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

BONNIE SIMPSON BURKE,

a Justice of the Perth Town Court,
Fulton County.

DETERMINATION

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THE COMMISSION:

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

APPEARANCES:

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

Abdella Law Offices (by Robert Abdella) for the Respondent

The respondent, Bonnie Simpson Burke, a Justice of the Perth Town Court, Fulton County, was served with a Formal Written Complaint dated August 12, 2009, containing three charges. The Formal Written Complaint alleged that respondent drove a

motor vehicle under the influence of alcohol and pleaded guilty to Driving While Ability Impaired, and that she presided over two cases without disclosing her friendship with the complaining witness or the witness' spouse. Respondent filed an answer dated September 17, 2009.

On October 28, 2009, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On November 5, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Perth Town Court, Fulton County, since January 1, 2004. She is not an attorney. Respondent's current term expires on December 31, 2011.

As to Charge I of the Formal Written Complaint:

2. On January 26, 2008, respondent operated a motor vehicle in the Town of Perth while under the influence of alcohol, crossed the double-yellow line on the roadway and collided with another vehicle. As a result, respondent was charged with Driving While Intoxicated ("DWI"), a violation of Sections 1192(2) and (3) of the Vehicle and Traffic Law, and Failure To Keep Right, a violation of Section 1120(a) of

the Vehicle and Traffic Law. Respondent's blood alcohol content (BAC) registered .11% shortly after her arrest.

3. On February 27, 2008, respondent pleaded guilty in the Gloversville City Court to Driving While Ability Impaired ("DWAI"), a violation of Section 1192(1) of the Vehicle and Traffic Law, in full satisfaction of all charges. The court sentenced respondent to a one-year conditional discharge, a 90-day license suspension and a $300 fine. The court also ordered respondent to make restitution for damages to the other vehicle and to attend a victim impact panel, a drinking driver program, and a substance abuse screening/assessment. Respondent underwent a substance abuse evaluation, which determined that no treatment was necessary.

As to Charge II of the Formal Written Complaint:

4. Respondent, a part-time judge, owned Route 30 Hair Salon in the Town of Perth from 2004 to June 2006, and has since rented booths in two other hair salons in the area.

5. Respondent has been friends with Edward Vickers since 2005. Respondent cut Mr. Vickers' hair at her beauty salon once a month, and Mr. Vickers plowed snow and performed odd jobs at the salon. Mr. Vickers frequently visited respondent at her salon to talk, and they spoke on the telephone several times a month. Respondent described Mr. Vickers as "like my son."

6. On September 26, 2006, Edward Vickers signed a Criminal Information filed by the Fulton County Sheriff's Department, charging Donald

Sobkowicz with Petit Larceny. Mr. Sobkowicz was issued an appearance ticket returnable in the Perth Town Court on October 9, 2006.

7. Respondent and her co-judge, Wayne McNeil, regularly hold court on Monday night. The judges arranged a rotating schedule whereby one judge presides for three consecutive weeks. An assistant district attorney is present in court on the first Monday of every month, and one judge presides while the other does paperwork.

8. On October 9, 2006, respondent presided over the arraignment in *People v. Donald Sobkowicz*. Respondent adjourned the matter to November 6, 2006, to allow Mr. Sobkowicz to appear with counsel.

9. On November 18, 2006, respondent issued a temporary Order of Protection against Mr. Sobkowicz on behalf of Mr. Vickers.

10. On December 4, 2006, Mr. Sobkowicz appeared with counsel and respondent adjourned the matter to January 8, 2007.

11. On January 8, 2007, on consent of the district attorney, respondent accepted Mr. Sobkowicz's guilty plea to a reduced charge of Disorderly Conduct. Respondent imposed a $100 surcharge and issued a one-year Order of Protection requiring Mr. Sobkowicz to stay away from Mr. Vickers.

12. Respondent did not disclose her friendship with Mr. Vickers to the parties or offer to disqualify herself from the matter.

13. On February 26, 2008, respondent disqualified herself from presiding over another matter, in which Mr. Vickers was a defendant, because her

impartiality might be reasonably questioned in view of their friendship.

As to Charge III of the Formal Written Complaint:

14. On May 7, 2008, the Fulton County Sheriff's Department filed a Criminal Information against Michael Hilts, charging him with Unauthorized Use of a Motor Vehicle in the Third Degree. The Information alleged that Mr. Hilts operated an all-terrain vehicle without the consent of its owner, Edward Vickers. Mr. Vickers' wife, Crystal Vickers, was the complaining witness and signed a supporting deposition filed with the Information. The defendant was issued an appearance ticket returnable in the Perth Town Court on June 2, 2008.

15. On November 3, 2008, on consent of the district attorney, respondent accepted Mr. Hilts' guilty plea to a reduced charge of Attempted Unauthorized Use of a Motor Vehicle in the Third Degree. Respondent sentenced Mr. Hilts to 30 days in jail, ordered him to make restitution to Mr. Vickers in the amount of $387.18, and issued a one-year Order of Protection requiring Mr. Hilts to stay away from Mr. Vickers.

16. Respondent did not disclose her friendship with Mr. Vickers to the parties or offer to disqualify herself from the matter.

17. On February 26, 2008, respondent had previously disqualified herself from presiding over another matter, in which Mr. Vickers was the defendant, because her impartiality might be reasonably questioned in view of their friendship.

Supplemental findings:

18. As to Charge I, respondent was cooperative during her arrest and did

not assert her judicial office. Respondent complied with the conditions of her sentence, and the one-year period of conditional discharge expired on February 27, 2009.

19. As to Charges II and III, in *People v. Sobkowicz* and *People v. Hilts*, respondent did not participate in plea negotiations, and she accepted the defendants' guilty pleas pursuant to the agreements reached by the assistant district attorney and the defendants' attorneys.

20. Notwithstanding that respondent's conduct in presiding over two cases involving her friend conveyed an appearance of impropriety, there is no evidence of favoritism or bias in her decisions.

21. Respondent has been cooperative with the Commission and its staff throughout the investigative and adjudicative proceedings in this matter.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(E)(1) and 100.4(A)(2) 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 III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A judge who operates a motor vehicle while under the influence of alcohol violates the law and imperils public safety. *Matter of Pajak*, 2005 Annual Report 195

(Comm on Judicial Conduct). Respondent's conduct resulted in a collision with another vehicle and in her conviction for Driving While Ability Impaired. By failing to abide by laws that she is called upon to apply in court, respondent undermined her effectiveness as a judge and brought the judiciary as a whole into disrepute. Such conduct has resulted in public discipline even where, as here, the judge was cooperative with the arresting officers and did not seek special treatment during the arrest.

In determining an appropriate disposition in such cases, the Commission has considered mitigating and/or aggravating circumstances, including the level of intoxication, whether the judge's conduct caused an accident or injury, whether the conduct was an isolated instance or part of a pattern, the conduct of the judge during arrest, and the need and willingness of the judge to seek treatment. *See, e.g., Matter of Mills*, 2006 Annual Report 218 (though acquitted of DWI, judge admitted operating a motor vehicle after consuming alcoholic beverages, "vehemently" protesting her arrest and making offensive statements to the arresting officers [censure]); *Matter of Pajak, supra* (judge was convicted of DWI after a property damage accident [admonition]); *Matter of Stelling*, 2003 Annual Report 165 (DWI conviction following a conviction for DWAI [censure]); *Matter of Burns*, 1999 Annual Report 83 (DWAI conviction [admonition]); *Matter of Siebert*, 1994 Annual Report 103 (DWAI conviction after causing a three-car accident [admonition]); *Matter of Henderson*, 1995 Annual Report 118 (DWAI conviction; judge referred to his judicial office during the arrest and asked, "Isn't there anything we can do?" [admonition]); *Matter of Innes*, 1985 Annual Report

152 (DWAI conviction; judge's car caused damage to a patrol car while backing up [admonition]); *Matter of Barr*, 1981 Annual Report 139 (judge had two alcohol-related convictions, asserted his judicial office and was abusive and uncooperative during his arrests, but had made "a sincere effort to rehabilitate himself" [censure]).

In recent years, in the wake of increased recognition of the dangers of Driving While Intoxicated and the toll it exacts on society, alcohol-related driving offenses have been regarded with particular severity. We conclude that, under the circumstances here, a severe sanction is appropriate. Such a result not only underscores the seriousness of such misconduct, but also serves as a reminder to respondent and to the public that judges are held to the highest standards of conduct, both on and off the bench (Rules, §§100.1, 100.2[A]).

It was also improper for respondent to preside over two criminal cases in which Edward Vickers, with whom she had a close relationship, or his spouse was the complaining witness. Disqualification is required when the judge's impartiality might reasonably be questioned (Rules, §100.3[E][1]). In view of her friendship with Mr. Vickers, which prompted her recusal in a case in which he was the defendant, respondent should have recognized that her impartiality might reasonably be questioned in a case in which he or his spouse was the complaining witness. At the very least, she should have disclosed the relationship and given the parties an opportunity to be heard on the issue before proceeding (*see* Rules, §100.3[F]; *Matter of Merkel*, 1989 Annual Report 111 [Comm on Judicial Conduct]). By failing to do so, she did not act in a manner that

promotes public confidence in the integrity and impartiality of the judiciary (Rules §100.2[A]). While it has been stipulated that there is no evidence of favoritism in her decisions in these cases, her conduct conveyed an appearance of impropriety (*Id.*).

The totality of respondent's misconduct, both on and off the bench, shows a disregard for the high ethical standards required of judges and warrants censure.

By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck dissents in an opinion and votes to reject the Agreed Statement of Facts on the basis that the proposed disposition is too lenient.

CERTIFICATION

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

Dated: December 15, 2009

Jean M Savanyu

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

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DISSENTING OPINION
BY MR. BELLUCK

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I dissent from the sanction of censure in this case because I believe that the judge's acknowledged unlawful conduct – resulting in her conviction for driving while impaired by alcohol – is extremely serious and requires the sanction of removal. In my view, a judge who engages in drunk driving,[1] especially where the judge causes property damage or physical injury, putting the safety of the public at serious risk and violating the very law the judge is sworn to uphold, violates the public's trust and should be removed from office. Only a "zero tolerance" policy towards such behavior can assure the public that the Commission views this conduct with appropriate severity and can fulfill the Commission's mandate to insure to the public a judiciary beyond reproach. At a time when the New York State Legislature and Governor are increasing the penalties for drunk driving, and establishing some of the toughest sanctions for drunk driving in the nation,

[1] I use this term to include not only the crime of Driving While Intoxicated ("DWI"), which is based on a blood alcohol content (BAC) of .08% or higher, but Driving While Ability Impaired by alcohol ("DWAI"), the reduced charge to which Judge Burke pled guilty (VTL §1192[1], [2]).

the Commission should send a strong message that conduct by a judge that threatens the safety of the public will not be tolerated. Imposing a censure here, a sanction which permits the respondent to continue to serve as a judge, and the same sanction the Commission has imposed for conduct that is far less egregious (including *Matter of Ridgeway*, decision issued today), seems wholly inadequate and disproportionate.

As the majority acknowledges, in recent years there has been increased recognition of the dangers of drunk driving and the enormous toll it exacts on society. This is not a victimless offense, but "deeply affect[s] the safety and welfare of the public." *In re Connor*, 124 NJ 18, 21 (1991). According to statistics published by the National Highway Traffic Safety Administration (www.nhtsa.dot.gov) and Mothers Against Drunk Driving (www.madd.org), about 13,000 people each year are killed in alcohol-related traffic accidents across the country, and more than half a million people are injured in crashes where police reported that alcohol was present – an average of one person injured almost every minute. Three in every ten Americans will be involved in an alcohol-related crash in their lives. Alcohol-related crashes in the United States cost the public billions of dollars each year. By any measure, drunk driving is a serious crime that cannot be viewed with benign indulgence.

As a judge who hears these types of cases, Judge Burke was certainly aware of what tragedy drunk drivers can inflict and of the serious consequences of drunk driving from a legal perspective. She was certainly cognizant of the fact that this behavior is illegal, of the threshold alcohol levels involved, and of the strict legal consequences imposed by our system of justice. Yet she chose to engage in this

dangerous, unlawful activity, operating a vehicle with a blood alcohol level (measured at .11%) well over the legal limit and thereby presenting a significant risk to innocent lives. Driving in an impaired condition, she then crossed a double-yellow line and collided with another vehicle. Although fortunately no one (it appears) was injured as a result of her behavior, she caused property damage. Her conduct posed a very real, deadly risk to others, specifically endangered the individuals in the vehicle she struck, and appropriately resulted in her arrest, conviction and punishment in a court of law. Under these circumstances, I believe that Judge Burke has irreparably damaged her ability to be a judge.

In considering the appropriate disciplinary sanction, I have reviewed the Commission's previous dispositions for such behavior, as well as the sanctions imposed in other states, which range from confidential dispositions to public censure or suspension. While the sanctions in recent years have been relatively more severe, it appears that this Commission – at least in the past decade – imposes admonition for an alcohol-related driving conviction in the absence of so-called aggravating factors (such as a very high level of intoxication, an accident or injury caused by the judge's conduct, the assertion of judicial office during the arrest, or multiple incidents of such behavior)[2]; where such factors are present or where there are other charges of misconduct, censure

[2] *E.g.*, *Matter of Burns* (DWAI conviction) (1998); *but see Matter of Pajak* (2004) (DWI conviction after a property damage accident); *Matter of Henderson* (1994) (DWAI conviction; judge referred to his judicial office during the arrest and asked, "Isn't there anything we can do?"); *Matter of Siebert* (1993) (DWAI conviction after causing a three-car accident); *Matter of Winkworth* (1992) (DWAI conviction; during the arrest judge was uncooperative, asserted his judicial office and threatened the arresting officer).

may result[3]; but the decisions are inconsistent and the distinction between censure and admonition is somewhat blurred. Other states generally follow a similar approach by imposing either a private reprimand or public admonition for a first offense, and censure or suspension where there are aggravating factors.[4]

This approach, I believe, is unduly lenient. The Commission has repeatedly stated that judges are held to the highest standards of personal conduct, both on and off the bench, and that certain actions which may be acceptable for others cannot be condoned in a member of the judiciary. The Court of Appeals has found that a judge who was involved in repeated alcohol-related driving incidents was "unfit" for judicial office, despite the absence of any evidence that his drinking interfered with the performance of his judicial duties (*Matter of Quinn*, 54 NY2d 386, 389, 392 [1981] [sanction of removal reduced to censure in view of the judge's resignation]). As the Court has stated:

> Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function [citations omitted]. As the Referee aptly

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[3] *E.g.*, *Matter of Mills* (2005) (though acquitted of DWI, judge admitted operating a motor vehicle after consuming alcoholic beverages, "vehemently" protesting her arrest and making offensive statements to the arresting officers); *Matter of Stelling* (2002) (two alcohol-related driving convictions); *Matter of Purple* (1997) (DWI conviction after the judge drove his car into a tree and was injured; judge also presided in court under the influence of alcohol).

[4] C. Gray, "*Discipline for Driving While Intoxicated*," 24 Judicial Conduct Reporter 2 (Winter 2003).

> noted, throughout this entire incident petitioner, "although off the bench remained cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others." *Matter of Kuehnel*, 49 NY2d 465, 469 (1980)

Clearly, if a minor transgression "impair[s] the usefulness of the individual judge to carry out his or her constitutionally mandated function," committing a serious, unlawful act irreparably compromises a judge's ability to serve with any level of moral authority or credibility. No judge can flout the laws the judge is sworn to uphold and expect to sustain the confidence and trust of the public in whose name he or she administers justice. At that point, the inquiry should turn to whether there are any extenuating or aggravating circumstances. Here, the judge's decision to drink enough alcohol to register a high level of alcohol in her blood and then drive an automobile led to a collision with another car. In my opinion, the collision escalates the drunk driving conduct. Since the collision was the result of the drunk driving and there are no compelling mitigating circumstances presented, I would remove the judge from office.

In 2007 the Commission removed a judge who had been convicted of a felony[5] and three misdemeanors for tampering with the utility meter at his home, which led to a theft of electrical services for some months (*Matter of Myles*, 2008 Annual Report 189). The Commission made clear that its determination of removal was based not on the judge's conviction (in which an appeal was pending), but on the underlying conduct, which "demonstrates his lack of fitness for judicial office," "is unacceptable in

[5] Although a judge convicted of a felony is automatically removed by the Court of Appeals when the conviction becomes final ((NY Const art VI, §22[f]; Jud Law §44[8][b]), that did not occur here because the judge resigned upon his conviction.

one who holds a position of public trust and irreparably damages respondent's ability to serve as a judge." Notwithstanding that the judge had resigned, the Commission removed the judge as a statement of condemnation for the judge's behavior and to ensure that he was ineligible to hold judicial office in the future. Yet no one's life was endangered by the judge's actions – unlike Judge Burke's conduct. In my judgment, Judge Burke's unlawful behavior is more of a threat to the public and is at least as serious as the crime of stealing electricity from a utility company, warranting a sanction no less severe. *See also*, *Matter of Bailey*, 67 NY2d 61 (1986) (judge removed for conviction of a misdemeanor in connection with a scheme to illegally hunt deer).

Moreover, the Commission has imposed the sanction of censure in numerous cases for behavior which I regard as far less egregious than the conduct here. It is inexplicable to me that a censure – the same sanction the Commission imposes today in *Matter of Ridgeway* for a judge's administrative shortcomings – should be imposed for a judge convicted of drunk driving. As I stated in my dissent in that case: "The continued use of censure for wrongdoing that is relatively minor... undermines the significance of this sanction when it is appropriately imposed and undermines public confidence in the Commission's ability to properly distinguish between serious wrongdoing and less serious misbehavior." The disparity of these results is inconsistent with the fair and proper administration of justice.

Finally, while censure is considered to be a harsher public rebuke than admonition, there is no real practical difference between the two sanctions and, apart from perhaps some personal embarrassment to the judge arising out of a public

chastisement, no meaningful adverse consequences for a judge for either sanction. In particular, both sanctions permit a judge – even, as here, one who has been convicted of unlawful behavior – to continue to hold a position of high public trust and to sit in judgment on the conduct of others. Further complicating the situation here is that the judge's behavior raises questions about her ability to adjudicate cases involving drunk driving. As a censured judge, Judge Burke may return to the bench and preside over DWI and DWAI cases, as well as offenses less serious than her own unlawful conduct. As a practical matter, it is inconceivable to me that the public could have confidence in her ability to hear such matters impartially and to pass sentence on similar offenders.[6] I cannot vote for such an incongruous result.

I would also suggest to the Commission that, at the very least, the scale of penalties for these types of cases should be recalibrated and ratcheted upward so that a first-time drunk-driving offense, standing alone, without any aggravating factors, should result at least in public censure – the most severe sanction short of removal – and that such conduct with aggravating factors would result in removal. Even under this standard – which is harsher than the current standard, though more lenient than I would favor – I would conclude that Judge Burke's conduct warrants removal. The aggravating circumstance here was the collision, which certainly caused some property damage and presented a heightened risk of injury to others.

I am also concerned that this is being considered by the Commission on an

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[6] I note that in *Matter of Barr*, 1981 Annual Report 139, in which the Commission censured a County Court judge who had two alcohol-related driving convictions, the judge agreed not to preside over contested felony DWI charges in the future.

agreed statement. As a result of the stipulated agreement, the Commission does not have access to the police report, interviews with the arresting officers, interviews with the owner of the vehicle hit by Judge Burke or any historical information to determine, for example, what she said to the police at the time of her arrest, whether she identified herself as a judge to the police, and whether she has engaged in this type of behavior previously.

Accordingly, I believe that the sanction of removal is required here. Since public confidence in the judiciary is seriously damaged when a judge engages in this type of behavior, only an appropriately severe disciplinary response can assure the public that such misconduct will not be tolerated and can fulfill the Commission's mandate to safeguard the bench from incumbents who violate the public's trust. Part of the role of the Commission is to protect the public. Only by sending a strong message to judges about drunk driving can we deter this behavior.

Therefore, I vote to reject the Agreed Statement of Facts.

Dated: December 15, 2009

Joseph W. Belluck, Esq., Member
New York State
Commission on Judicial Conduct