified.

30. On November 10, 2005, the Support Collection Unit filed an affidavit alleging that Mr. Grizzard had failed to pay his support and requested that the suspended sentence be vacated.

31. The matter came on to be heard before respondent on December 5, 2005. At this court appearance, respondent vacated the suspended sentence and entered an order of commitment requiring Mr. Grizzard to serve the 30 days' incarceration. Prior to vacating the suspended sentence and committing Mr. Grizzard to jail, respondent did not advise him of his right to counsel and to assigned counsel if qualified. Mr. Grizzard paid the purge amount and was released that day.

32. Respondent acknowledges that prior to commitment, Mr. Grizzard should have been advised of his right to counsel and to assigned counsel if qualified.

33. At the hearing, respondent acknowledged that he failed to advise Mr. Grizzard of his rights, but testified the case had "a happy outcome" since Mr. Grizzard paid the purge amount and was released.

As to Charge VI of the Formal Written Complaint:

34. On November 28, 2005, the Support Magistrate found Peter

Mahaney to be in willful violation of a child support order. The Support Magistrate did not sign the order to that effect until December 5, 2005.

32. Mr. Mahaney was not present at the November 28 support hearing. He had called to ask for an adjournment, which the Support Magistrate denied. The matter was referred to respondent for confirmation and sentencing on December 9, 2005.

33. The summons for sentencing was mailed to Mr. Mahaney on December 1, 2005, which was four days before the Support Magistrate signed the order of disposition. The 35-day statutory requirement for filing of objections had not run by the summons return date of December 9, 2005.

34. On December 9, 2005, Mr. Mahaney called the court and advised that he would be late. After waiting for one hour and 20 minutes for his arrival, respondent had the matter called, confirmed the findings of the Support Magistrate and sentenced Mr. Mahaney to 180 days' incarceration.

35. Mr. Mahaney appeared five minutes later, and respondent recalled the matter. Respondent failed to advise Mr. Mahaney of his right to counsel prior to imposing the 180-day sentence of incarceration, failed to grant a hearing, failed to determine if Mr. Mahaney had received the order and failed to adjourn the matter until after Mr. Mahaney's right to file objections had run.

36. Respondent acknowledges that Mr. Mahaney had the right to counsel, the right to a hearing and the right to file objections and that respondent should have determined if Mr. Mahaney had received the order prior to imposing a sentence.

37. Mr. Mahaney evinced his desire to have counsel appointed when he stated that he never received an application for a Public Defender. In response, respondent told Mr. Mahaney, after imposing the 180-day sentence, “We’ll give you a PD application to take with you to get you out.” Mr. Mahaney served 180 days in jail.

38. At the hearing, respondent testified that he did not notice the date the order was signed and that he should have adjourned the proceedings and appointed an attorney to represent Mr. Mahaney, who seemed “clueless” about the proceedings.

As to Charge VII of the Formal Written Complaint:

39. On February 9, 2005, the Commission issued respondent a Letter of Dismissal and Caution for, *inter alia*, failing to “advise[] [a litigant] of his right to counsel, as required by Section 262 of the Family Court Act,” and failing to advise another litigant “of her right to assigned counsel, as required by statute” and to “make appropriate inquiries as to her ability to afford counsel.” The Commission’s letter stated in part: “[This letter] is a confidential disposition of the current complaint but may be used in a future disciplinary proceeding based on a failure to adhere to the terms of the letter.”

40. Notwithstanding his receipt of the Letter of Dismissal and Caution, and within a few months after receiving the letter, respondent failed to advise litigants of their right to counsel in the *Allen, Brown, Grizzard* and *Mahaney* matters.

As to Charge VIII of the Second Formal Written Complaint:

41. In 2008 respondent was the presiding judge of the Saratoga County Family Treatment Court (hereinafter "Treatment Court"). The operation of the Treatment Court is governed by a Policy and Procedure Manual, which respondent helped draft. Participants in Treatment Court proceedings are parties charged with abuse or neglect, where substance abuse is a critical factor. If accepted for Treatment Court, a party receives treatment and support services, is monitored by the court and appears on a regular basis. The Treatment Court team, which includes Resource Coordinator Rebecca Dixon, Assistant County Attorney Karen D'Andrea, case managers and administrative staff, meets after each weekly session and then meets with the judge to inform him of their conclusions about the cases. The charges against participants who successfully complete the program are resolved akin to an adjournment in contemplation of dismissal.

42. Although Treatment Court is a less structured environment than the regular part of Family Court and has certain procedures that are different from those in the regular part of Family Court, including that the participants have direct conversation with the judge without benefit of counsel and are not under oath, its proceedings are court proceedings. Resource Coordinator Rebecca Dixon testified:

"The judge is always in the role of judge, so he is always presiding over the – It's a formal court proceeding. Although it may look and sound different from other court proceedings, it is a formal court proceeding. So, in that sense, he is not a discussion leader. He is the judge."

Ms. Dixon testified that the judge's direct conversations with Treatment Court

participants are “generally considered one of the key differences and one of the key components to success in treatment courts, because there is an investment directly from the judge and the participants usually respond to that.” During Treatment Court proceedings, respondent always wore his robes and sat on the bench.

43. On September 28, 2006, a neglect proceeding was commenced in Warren County against Wendy \_\_\_ (hereinafter “Wendy”). The neglect petition alleged that Wendy and her child’s father had used their child as a “look out” while stealing merchandise from a store; the petition also alleged that Wendy had a history of substance abuse. A short time later, the matter was transferred to Saratoga County Family Court.

44. The Warren County Family Court issued an Order dated January 29, 2007, releasing the child to the custody of her mother, with supervision by the Saratoga County Department of Social Services, upon specified terms and conditions which required, *inter alia*, that Wendy undergo an assessment with the Saratoga County Treatment Court, participate in the Treatment Court program if accepted, and attend the program until successfully discharged or terminated from the program. After an assessment, Wendy entered the Treatment Court program. Wendy was required, *inter alia*, to appear in court on a weekly basis.

45. At an appearance in Treatment Court before respondent on April 14, 2008, Wendy wore a T-shirt with an innocuous caricature of a smiling turtle; beneath the caricature was the caption “cranky but adorable so I’m worth it.” The following statements were made on the record during the proceeding:

“JUDGE ABRAMSON: Let me talk to my friend Wendy, who has to have her meniscus done.

WENDY: Yeah.

JUDGE ABRAMSON: Yeah.

KAREN D’ANDREA: Look at her shirt.

WENDY: It says, ‘Cranky but adorable so I’m worth it.’

JUDGE ABRAMSON: It’s a shirt with a penis on it. I don’t understand. It’s a turtle, right?

WENDY: Yep.

JUDGE ABRAMSON: So you’re walking – you’re hobbling. That’s what it looks like. It’s very phallic, and it’s a penis with a smile on it. I’ve embarrassed (unintelligible). She’s blushing. I didn’t know I could do that. (unintelligible). So you got to get your meniscus done. You’re hobbling like crazy. You go side to side.

WENDY: Well, no – yeah.

JUDGE ABRAMSON: That’s the meniscus. So you go for the MRI and your doctor. She’s (unintelligible). She’s got the giggles.

FEMALE VOICE: Now I look at turtles in a whole different way. Oh god. It’s going to change them forever.

WENDY: Naw, I ain’ts going to wear this shirt again.

JUDGE ABRAMSON: Did you ever see a sad turtle? They’re happy to be like – because that turtle, that’s a turtle on Viagra. It’s erect; it’s smiling. And you never see a sad Mrs. Turtle, because they’re fully satisfied. They always (intelligible). So I had the meniscus surgery done. It was a day. There are three little incisions. They go in and they’re done and you’re home. And I went to work the next day. But

as Becky (unintelligible) points out (sic), 'You sit on your judicial ass all day. So you could sit and do your job.' She didn't really say that. But you work, you're standing on your feet. But it will be a couple of days. That's a small potato surgery. But she's going to puke she's laughing so hard. This is like the highlight of my day. (Unintelligible). So you'll get this surgery done, because it's a small procedure. It's not laparoscopic, but they use a little machine and it's done and then you go home. She's got the giggles. I'm bringing down the house.

FEMALE VOICE: Everybody's --

JUDGE ABRAMSON: -- It feels good. You can't look at your shirt without feeling aroused."

46. At the hearing before the referee, respondent conceded that when he said, "That's a turtle on Viagra," he was "implying that it's a turtle that has an erection" and that when he said "you never see a sad Mrs. Turtle, because they're fully satisfied," he was talking about "sexual satisfaction." He also agreed that he was "talking about a turtle on Viagra satisfying [his] wife, Mrs. Turtle, sexually."

47. At the hearing before the referee, in response to a suggestion by respondent's attorney that the conversation about the shirt may have "relaxed" Wendy, Ms. Dixon, the Treatment Court Resource Coordinator, testified:

"I am not Wendy, so I can't speak to what calms her down or doesn't calm her down. I would maintain that that is still not an appropriate topic and if that was calming to her or not, it probably speaks to why it shouldn't be said in court."

She also testified:

"The judge is not a therapist and that is not the judge's role. What we have found is that the fact that the judge is speaking directly to people and is concerned about their well-being may

have a therapeutic value for that person, but the judge's role is not that of a therapist."

48. On the Monday following the April 14 proceeding, Ms. Dixon told respondent that "the shirt thing was not a good idea." Respondent understood Ms. Dixon's suggestion to mean that he should not talk about the T-shirt again, and he "definitely" agreed with that suggestion. On the same day, the Treatment Court team held its usual weekly meeting, and after discussing respondent's comments about the shirt, they caused their conclusion to be communicated to him. Respondent agreed that he would not comment about the shirt again, and he said he would apologize to Wendy. There is no evidence that he did so.

49. On May 16, 2008, a violation petition was filed by the Child Protective Services, alleging that Wendy, *inter alia*, had failed a drug screen, had failed to appear at Treatment Court, and had allowed a drug dealer into her home in an effort to purchase crack cocaine. A public defender was assigned to her, and when they appeared on July 17, 2008, Wendy admitted to having been under the influence of cocaine while caring for her child. Respondent signed an Order of Supervision, whose terms and conditions included a requirement that Wendy continue to submit to the jurisdiction of the Treatment Court and comply with its terms and conditions until successfully discharged.

50. On September 22, 2008, Wendy wore the same T-shirt to Treatment Court that she had worn on April 14<sup>th</sup>. Respondent again commented inappropriately about the shirt, describing the image as "phallic" and "pornographic." The following statements were made on the record during the proceeding:

“JUDGE ABRAMSON: So Wendy, another great shirt. You get the best shirts, and you went to a place where the shirts are like \$4.99 a shirt.

FEMALE VOICE: \$8.95.

JUDGE ABRAMSON: \$8.95. Well, that’s a nice shirt.

WENDY: Thank you.

JUDGE ABRAMSON: All of Wendy’s shirts are phallic. Look at the turtle. Look at the turtle.

MS. DIXON: Leave the turtle alone, your honor.

JUDGE ABRAMSON: It’s a turtle. It’s a pornographic turtle. You know what the turtle looks like? The guy who does the enzyte commercial? You know, smiling Bob – you know, for male enhancement, the same goofy smile? I’m just embarrassing the crap out of Wendy. It’s my personal (unintelligible) of the week. She’s hiding the turtle. So, Wendy, you missed some (unintelligible) test, you thought that if you went for -- to treatment the next day, you take the test --

WENDY: -- Saturday morning.

JUDGE ABRAMSON: You got to take it.

WENDY: Yeah.

JUDGE ABRAMSON: You got to do it on the day.

WENDY: I’ve been calling Becky, like, every day like I was supposed to. I was bugging her actually, but then Thursday and Friday, I just -- I rode -- I went to my class and then after my class -- Well, after work Friday, I totally bugged out and --

JUDGE ABRAMSON: – Been three years, straightforward thing.

WENDY: Yes, I got a big old note by the phone.

JUDGE ABRAMSON: You have a nice turtle, it really is. You saw the nice turtle.

WENDY: Yeah, I'm not wearing that shirt.

JUDGE ABRAMSON: I tease you every shirt you wear.

WENDY: Yeah, I know, right.

UNKNOWN: I'd think you'd learn already.

JUDGE ABRAMSON: Yeah, yeah, yeah.

WENDY: Yeah, it takes me awhile."

51. Respondent testified that he commented on the shirt at the September 22, 2008, proceeding because the fact that Wendy wore the shirt again and drew attention to the shirt by pointing to it indicated that "she was welcoming of the attention, and I thought that was appropriate." He also testified that his role in Treatment Court was "to take away the barriers of being afraid of the judge." and he stated:

"People in treatment court should not be afraid to say how they are feeling, how they are doing, that they've had a problem, the problem with the wife, the girlfriend, the boyfriend, the in-laws, not to be afraid. Put it on the table for us to work on it. That's my job, to remove those impediments. The other impediments they deal with in staffing. My job is to say, 'No one is going to hurt you here. Tell us how we can help.' so they don't have to be afraid and they can be honest. That's really my job.

\* \* \*

We are in another part and there are no adversaries here. We are here to help you, not punish you, and whatever you need

to do to be okay, it's okay, and really take the fear element off the table. And it is. When someone asks is this therapy, but—no, but it is therapeutic. It's exactly therapeutic. It's a safe place to overcome the obstacles that are in your way.”

52. Respondent testified further that Wendy was “wound very tight” and “stressed” about her impending knee surgery so he “wanted to take her mind off the subject, hence the shirt was an easy target.” He testified that he thought he was being funny and that his humor was appropriate to the situation, but “it didn’t work”:

“I try to make light of the moment of the shirt that I know she was very fond of – she was showing it off – and to make fun of the context in which the shirt looked like a penis, and it was the Enzyte ad about smiling Bob, that everybody loved.

I was trying to get her to giggle and relax and take her mind off her presenting issues. And she laughed. That was successful. But it didn’t accomplish what I wanted to do and get her in a better place to deal with her medical issues. That’s what I was shooting for.

THE REFEREE: Shooting for what?

THE WITNESS: Getting her to decompress and take her mind off her pending surgery. She was very – not a good patient medically. And - But we went right back to it, and I think I added more stress to her than not.”

53. In an affidavit to the Commission, respondent stated that while he “did note [Wendy’s] blush of embarrassment for which I, the outsider, take self-assigned blame....[i]t was not my purpose to produce the blush, but to poke good-natured fun at the notorious male ‘enhancement’ ad it seems the whole real world has seen.”

54. At the hearing before the referee, respondent acknowledged that his

comments about Wendy's shirt would have been "absolutely inappropriate" in the regular part of the Family Court, but testified, "I am a different judge when I'm doing Family Court than I am a treatment court judge."

55. He also testified that, in hindsight, he recognized that his remarks were not appropriate.

As to Charge IX of the Second Formal Written Complaint:

56. On August 15, 2008, Nancy Hammond filed a petition in Family Court seeking an order of protection against Edward Trzeciak, alleging that he was coming to her home and calling her. After hearing Ms. Hammond's *ex parte* request and taking her testimony, respondent issued a temporary order of protection and adjourned the matter to September 29, 2008.

57. At the outset of the proceeding on September 29, 2008, Mr. Trzeciak did not appear in the courtroom, and respondent proceeded in his absence to grant Ms. Hammond an order of protection by default. She then left the courtroom to wait for the order.

58. Unknown to respondent at that time, Mr. Trzeciak had been in the waiting room of the court and had not heard his name called. When he asked a court officer what was going on, the officer brought him to the courtroom. Ms. Hammond re-entered the courtroom, and respondent said he would "re-do" the proceeding.

59. At no time during the recorded proceeding at which both parties were present did respondent advise Mr. Trzeciak of his right to the assistance of counsel,

to have an adjournment to confer with counsel, or to have counsel assigned if he were financially unable to obtain counsel. Respondent claims that before the proceeding went back on the record, he advised Mr. Trzeciak of these rights and that Mr. Trzeciak said that he did not want an attorney and wanted to proceed. The evidence as to such a conversation is inconvincing. It is clear that respondent did not conduct any inquiry to confirm that Mr. Trzeciak's purported waiver of counsel was knowing, intelligent and voluntary, an inquiry that respondent knew was required by law.

60. During the Commission's investigation as to whether he had advised Mr. Trzeciak of the right to counsel, respondent stated, "I felt it injudicious and most unwise to read him the option in Miranda-like fashion...when he consented to the order to stay away." At the hearing, respondent testified that he had perceived Mr. Trzeciak's comments on the record to have constituted his consent to the order of protection and that respondent had concluded, incorrectly, that such "consent" obviated the need to afford Mr. Trzeciak the right to counsel.

61. Respondent granted Ms. Hammond a three-year order of protection. Two months later, upon the advice of his court attorney that by law the maximum time period for an order under the circumstances is two years, respondent issued an amended order of protection for two years.

As to Charge X of the Second Formal Written Complaint:

62. On February 9, 2005, the Commission issued respondent a Letter of Dismissal and Caution for failing to advise a litigant of the right to counsel, as required

by Section 262 of the Family Court Act, and failing to advise another litigant of the right to assigned counsel and to make appropriate inquiries as to her ability to afford counsel.

63. Notwithstanding his receipt of the Letter of Dismissal and Caution, respondent, as set forth in Charge IX, did not advise Mr. Trzeciak of the right to counsel as required by law or make any inquiry to determine whether he had knowingly, intelligently and voluntarily waived the right to counsel.

Additional findings:

64. As to Charges I through VII, respondent acknowledged by stipulation that he failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, failed to avoid impropriety and the appearance of impropriety in that he failed to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, failed to perform his judicial duties impartially and diligently in that he failed to be faithful to the law and maintain professional competence in it, and failed to accord the right to be heard according to law.

65. Respondent testified that notwithstanding his receipt of the Letter of Dismissal and Caution in February 2005, it was not clear until the decision of the Appellate Division, Third Department, in *People ex rel. Foote v. Lorey*, 28 AD3d 917 (3d Dept 2006), *app disp'd*, 7 NY3d 863 (2006), *app den'd*, 8 NY3d 803 (2007), which was issued in April 2006, that the right to counsel attaches at all stages of a Family Court

proceeding.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(2), 100.3(B)(3) and 100.3(B)(6) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through VII of the first Formal Written Complaint and Charges VIII through X of the Second Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent’s misconduct is established.

Respondent repeatedly denied litigants in Family Court proceedings fundamental constitutional and statutory rights, including the right to be represented by counsel and the right to a hearing, while depriving them of liberty. Such a systematic disregard of basic legal requirements constitutes serious misconduct (*Matter of Jung*, 11 NY3d 365 [2008]; *see also, Matter of Bauer*, 3 NY3d 158 [2004]), which is aggravated by respondent’s failure to heed an earlier Commission warning about his failure to accord the right to counsel. Compounding this record of impropriety, respondent made inappropriate comments of a sexual nature while presiding over a Treatment Court proceeding and continued to make such remarks at a subsequent proceeding even after their impropriety was brought to his attention. This record of egregious misbehavior “cannot be viewed as acceptable conduct by one holding judicial office.” *Matter of*

*VonderHeide*, 72 NY2d 658, 660 (1988).

## I. Denial of Fundamental Rights

It is well-established that the right to be heard is fundamental to our system of justice and “necessarily attaches to family offense proceedings,” where parents “have an equally fundamental interest in the liberty, care and control of their children” (*Matter of Jung*, *supra*, 11 NY3d at 373; *see also* Fam Ct Act §454[1], [3] [providing for incarceration “after hearing” on a willful violation of an order of support]). The right to counsel is “[i]ntegral to this fundamental interest” and “coextensive with the right to be heard in a meaningful manner,” as the Court of Appeals has held:

“‘[A]n indigent parent, faced with the loss of a child’s society, as well as the possibility of criminal charges...is entitled to the assistance of counsel’ (*Ella B.*, 30 NY2d at 356 [codified in 1975 and extended to provide litigants with the right to counsel in custody, family offense and contempt proceedings (*see* Family Court Act §§261, 262[a] [v], [a][vii]))...Waiver of this right must be ‘unequivocal, voluntary and intelligent’; a court is obligated to make a ‘searching inquiry’ to ensure that it is (*see People v Smith*, 92 NY2d 516, 520 [1998]).”

(*Id.*; *see also*, *Matter of Bauer*, *supra*, 3 NY3d at 164 [“The right to counsel, in practical respects, remains absolutely fundamental to the protection of a defendant’s other substantive rights”]). In Family Court, “where matters of the utmost sensitivity are often litigated by those who are unrepresented and unaware of their rights,” the failure to afford these fundamental rights is especially “intolerable” and “necessarily has the effect of leaving litigants with the impression that our judicial system is unfair and unjust” (*Matter of Esworthy*, 77 NY2d 280, 283 [1991] [among other misconduct, judge “neglected to

inform litigants appearing before him of their constitutional and statutory rights, including their right to counsel” (*Id.* at 282)]).

Respondent has stipulated that he failed to afford these fundamental rights in six cases in which he summarily ordered the incarceration of parties for non-payment of support. As the record shows, these derelictions had grave consequences for litigants. As a consequence of respondent’s disregard of fundamental rights, six litigants were sentenced to significant terms of incarceration, and the record indicates that three of those litigants served six months or more in jail on the unlawful sentence he imposed.

In *Eddy*, involving a litigant who was impaired by a stroke, unable to read or write, and who had filed a modification petition based on his impairment, respondent failed to hold a hearing and confirmed the support magistrate’s findings which were based on the litigant’s default, notwithstanding that the default judgment was invalid since Mr. Eddy had not been personally served (Fam Ct Act §453[c]). Although Mr. Eddy’s attorney repeatedly questioned whether his client had been properly served, respondent imposed two consecutive 180-day sentences without reviewing the affidavit of service, stating cavalierly that he would look for it later. After Mr. Eddy’s attorney sent respondent a letter the next day asking him again to review the issue, respondent finally determined that the litigant had never been properly served and – 21 days after he was sent to jail – ordered his release.

In four of these cases, respondent also failed to advise the parties of the right to counsel and/or to effectuate that right before depriving them of their liberty. In

*Mahaney*, for example, respondent confirmed the support magistrate’s findings, which were based on the litigant’s default, and imposed a 180-day sentence on the unrepresented litigant without advising him of the right to counsel or conducting any inquiry to determine whether he had “unequivocal[ly], voluntar[ily] and intelligent[ly]” waived that right (*People v. Smith*, 92 NY2d 516, 520 [1998]). When Mr. Mahaney told respondent that he had never gotten an application for the public defender – a comment that should have raised a red flag as to whether he had been afforded his rights – respondent ignored that statement and imposed the sentence, callously stating, “We’ll give you a PD application to take with you to get you out.” In fact, Mr. Mahaney’s time to file objections to the support magistrate’s findings had not yet expired (*see* Fam Ct Act §439[e]), but without the benefit of counsel, he did not assert his statutory rights. (Under similar circumstances involving another unrepresented litigant [*Brown*] who did not receive the statutorily-mandated time to file objections, respondent committed the litigant to jail for 180 days.<sup>1</sup>) Mr. Mahaney served the entire sentence – 180 days in jail – as a result of respondent’s unlawful commitment order.

In *Allen* and *Grizzard*, respondent also failed to advise the parties of the right to counsel before sentencing them and failed to conduct any inquiry to determine whether they had knowingly waived their rights. In *Allen*, a support proceeding in which

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<sup>1</sup> After imposing the sentence, respondent told Mr. Brown, “[Y]ou should be used to jail. You’ve been there before.” When Mr. Brown replied, “I’m not used to jail, your honor,” respondent told him curtly, “Well, get used to it. Be current on your payment or sit in jail” (Ex. 1 [Stipulated Facts], Ex. R, p. 6). Mr. Brown served 177 days of the sentence.

respondent vacated the suspension of a 270-day sentence, respondent pointedly denied the litigant's request for an adjournment to obtain counsel, telling him that he had already been sentenced (Mr. Allen served 268 days of the sentence).

Significantly, these four cases occurred only a few months after respondent had received a Letter of Dismissal and Caution from the Commission with respect to his failure to afford the right to counsel in two earlier matters. A judge's disregard of a cautionary warning that his or her conduct was improper is a significant aggravating factor in disciplinary proceedings. *See, Matter of Assini*, 94 NY2d 26, 30-31 (1999); *Matter of Robert*, 89 NY2d 745, 747 (1997).

While such transgressions may be characterized as legal error, it is well-established that legal error and judicial misconduct "are not necessarily mutually exclusive" (*Matter of Feinberg*, 5 NY3d 206, 215 [2005]; *see also, Matter of Reeves*, 63 NY2d 105, 109-10 [1984]); as the Court of Appeals has held, "a pattern of fundamental legal error may be 'serious misconduct'" (*Matter of Jung, supra*, 11 NY3d at 373; *see also, Matter of Sardino*, 58 NY2d 286, 289 [1983]; *Matter of McGee*, 59 NY2d 870, 871 [1983]). In this case, as in the cases cited above, legal error and misconduct overlap. In repeatedly depriving litigants of fundamental constitutional and statutory rights, respondent also violated ethical standards requiring every judge to "be faithful to the law and maintain professional competence in it" and to afford the right to be heard according to law (Rules, §§100.3[B][1], 100.3[B][6]).

The misconduct depicted here is essentially undisputed; indeed, by

stipulation, respondent admitted the underlying facts and misconduct as to Charges I through VII.<sup>2</sup> Although respondent stated in his Answer to the first Formal Written Complaint that after receiving the Commission’s Letter of Dismissal and Caution he “dramatically changed his methodology on the bench with special attention to the rights to counsel to all stages of the proceedings” (Answer, par. 4), at the hearing he insisted that the law in that regard was not clear until the decision of the Appellate Division, Third Department, in *People ex rel. Foote v. Lorey*, 28 AD3d 917 (3d Dept 2006), *app dismiss’d*, 7 NY3d 863 (2006), *app den’d*, 8 NY3d 803 (2007). We find that argument unconvincing. While *Foote* emphasized that the right to counsel is “an absolute and fundamental right” and held that “Family Court is obligated to conduct an ‘in depth inquiry to ascertain that the [party’s] decision to proceed [without counsel] was knowingly, intelligently and voluntarily made’” (*Id.* at 918), those fundamental principles of constitutional and statutory law were well-established, as that opinion itself makes clear. That those principles were clear prior to *Foote* is shown by the fact that the Family Court judge whose conduct was criticized in that case was later removed by the Court of Appeals for depriving that litigant, and others, of rights that were “fundamental to our system of justice” (*Matter of Jung, supra*, 11 NY3d at 372). As an experienced judge with previous professional experience dealing with Family Court matters, it is inconceivable that respondent would be unfamiliar with those important principles of law

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<sup>2</sup> See Ex. 1. Although respondent, in his hearing testimony, “attempted to disavow” the contents of the stipulation in certain respects, as the referee noted (Rep. 12), the underlying facts are conclusively established by the documentary evidence.

and with the relevant provisions of the Family Court Act which he was called upon to implement on a daily basis. Moreover, just months before his conduct in the cases presented in this record, the Commission's cautionary letter reminded respondent of his obligations with respect to affording the right to counsel and cited the relevant law. Respondent clearly should have known that he was violating core rights at the heart of the proceedings.

Significantly, more than two years after *Foote* and three months after being served with the first Formal Written Complaint in this proceeding, respondent failed to advise another litigant of the right to counsel on the record before issuing an order of protection against him.<sup>3</sup> Notwithstanding respondent's "unconvincing" testimony (Referee's Report, p. 19) that he advised Mr. Trzeciak of his rights off the record and notwithstanding the dubious proposition that respondent construed Mr. Trzeciak's statement that he did not oppose the order of protection to constitute a waiver of the right to counsel, it is undisputed that respondent "did not conduct any inquiry, no less an in-depth inquiry," to confirm that this purported waiver of counsel "was knowing, intelligent and voluntary," as he knew the law required (Referee's Report, p. 19; *Matter of Foote*, *supra*, 28 AD3d at 918 [quoting *Lee v. Stark*, 1 AD3d 815, 816 [3d Dept 2003]]). There is no indication on the record that Mr. Trzeciak knew that he had a right to counsel

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<sup>3</sup> This was a proceeding that followed the issuance of an *ex parte* temporary order of protection (Ex. 16). With respect to the proceeding on September 29, 2008, respondent told the Commission that had Mr. Trzeciak not "consented" to the order of protection, he "gets the mantra under FCA Section 832" (Ex. 23, p. 3).

or that he explicitly and intelligently waived that right.

During the investigation and at the hearing, respondent rationalized his failure to advise Mr. Trzeciak of the right to counsel by stating that he “felt it injudicious and most unwise to read him the option in Miranda-like fashion” since Mr. Trzeciak consented to the order and both parties “wanted to be away from each other as quickly as possible” (Ex. 23, p. 3; Tr. 773). Respondent’s continued insensitivity to the importance of affording the fundamental right to counsel – despite the Commission’s cautionary letter, despite the fact that he was then the subject of pending disciplinary charges involving similar improprieties, and despite his insistence that after the *Foote* decision he has scrupulously followed the law – “strongly suggests that, if he is allowed to continue on the bench, we may expect more of the same” (*Matter of Bauer, supra*, 3 NY3d at 165).

## II. Comments in Treatment Court Proceedings

Respondent’s comments on two separate occasions while presiding over Treatment Court proceedings were egregious and inexcusable. His gratuitous remarks, which were prompted by an innocuous caricature on a litigant’s T-shirt, were ribald and replete with sexual innuendo. (It should be underscored that the image on the shirt was benign and non-sexual.) Even when respondent noticed that the litigant was blushing with embarrassment and giggling nervously at his comments, he continued in the same vein, joking and commenting with evident satisfaction, “I’m bringing down the house.” Even more inexcusably, respondent made similar comments some five months later when the litigant wore the same T-shirt to court, notwithstanding that the Resource Director of

the Treatment Court team had advised him in the interim that his earlier remarks were inappropriate and respondent had assured her that it “wouldn’t happen again.”

“A judge is obliged to be the exemplar of dignity and decorum in the courtroom and to treat those who appear in the court with courtesy and respect” (*Matter of Caplicki*, 2008 Annual Report 103 [Comm on Judicial Conduct]; Rules, §100.3[B][3]). By repeatedly making gratuitous, joking comments of a sexual nature during court proceedings, respondent clearly violated those standards.

It is no defense that respondent may have been attempting to relax a litigant who was anxious about her impending surgery or that he was attempting to put her at ease in the court proceedings generally, as he claims. “[B]reaches of judicial temperament are of the utmost gravity...[and] impair[ ] the public’s image of the dignity and impartiality of courts, which is essential to...fulfilling the court’s role in society” (*Matter of Mertens*, 56 AD2d 456 [1st Dept 1977]). In *Matter of Trost*, 1980 Annual Report 153 (Comm on Judicial Conduct), the Commission rejected a similar justification by a Family Court judge for his inappropriate statements (*e.g.*, telling two litigants that they were “wasting everybody’s time” and “ought to get shotguns and...kill each other”). In that case, the Commission noted, the judge had asserted that it “is effective at times [for a judge] to meet people at their own level and to use language and convey ideas that they would not understand if presented in any other fashion.” As the Commission stated in *Trost*:

Although respondent describes the setting of his court as “informal” (Hr. 28), his conduct fails to comport with reasonable standards of decorum and taste, appropriate even to an informal setting. He appears to have used the

informality of his court to justify the denigration of those who appear in that court.

Similarly, we reject respondent's claim here that the relative informality in some respects of Treatment Court proceedings justified his joking use of sexually charged language in an attempt "to take away the barriers of being afraid of the judge" and to "remove those impediments" so that the participants can be honest. Although "we are mindful of the unique dynamics of Treatment Court proceedings, its laudable goals and record of success" (*Matter of Blackburne*, 2006 Annual Report 103, *sanction accepted*, 7 NY3d 213 [2006]), nothing in the special nature of such a court or its governing procedures or policies can excuse the language depicted in this record, which clearly "fails to comport with reasonable standards of decorum and taste." Respondent conceded that his remarks would have been inappropriate in the regular part of Family Court, and we agree with the referee's conclusion, following his scholarly analysis of Treatment Court proceedings, that there is simply "no basis for affording the presiding judge in Family Treatment Court more latitude in that respect" (Referee's Report, p. 23). *See also*, *Matter of Restaino*, 2008 Annual Report 191, *sanction accepted*, 10 NY3d 577 (2008) (judge's attempt to reinforce standards of "trust and personal accountability" in a Domestic Violence Part did not excuse his incarceration of participants when no one took responsibility for a ringing cell phone in the court); *Matter of Blackburne*, *supra*, 2006 Annual Report at 108 (notwithstanding "the special nature" of Treatment Court proceedings, "we fail to see how public confidence in the court is advanced when a judge actively helps a defendant to avoid arrest by sneaking him out the back door.

Respondent's behavior in this case far exceeded the norm of acceptable conduct by any judge in any court").

Despite their relative informality, Treatment Court proceedings are formal court proceedings in every critical respect. The litigant who was the principal target of respondent's comments had been ordered by him to continue her participation in Treatment Court, which was a mandatory and critical part of the judicial process in her case, and he had presided over a violation petition against her while she was a participant in the Treatment Court. His comments towards her represent a significant and unacceptable departure from the proper role of a judge who had been, and would continue to be, the final arbiter of her case.

### III. Conclusion

The record in its totality demonstrates respondent's profound disregard for the rule of law and his continuing insensitivity to the overriding importance of protecting the rights of litigants despite the Commission's cautionary warning and despite his assurances that he "dramatically changed" his practices after that warning. Even after being served with formal charges involving similar improprieties, respondent failed to accord the right to counsel in the *Trzeciak* matter, and, at a time when he should have been especially sensitive to his ethical obligations in view of the pending disciplinary proceedings, he made the grossly inappropriate comments in Treatment Court that are set forth in this record.

As the Court of Appeals stated in *Matter of Jung, supra*, 11 NY3d at 374, a

case that bears notable similarities to the instant matter:

“Although judicial disciplinary proceedings are not punishment (*Matter of Esworthy*, 77 NY2d 280 [1991]), the severe sanction of removal is warranted where a jurist has exhibited a ‘pattern of injudicious behavior ... which cannot be viewed as acceptable conduct by one holding judicial office’ (*Matter of VonderHeide*, 72 NY2d 658, 660 [1988]) or an abuse of ‘the power of his office in a manner that ... has irredeemably damaged public confidence in the integrity of his court’ (*Matter of McGee*, 59 NY2d 870, 871 [1983]).”

Recognizing that removal from office is an “extreme sanction” that “should be imposed only in the event of truly egregious circumstances” (*Matter of Cunningham*, 57 NY2d 270, 275 [1982]), we conclude that the appropriate disposition is removal, a sanction that renders respondent ineligible to hold judicial office in the future (NY Const Art 6 §22[h]).

The disposition in this case is rendered pursuant to Judiciary Law Section 47 in view of respondent’s resignation from the bench.

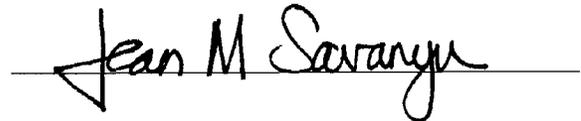
Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Emery, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Harding were not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State  
Commission on Judicial Conduct.

Dated: October 26, 2010

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a large initial "J" and "S".

Jean M. Savanyu, Esq.  
Clerk of the Commission  
New York State  
Commission on Judicial Conduct