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

JANET M. CALANO,

a Justice of the Eastchester Town Court,
Westchester County.

DETERMINATION

- -

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Honorable Sylvia G. Ash
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Terry Jane Ruderman[1]
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Erica K. Sparkler, Of Counsel) for the Commission

Scalise, Hamilton & Sheridan LLP (by Deborah A. Scalise) for the Respondent

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[1] Judge Ruderman's term as a member of the Commission expired on March 31, 2016. The vote in this matter was taken on December 10, 2015.

The respondent, Janet M. Calano, a Justice of the Eastchester Town Court, Westchester County, was served with a Formal Written Complaint dated April 2, 2014, containing two charges. The Formal Written Complaint, as amended at the hearing, alleged that respondent: (i) impermissibly delegated her judicial duties from May 2011 through May 2012 in that she did not review or approve dispositions and sentences that the Deputy Town Attorney negotiated with defendants in traffic cases (Charge I), and (ii) altered original court records requested by the Commission by placing her initials on case files, next to the prosecutor's notation of plea agreements, which created the appearance and/or was intended to give the impression that respondent had reviewed and approved the dispositions (Charge II). Respondent filed a verified Answer dated June 28, 2014. The Commission rejected an Agreed Statement of Facts.

By Order dated December 17, 2014, the Commission designated Eleanor B. Alter, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 24, 2015, in New York City. A stipulation of facts was received in evidence, and respondent testified on her own behalf and called nine character witnesses. The referee filed a report dated September 9, 2015.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of censure, and respondent's counsel recommended a sanction no greater than censure. On December 10, 2015, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Eastchester Town Court, Westchester County, since May 2011, when she was appointed to that position. She was subsequently elected to the position, and her current term expires on December 31, 2019.

2. Respondent was admitted to the practice of law in 1986. She has been engaged in the private practice of law and served as the Eastchester Deputy Town Attorney from 1994 through 2000 and thereafter as the Town Attorney until 2003.

3. When respondent became a judge, her co-judge was Domenick J. Porco, who had served as Eastchester Town Justice since 1992.[2] Respondent had known Judge Porco since the 1980's and had rented office space from him for her law practice.

4. In her first month as a judge, respondent sat with Judge Porco when he presided in court, and then he sat with her for a month when she presided. Thereafter, with some exceptions, respondent and Judge Porco presided in alternate months in the Eastchester Town Court. Court proceedings were conducted every Wednesday and on the third Thursday of every month.

As to Charge I of the Formal Written Complaint:

5. From May 2011 through May 2012, Deputy Town Attorney Robert M. Tudisco conducted weekly conferences with defendants in Vehicle and Traffic Law ("VTL") cases. The conferences took place each Tuesday in the Eastchester Town Court, and approximately 60 to 80 defendants appeared each week, including those who had

[2] Judge Porco resigned from judicial office effective September 30, 2014, pursuant to a Stipulation, which the Commission accepted. *See Matter of Porco*, 2015 NYSCJC Annual Report 183 (http://www.cjc.ny.gov/Determinations/P/Porco.htm).

pled not guilty by mail and some "walk-ins."

6. When respondent had been the Deputy Town Attorney approximately ten years earlier, conferences and plea agreements in VTL cases were handled on Wednesdays, and the dispositions negotiated with defendants were placed on the record before a judge.

7. Respondent testified that shortly after she became a judge, she was told that "by statute" VTL matters had been moved to a conference day on Tuesdays.[3] Respondent asked if she was required to be present during the conferences, and Judge Porco, who was not regularly present during the Tuesday conferences and did not participate in them, told her that a judge's presence was not required.

8. From May 2011 through May 2012, neither judge was present during the Tuesday conferences when the Deputy Town Attorney negotiated pleas with defendants charged with VTL violations, and neither judge participated in them. In this regard, respondent continued the practice that predated her assuming judicial office.

9. From May 2011 through May 2012, in the majority of the VTL cases conferenced on Tuesdays, the Deputy Town Attorney and defendants reached agreements involving pleas to reduced charges, the imposition of fines and surcharges, and, in some instances, dismissal of charges. At the conferences, Mr. Tudisco advised defendants that

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[3] In 2009 VTL Section 1806 was amended to provide that when a defendant pleads not guilty by mail to a traffic infraction, the court must advise the defendant of an "appearance" date (rather than, as previously required, a trial date).

they would not appear before a judge that day but that the proposed dispositions would be reviewed by a judge and required a judge's approval. During the relevant time period, respondent was aware that Mr. Tudisco was making such representations to defendants.

10. The defendants in VTL matters where dispositions and sentences were negotiated at the Tuesday conferences neither signed plea agreements nor appeared before a judge to enter their pleas. In the majority of cases, such defendants paid their fines and/or surcharges to a court clerk immediately following the conferences. The court clerks entered the dispositions into the court's computer system and electronically transmitted the dispositions to the State without respondent having reviewed or approved them.

11. From May 2011 through May 2012 respondent did not review or approve the VTL plea agreements reached at the Tuesday conferences during the months in which she presided. Respondent now realizes that she should have reviewed and approved the dispositions.

12. On occasion, respondent spoke with the Deputy Town Attorney to ensure that he complied with certain parameters that had been established with respect to the dispositions (for example, respondent testified, a charge of passing a school bus would never be reduced). At the hearing before the referee, respondent testified that since the Deputy Town Attorney was "an officer of the court," she trusted that the dispositions he negotiated were within the parameters they had discussed and that he would ask her or Judge Porco about any dispositions that were outside of the parameters. Respondent never reviewed the negotiated dispositions to determine if they deviated from

the parameters.

13. For a period before respondent assumed judicial office, including the period that she was the Deputy Town Attorney, the judges of the Eastchester Town Court did review and approve plea agreements reached between defendants and the Deputy Town Attorney in VTL cases, but they had stopped doing so before respondent became a judge.

14. By failing to oversee and approve the dispositions in VTL cases conferenced on Tuesdays during the months in which she presided, including negotiated pleas, sentences and dismissal of charges, respondent effectively delegated her judicial duties to the Deputy Town Attorney and permitted him to dispose of cases without judicial oversight.

15. Respondent testified that during the relevant time period, she did not recognize that the court's procedures were improper because those practices were in place when she became a judge and she relied on her experienced co-judge for guidance. She also testified that she received no formal training when she took office, other than observing and being guided by Judge Porco; that as a new judge and "the first woman there," she "tread very lightly" and "held back a little bit" with respect to making changes in the court; and that during her first year on the bench she had other priorities, including improving court security and learning about handling criminal matters.

16. As of September 2012 respondent and Judge Porco instituted a requirement that VTL defendants who negotiate plea agreements with the Deputy Town Attorney sign a declaration form entering a plea conditioned on the specified sentence;

the form, which notes that the plea is subject to the court's approval, requires a judge's signature to indicate whether the plea is accepted or rejected. The form was revised in 2014 in response to directives from respondent's Supervising Judge.

17. Since January 2014, during the months she presides, respondent has been present in court on Tuesdays when the Deputy Town Attorney conducts plea negotiations in VTL cases. After a plea agreement is reached, the defendant appears before respondent on the record, and respondent reviews the signed declaration and, before accepting the plea, inquires to ensure that each defendant understands the plea agreement.

As to Charge II of the Formal Written Complaint:

18. On May 11, 2012, the Commission sent a letter to Rocco Cacciola, a clerk of the Eastchester Town Court, requesting copies of the court calendar and court files for all cases called in the Eastchester Town Court on five specified dates, all Tuesdays, over the previous year. The letter to Mr. Cacciola did not reveal the purpose of the Commission's request. Three of the five dates covered by the Commission's request were in months during which respondent had presided.

19. Respondent and Judge Porco discussed the Commission's letter. Judge Porco noted that it was not readily apparent from the court files which judge was responsible for each disposition, *i.e.*, which judge had presided during the month in which each agreement was reached. Judge Porco suggested that he and respondent should indicate which judge was presiding at the relevant time each plea agreement was

reached. The judges agreed that before the files were copied and sent to the Commission, they would indicate who was responsible for each disposition by initialing the top sheet of the respective files of cases in which plea agreements were reached at the Tuesday conferences conducted during months in which each of them had presided.

20. At that time, since the Commission's letter did not indicate the reason for the request, respondent did not know the Commission's purpose in seeking the records. Respondent testified at the hearing that she and Judge Porco assumed that the Commission was investigating a complaint that had come to their attention alleging favoritism towards Eastchester residents with respect to plea agreements in VTL cases. She also testified that although she had never reviewed the negotiated dispositions, she was confident that the matters were disposed of fairly and without favoritism.

21. Respondent and Judge Porco directed the court staff to retrieve the court files requested by the Commission. Thereafter, over a period of several days in late May and/or early June 2012, in the clerk's office in the presence of court staff, respondent placed her initials on the top sheet of approximately 189 original court files.

22. Respondent did not initial all of the approximately 700 files that were calendared for conference during the requested dates in months in which she had presided, but only initialed those cases in which there was a plea agreement involving reduced charges and/or dismissal of charges.

23. Respondent placed her initials next to the Deputy Town Attorney's handwritten notation of the plea agreement or dismissal. In one file, where the Deputy Town Attorney had written "Dismiss" on the top sheet, she wrote her initials below the

notation "OK." When respondent initialed the files, she did not indicate the date on which she had written her initials.

24. Thereafter, the court files and calendars the Commission had requested were photocopied, and on June 20, 2012, Mr. Cacciola provided the copies to the Commission, including copies of the court files that were newly initialed by respondent. When the photocopied records were provided, neither respondent nor anyone on her behalf advised the Commission that respondent had placed her initials on the records after she became aware of the Commission's request.

25. Upon taking statements from various witnesses, the Commission learned that (a) for a time prior to respondent's becoming a judge, when the Eastchester justices were reviewing the plea agreements negotiated by the Deputy Town Attorney, it had been the judges' practice to place their initials on the original files to signify that they had reviewed and approved the plea agreements, (b) Judge Porco had stopped doing so before respondent became a judge, and (c) respondent and Judge Porco had put their initials on the requested files only after the Commission had requested them.

26. Respondent acknowledges that it was improper to change the court records in any way after the Commission had requested them.

27. Respondent acknowledges that there were more appropriate and effective ways to identify for the Commission the judge presiding in each of the relevant VTL case files.

28. It was stipulated between respondent and counsel for the Commission, and respondent testified at the hearing, that when she initialed the files of

cases involving plea agreements: (i) her purpose was to indicate to the Commission that she accepted responsibility for the matters that were disposed of during the months in which she had presided, and (ii) she had no intent to mislead the Commission or to convey the impression that she had contemporaneously reviewed the negotiated dispositions since at that time, she did not know that the court's practices were improper and had no knowledge that the Commission was investigating a complaint alleging improper delegation of judicial duties.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(1) 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 and II of the Formal Written Complaint, as amended, are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

It is undisputed that for 13 months after assuming judicial office, respondent permitted the Deputy Town Attorney and her court staff to exercise judicial powers in her court by disposing of traffic cases without judicial oversight, and that thereafter she altered court records requested by the Commission in a manner that conveyed the impression that she had contemporaneously reviewed and approved those dispositions, when in fact she had not done so. Based on the totality of the circumstances presented and the record before us, including the stipulated facts presented at the hearing

and respondent's sworn testimony, we conclude for the reasons set forth below that the sanction of admonition is appropriate.

In weekly conferences in respondent's court, held in her absence, the Deputy Town Attorney who prosecuted traffic cases in that court effectively dictated the dispositions of dozens of cases each week. First, he negotiated with defendants, including those who had pled not guilty by mail (who were required by law to appear), and reached agreements to reduce or dismiss charges and the sentence to be imposed. Thereafter, though the Deputy Town Attorney had advised the defendants that the dispositions required judicial approval and would be reviewed by a judge, defendants immediately paid their fines to the court clerks, who entered the dispositions into the court's computer system and transmitted them to the State – all without judicial involvement or oversight. The defendants did not sign plea agreements, nor did they ever appear before a judge to enter their pleas and receive the protections afforded by law for arraignments on traffic violations. Since no judge was present, there was no judicial oversight to make certain that defendants were advised of their rights and that their pleas were understood, voluntary and not coercive.

Only judges have authority and responsibility to accept or reject a negotiated plea; and dismissing and reducing charges, convicting defendants and imposing sentences are quintessential judicial functions requiring the exercise of judicial discretion. Placing such responsibilities in the hands of the prosecutor, who is not a neutral arbiter but an advocate, is especially problematic. Though respondent testified that she occasionally spoke to the Deputy Town Attorney about "parameters" for

negotiated dispositions, a discussion of parameters is no substitute for reviewing dispositions in individual cases. Nor is it any excuse that, as respondent testified, Mr. Tudisco was an officer of the court whom she trusted to act appropriately. By abandoning her responsibility to review dispositions negotiated by the Deputy Town Attorney, respondent delegated these important judicial functions to the prosecutor and to court clerks, who accepted and processed the negotiated pleas. Such conduct was inconsistent with her obligation "to perform the duties of judicial office impartially and diligently" and "be faithful to the law," and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules, §§100.3[B][1], 100.2[A]).

The fact that these practices predated her tenure in office does not excuse respondent's misconduct. In *Matter of Greenfeld,* 71 NY2d 389 (1988), the Court of Appeals rejected a similar defense in finding that an Acting Village Justice impermissibly delegated judicial duties to the Deputy Village Attorney by allowing the prosecutor to accept guilty pleas, set fines and enter the dispositions on court records. Rejecting the judge's explanation that as an Acting Justice, he was obliged to follow the procedures of the Village Justice, the Court stated:

> "That the procedures were instituted by petitioner's predecessor, the deceased Village Justice, who directed petitioner as Acting Justice to follow them does not excuse the conduct. **Petitioner was responsible for his own conduct in the discharge of his judicial duties**." (*Id.* at 392 [emphasis added])

As a judge of the Eastchester Town Court, respondent had equal status to her co-judge and the responsibility to ensure that the procedures in her court complied with the law.

See also Matter of Sardino, 58 NY2d 286, 291 (1983) ("Each judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense").

Nor is it an excuse that respondent relied on her experienced co-judge for guidance, and specifically on his assurance that her presence was not required at the Tuesday plea conferences. Her absence from the conferences did not preclude her from subsequently reviewing and signing off on the dispositions, which was her responsibility as a judge. Although she was a new judge, respondent had been a lawyer for 25 years, including seven years as the Deputy Town Attorney, when pleas were reviewed and approved by a judge, and several years as Town Attorney. As a former prosecutor, she should have recognized that the disposition of cases – even traffic cases – requires judicial approval. Moreover, since respondent knew that the Deputy Town Attorney was advising defendants that the negotiated dispositions required judicial approval and would be reviewed by a judge, the prosecutor's statements should have reinforced and reminded her of that important obligation.

After these practices had continued for a year in respondent's court, the Commission requested court files and calendars from several nights on which negotiated pleas had been processed. Before the files were copied and sent to the Commission, respondent placed her initials on each of 189 files, next to the Deputy Town Attorney's notation of the plea agreement, which conveyed the appearance that she had contemporaneously reviewed and approved the dispositions.

It is wrong for a judge to alter records in any way, for any purpose, after the Commission has requested them, and particularly improper to do so if the alterations might be misleading. Only after the Commission had interviewed various witnesses did the Commission learn that respondent had initialed the files only after the Commission had requested them. Had it been proved that respondent intended to mislead the Commission by conveying the false impression that she had contemporaneously reviewed the dispositions, there is little doubt that the sanction of removal would be appropriate. *See Matter of Jones*, 47 NY2d (mmm), (rrr) (Ct on the Judiciary 1979) (to conceal evidence of ticket-fixing, judge directed court clerks to erase notations on tickets and to remove letters from case files the Commission had requested, acts that are "specially subject to condemnation when performed by a public official engaged in obstructing an investigation into his own misconduct").

However, after careful consideration of the entire record, we accept the stipulated facts and respondent's testimony that her intent in initialing the files was not to deceive the Commission, bur rather to indicate that she was responsible for the negotiated dispositions that occurred during the months she had presided, having mistakenly assumed that the Commission was investigating a complaint alleging favoritism with respect to plea agreements. Respondent's testimony in this regard is supported by other evidence in the record before us. In particular, we note that respondent initialed the records in the clerk's office over a period of several days in full view of court staff, indicating that she did not attempt to conceal her actions. We further note that since the Commission's letter did not reveal the purpose of its request, respondent was not on

notice that the Commission was concerned about the delegation of judicial duties. Moreover, although respondent's co-judge had previously initialed court files to signify that he had approved the plea agreements, he stopped doing so before respondent became a judge, and there is nothing in the record to indicate that respondent was aware of the prior practice.

In considering the sanction, we note that respondent has acknowledged that it was improper to change the records after the Commission requested them. We are also mindful that in following the procedures of her co-judge during her first year in office, she was likely influenced to trust his guidance not only because of his lengthy tenure as a judge but because of their longstanding professional relationship. Further, we note that respondent has taken steps to improve the court's procedures: in her second year as a judge, respondent (together with her co-judge) began to require VTL defendants who negotiated plea reductions to sign a form confirming the plea and requiring a judge's signature; the form was later revised after input from her Supervising Judge; and since January 2014, defendants who negotiated plea agreements have appeared before respondent on the record before the dispositions are finalized. Respondent has accepted responsibility for her conduct and has been cooperative with the Commission throughout its inquiry.

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

Mr. Harding, Mr. Cohen, Ms. Corngold, Judge Klonick, Judge Ruderman

and Judge Weinstein concur.

Mr. Emery dissents in an opinion and votes to remit the matter for further development of the record.

Mr. Belluck and Mr. Stoloff dissent as to the sanction and vote that respondent should be censured. Mr. Stoloff files an opinion, which Mr. Belluck joins.

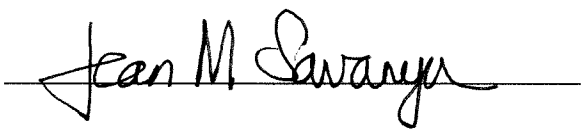
Judge Acosta was not present.

Judge Ash was not a member of the Commission when the vote was taken in this matter.

CERTIFICATION

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

Dated: May 9, 2016



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

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

JANET M. CALANO,

a Justice of the Eastchester Town Court,
Westchester County.

DISSENTING OPINION
BY MR. EMERY

- -

The majority determines to admonish respondent based on an incomplete record that makes it impossible for me to determine with any degree of confidence whether that sanction is appropriate. Regrettably, the record is incomplete because we have not followed through with our commitment to have the record appropriately developed. When we rejected an earlier Agreed Statement and sent the matter to a referee, we directed that an adversarial proceeding take place to fully develop the factual record. Instead, the staff stipulated to facts central to the case that were very much in dispute and did not seek to develop the record as we directed. The majority's response now is to abandon the effort rather than require a full exploration of the evidence which, in my view, would be dispositive of the fundamental open question in this case.

There is no dispute that in placing her initials on 189 court files, next to the Deputy Town Attorney's notations of plea agreements and recommended dismissals, respondent conveyed the appearance that she had previously reviewed and approved the

dispositions when, in fact, she had not – the very conduct the Commission was investigating. The key issue is why she initialed these documents in the misleading way she did: did she initial the files in order to mislead the Commission – engaging in a cover-up as the Formal Written Complaint alleges – or did she merely initial them without any intent to mislead the Commission in order to identify the files as her cases?[1] Rather than probing this central issue and developing the record more fully, as we directed in rejecting the previously proffered Agreed Statement, we are now presented with stipulated facts stating, *inter alia*, that it is "not in dispute" that the judge did not intend to mislead the Commission (Ref Ex 1, pp 1, 8, 11). But the evidence, on its face, conveys a plainly contrary appearance. And plainly, this was *the* central factual dispute in the case.

Moreover, as set forth below, a simple review of the subsequent plea agreement documents and respondent's notations *on them* would shed dispositive light on this central factual dispute. Regrettably, the record before us does not reveal whether the staff ever undertook that review, and now, the Commission declines to order it.

A crucial element of respondent's defense is that when she initialed the plea files in response to the Commission's inquiry, she had no idea that the Commission was

[1] Respondent's admission in the stipulation that there were "more appropriate and effective ways" to indicate the dispositions for which she was responsible is a stunning understatement. *Certainly* there were more efficient ways to convey that information. Since the Commission had requested court calendars and case files for five specific dates, a one-sentence letter could have disclosed that respondent was responsible for all the cases on three of those dates. Instead, the record reveals, she reviewed hundreds of files in multiple sittings with her co-judge over several days, determined which cases involved negotiated dispositions, and wrote her initials in those 189 files in a manner that mirrored the previous notations used by the judges of that court to indicate a proper review of pleas.

investigating her improper delegation of judicial duties. She claims she did not know, and had no reason even to suspect, that there was anything wrong with her court's procedures that omitted mandated judicial review of pleas and delegated such reviews to the Deputy Town Attorney. In accepting respondent's benign explanation of her intent, the majority ignores the clear and convincing evidence that she should have known that the court's procedure of not reviewing pleas was improper. See dissent of Commission Member Richard Stoloff.

As a lawyer with 25 years of experience both as a prosecutor and in private practice, respondent should have known that only judges have authority to reduce or dismiss charges and to impose sentences. And as the former Deputy Town Attorney a decade earlier, respondent knew that the dispositions she had negotiated then were reviewed and approved by a judge. Critically, throughout her tenure as a judge, she also knew that the Deputy Town Attorney was specifically advising VTL defendants in her court that the dispositions required judicial approval and would be reviewed by a judge. At the same time, she obviously knew that she was not reviewing them.

Given these facts, respondent's testimony that she had "nothing to hide" when the Commission requested the court files, and no reason to think that her failure to review the dispositions was misconduct is highly suspect and certainly not the stuff of stipulations. The majority accurately states that she did not *know* what the Commission was investigating since its letter did not reveal the purpose of its request (Determination, Finding 20). But that is a tautology. She certainly had ample reason to *suspect* the actual purpose of our investigation, especially when, by her own testimony, she was guided by

her experienced co-judge who subsequently resigned after being served with the same charges arising out of the Commission's investigation of these improper practices.

It would indeed be a remarkable coincidence if respondent, with no inkling that the Commission was investigating whether she had contemporaneously reviewed and approved the negotiated dispositions, initialed the requested files in a manner that conveyed the appearance that she had reviewed the pleas when, in fact, she had not. That seems to be a "coincidence" that the majority embraces. Without more information, I cannot reach for that conclusion. Even if she acted innocently, at the suggestion of her co-judge who had previously initialed court files in exactly the same manner to indicate that he had reviewed them, respondent's actions effectively disguised her own wrongdoing.

Further confusing the issue, respondent has acknowledged that sometime after initialing the files provided to the Commission, she started initialing all her court files with negotiated pleas on a regular basis to indicate that she *had* reviewed them. This testimony is key and potentially dispositive of the question of her intent when she initialed the files she had not reviewed – the heart of this case. To resolve this question, the Commission must evaluate evidence of her initialing practices immediately after she initialed the files produced to the Commission. If she initialed pleas and dispositions immediately after the Commission had requested the records, it would indicate that she *did* understand the significance of initialing the documents and that initialing was to convey review rather than mere identification of her cases. Thus, initials on plea documents that the Commission did not request would contradict her testimony that she

misconceived the thrust of the Commission's inquiry and reveal her as engaging in a cover-up. If, on the other hand, her reviews and initials began only sometime later when, as she claims, she "realized" that she had an obligation to personally review pleas, that would support her claim that she had acted innocently when she initialed the documents the Commission sought, *i.e.*, only to identify which cases were hers. Consistent with her rationale, it would make no sense for her to be initialing files the Commission was not seeking unless she was engaging in a cover-up, trying to make it appear that she was reviewing plea files when, in fact, she was not. For identification purposes, there would have been no reason to initial files the Commission had not requested unless she was trying to cover up her failure to review them.

The answer to this central question is not discernable in the record before us. The plea files subsequent to the requested files were never produced. Respondent's statements addressing the issue are contradictory: at the hearing before the referee she testified that she started initialing the files regularly after speaking to her attorney, which was "after the Commission came in a second time" (apparently January 2013, when records were subpoenaed), but then she added, "I don't really remember" (Tr 108-09). At the oral argument before the full Commission, the judge initially stated that she regularly began reviewing pleas "right after" the Commission had requested the records in May 2012 ("right after that we started reviewing, and then we added a declaration page in September 2012"); then, when I asked her if the Commission's request had brought to her attention that she had to review the dispositions, she stated that she was "mixing up the dates" and that she began reviewing the pleas only after speaking to her attorney the

following February (Argument, pp 73-74). Other evidence as to when she started reviewing the dispositions as required is similarly inconclusive.[2]

But the judge's ambiguous testimony is beside the point: that open question could be answered definitively, simply by reviewing the plea and disposition documents that respondent handled in the weeks and months immediately after June 2012. To reiterate, if the records have her initials, it is hard to see how she has been truthful with us as to her intent. Clearly, she would have been trying to falsely convey that she was reviewing pleas, when she hadn't. If they are not initialed, then I would accept her explanation that she was merely identifying *her* cases, despite my concerns about other notable gaps in the record as to issues that were never fully explored at the hearing. Thus, I am mystified by my fellow Commissioners' unwillingness to remit the matter to permit the record to be expanded on this simple issue.

Because the record is based almost entirely on stipulated facts presented to the referee that included factual conclusions about the very issues that should have been explored at an adversarial proceeding (including the judge's intent, motives, and what she knew or did not know), and because the only witnesses called at the hearing were respondent and her character witnesses, the abbreviated record that resulted makes it impossible to determine with any level of evidentiary certainty what really occurred and what the appropriate sanction should be. At this point, I cannot be confident that I know the facts. Certainly, if this is a cover-up she should be removed. It is the lack of rigor in

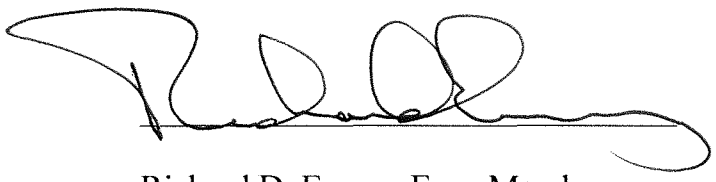
[2] The stipulated facts (Ref Ex 1, p 10) state that "respondent now contemporaneously reviews VTL dispositions."

this case that troubles me and threatens our oversight function.

In exercising our responsibility to protect the public from unfit incumbents, including judges who cover up their misconduct or who fail to understand the most basic principles of being a judge, it is our duty to have a complete record on which to determine what sanction is appropriate. *See Matter of Gilpatric*, 13 NY3d 586 (2009) (on review, Court of Appeals remitted the matter to the Commission for further proceedings since the judge's culpability could not be determined from the record presented).

Accordingly, on the facts presented here, I vote to remand the matter for further development of the record with respect to the issues described above.

Dated: May 9, 2016



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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Pursuant to Section 44, subdivision 4,
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DISSENTING OPINION
BY MR. STOLOFF,
WHICH MR. BELLUCK
JOINS

- -

In disciplining respondent for impermissibly delegating judicial responsibilities to the Deputy Town Attorney, the majority's determination minimizes a troubling aspect of respondent's conduct: her complicity in a practice that she knew was an outright deception. The record in this matter establishes that for at least 13 months (from May 2011 through May 2012) and likely several months longer (until February of 2013, when respondent first met with her attorney), the Deputy Town Attorney routinely represented to defendants that the dispositions they negotiated in conference required judicial approval and would be reviewed by a judge. That assurance, made and remade to dozens of defendants each week, was false: there was no judicial review or approval, as respondent admits. Notably, respondent also admits that *she knew that the Deputy Town Attorney was making these representations*, which she obviously knew were untrue. The record before us, which largely consists of stipulated facts and respondent's statements at the hearing and oral argument, does not indicate that respondent ever

questioned these misrepresentations of the court's practices – or that those statements prompted her to question the practices themselves. Even if she was influenced by her experienced co-judge to accept the court's procedures in permitting the Deputy Town Attorney to reduce charges, dismiss charges and impose fines, it is incomprehensible to me that a judge would acquiesce to a practice whereby defendants were regularly lied to in her own court. It is my opinion that respondent's role in permitting this deception to continue for as long as it did constitutes a significant aggravating factor that warrants a stricter sanction than that determined by the majority.

In *Matter of Greenfeld*, 71 NY2d 389 (1988), the Court of Appeals accepted the Commission's determination of removal for a Village Justice whose conduct bears notable similarities to the facts in this case. In *Greenfeld*, the Court found, based upon stipulated facts, that the judge permitted the Deputy Village Attorney "to perform the judicial duties of the Village Court in the absence of a judge by conducting conferences with defendants [in VTL cases] after the court had written to the defendants and advised them to appear for trial" (*Id.* at 390). As described by the Court:

> "The Deputy Village Attorney accepted guilty pleas; determined the amount of fines to be paid by defendants and advised defendants of the amount of fines to be paid only after they had entered pleas of guilty; and entered the disposition of cases on official court records. In virtually every case that was disposed of without trial, the Justice presiding did not see the defendant after arraignment nor did he review the disposition of the case after the plea bargain was consummated." (*Id.*)

It was also stipulated that when the administrative judge asked Judge Greenfeld (then an Acting Justice) and the Village Justice to respond to an anonymous complaint about the

court's procedures, Judge Greenfeld prepared and signed a letter that "falsely stated that the judge presiding in the Village Court reviewed and approved all plea bargains on the night that they were made and that if there were close questions or problems, the parties were brought before the Bench where judicial discretion was exercised" (*Id.* at 391).

In *Greenfeld*, the judge's misrepresentation to his administrative judge concealed his misconduct and prevented the implementation of corrective measures. In Judge Calano's case, had it been proved that she altered court records in order to conceal her misconduct and mislead the Commission, there is no question that the sanction of removal would have been appropriate. However, I believe that respondent's complicity in misrepresenting the court's procedures to defendants, which concealed that the judges of the court had abdicated their judicial responsibility to review pleas and impose sentences, cannot be overlooked since "deception is antithetical to the role of a judge who is sworn to uphold the law and seek the truth" (*Matter of Myers*, 67 NY2d 550, 554 [1986]).

It is noteworthy that for all but three months of the period covered by Judge Greenfeld's misconduct, he was an Acting Village Justice who claimed he merely followed the procedures instituted by the judge who regularly sat in the court.[1] In respondent's case, her defense that she followed the procedures in place seems even less persuasive since she was not an Acting Justice, but a duly elected judge of the Easthampton Town Court with equal status to her co-judge.

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[1] The Village Justice died on March 10, 1986. Judge Greenfeld served as Acting Village Justice of Valley Stream from April 1, 1983 to March 9, 1986 and on March 10, 1986 was appointed as Village Justice.

In an attempt to demonstrate her efforts to improve the court's procedures, respondent has emphasized that in September 2012, she and her co-judge instituted a requirement that VTL defendants who negotiated plea reductions with the Deputy Town Attorney sign a declaration form entering a guilty plea conditioned on a specified sentence. Significantly, that form (Resp Ex B) also represented to defendants that the plea "is subject to court's approval" and contained a line for the judge's signature to indicate whether the plea was approved or rejected. The record before us does not indicate whether respondent signed off on those forms – no completed forms are in evidence, and respondent's testimony emphasized that the purpose of the form was to obtain the defendant's signature – but even if she did, the form itself is too sparse to provide adequate review of the dispositions. The form was used only for plea reductions, not for charges that the Deputy Town Attorney dismissed; and even as to the negotiated reductions, the form specifies only the reduced charge a defendant has pled guilty to, not the original charge. More to the point, respondent's own testimony and her statements to the Commission at the oral argument indicate that even after her court had been using this form for months, she still did not understand her obligation to approve plea bargains and set fines until February 2013, when she first met with her attorney after the Commission had subpoenaed her court records. Therefore, in my opinion, a fair preponderance of the evidence establishes that even after this form was instituted respondent continued to misrepresent the court's practices to VTL defendants and continued to fail to exercise her judicial responsibilities.

For these reasons, I believe that the proper sanction under the facts of this case is no less than censure, and accordingly dissent from the majority opinion.

Dated: May 9, 2016

Richard A. Stoloff, Esq., Member
New York State
Commission on Judicial Conduct