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

RICHARD L. CAMPBELL,

a Justice of the Newstead Town Court and
Acting Justice of the Akron Village Court,
Erie County.

- -

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission

Honorable Richard L. Campbell, *pro se*

The respondent, Richard L. Campbell, a Justice of the Newstead Town Court and Acting Justice of the Akron Village Court, Erie County, was served with a

Formal Written Complaint dated March 2, 2004, containing one charge. Respondent filed a verified answer dated April 22, 2004.

On June 11, 2004, the Administrator of the Commission 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 admonished and waiving further submissions and oral argument.

On June 17, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Newstead Town Court, Erie County, since 1991 and an acting justice of the Akron Village Court, Erie County, since 2003. Respondent is an attorney.

2. Respondent was a candidate for the Newstead Town Republican Party's nomination for town justice in the primary election held on September 9, 2003.

3. On or about September 3, 2003, respondent signed and issued a campaign letter in which he specifically endorsed the nomination of Joan Glor and Scott Chaffee as the Republican candidates for nomination for the Newstead Town Board in the primary election to be held on September 9, 2003.

4. On or about September 5, 2003, respondent signed and issued a campaign letter in which he again specifically endorsed the nomination of Joan Glor and Scott Chaffee as the Republican candidates for nomination for the Newstead Town Board in the primary election to be held on September 9, 2003.

5. In the campaign letter dated September 5, 2003, respondent specifically opposed the nomination and criticized the campaign of David L. Cummings, a candidate for Newstead Town Board.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.5(A)(1)(e) of the Rules Governing Judicial Conduct 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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Judges are prohibited from engaging in political activity, except for certain, limited activity in connection with the judge's own campaign for office. The ethical rules explicitly prohibit a judge from publicly endorsing or opposing other candidates for public office (Section 100.5[A][1][e] of the Rules Governing Judicial Conduct). Respondent's campaign letters endorsing two candidates for the town board and criticizing another candidate clearly violated that provision and constitute misconduct. *See Matter of Cacciatore*, 1999 Annual Report 85 (Comm. on Judicial Conduct); *Matter of Decker*, 1995 Annual Report 111 (Comm. on Judicial Conduct); *Matter of Crnkovich*, 2003 Annual Report 99 (Comm. on Judicial Conduct).

Referring to the candidacies of two individuals for the town board, respondent praised their abilities and qualifications and asked local residents to "support

our entire ticket" in the upcoming primary election. In a second letter, he not only explicitly asked residents to vote for those two individuals, but made disparaging and accusatory statements about another candidate. Notwithstanding that respondent's letters did not make specific reference to his judicial office, it can be assumed that many residents of respondent's town would know that he is a town justice. By signing his name to such letters, respondent improperly interjected himself and his judicial prestige into the political campaigns of others.

Participation by judges and judicial candidates in the political campaigns of other candidates is strictly prohibited; a judge may not even make anonymous telephone calls while participating in a telephone bank on behalf of a candidate for public office. *Matter of Raab v. Comm. on Judicial Conduct,* 100 NY2d 305 (2003). When a judge voices support for other candidates or public officials, the judge not only puts the prestige and integrity of the court behind the endorsement but may also convey the impression that the judge is engaging in political alliances with individuals who might influence the judge in future cases.

We are constrained to reply to our colleague's opinion that, in light of the decision in *Republican Party of Minnesota v. White*, 536 US 765 (2002), New York's political activity restrictions are an unconstitutional abridgment of a judicial candidate's First Amendment rights. In our view, nothing in *White* permits a judge to endorse other candidates for public office, as respondent did here. We accept the Court's specific statements that it has not intended to address issues that were not presented by the facts in

the *White* case. We refrain from treating the decision in *White* as though it covered every aspect of campaign activity. It is premature and entirely speculative to assume that *White* will ultimately be given such a broad sweep.

We believe that New York's rules prohibiting political activity by judges (with certain defined exceptions during a judge's own campaign for election) are not only constitutionally sound, but fair and necessary to "preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State's court system," as the Court of Appeals has held (*Matter of Raab*, *supra*, 100 NY2d at 312). The alleged anomalies in the rules, cited in the concurring opinion, do not invalidate the entire body of the rules, which address "the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary" (*Id.* at 316). The New York rules recognize that the system of election of judges requires that candidates should be permitted to engage in limited political activity.

We deal here with whether the rule against endorsing other candidates serves a valid State objective. We believe it does, and we believe the rules are narrowly drawn. The conduct here, endorsing candidates and criticizing a candidate for legislative office, was not considered by the Supreme Court in *White*. The majority in *White* addressed content-based speech that was intended to let voters know a judicial candidate's views on issues that could come before him or her as a judge. The constitutionality of Minnesota's "announce clause" was at issue, not all of the restrictions that could be imposed in judicial campaigns. The majority specifically stated that it was not taking a

position on whether judicial candidates had the same First Amendment rights as candidates in campaigns for legislative office: "[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office" (536 US at 783).

The New York Constitution mandates elections for most judicial positions. The rules governing political activity for judges and judicial candidates seek to achieve a reasonable balance between the goals of prohibiting judges from being involved in politics and permitting judges to campaign effectively. We see nothing in *White* that would strike down existing rules in New York that permit the voters to elect its judiciary. While the system is not perfect, it is not unconstitutional. *Matter of Raab, supra*; *Matter of Watson v. Comm. on Judicial Conduct*, 100 NY2d 290 (2003). To the extent that any aspect of the present system is constitutionally challenged, we believe that the courts are in the best position to make such a determination. We once again abide by *Matter of Raab,* a decision that makes excellent sense and protects the public, the judiciary and potential litigants.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Felder, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

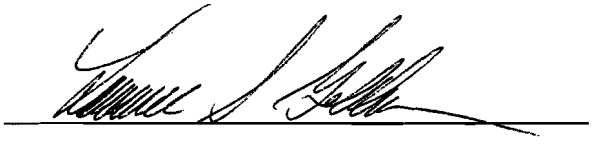
Mr. Emery concurs in the disposition and files a concurring opinion.

Ms. Hernandez was not present.

CERTIFICATION

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

Dated: November 12, 2004



Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct

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CONCURRING OPINION
BY MR. EMERY

The Commission admonishes Judge Campbell for publicly endorsing and criticizing various candidates for office in a town board election. The Commission suggests that by doing so, Judge Campbell "improperly interjected himself and his judicial prestige into the political campaigns of others," thereby creating the appearance of "political bias or corruption" (Determination at 4, 5).

The Commission's Determination begs two important questions. First, how exactly did it create the appearance of "political bias or corruption" when Judge Campbell made public comments about town board candidates who were not in any way related to any litigation pending before him? Second, if preventing the appearance of "political bias or corruption" is really so sacred, why does Rule 100.5 permit Judge Campbell to purchase tickets to and attend political fundraisers thrown on behalf of any candidates for office, including the very town board candidates at issue in this case; to appear at political functions and in media advertisements with any candidates for office who are part of his

slate; and to accept non-anonymous campaign contributions from litigants and lawyers who regularly appear before him, as well as by the very town board candidates he is being disciplined for supporting?

Because there are no satisfactory answers to these questions, and for all of the reasons set forth at length in my concurrence in *Matter of Farrell*, 2004 Annual Report __ (Comm. on Judicial Conduct, June 24, 2004), I believe that Rule 100.5 is both overinclusive and underinclusive, and that it therefore fails the strict scrutiny test that applies under *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

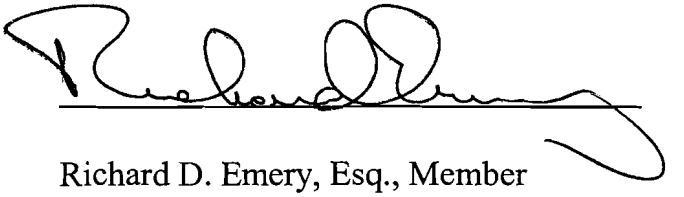
My colleagues refuse to apply *White* "as though it covered every aspect of campaign activity" (Determination at 5). But *White* unquestionably *does* apply to "every aspect of campaign activity" in once inescapable sense: under *White*, strict scrutiny is triggered any time the State suppresses the core political speech of a judicial candidate. The point is not, as my colleagues would have it, whether judicial candidates have the same First Amendment rights as candidates "for legislative office"; they plainly do not. The point, rather, is whether Rule 100.5 can survive the searching inquiry that the Court in *White* indisputably held applies to *all* restrictions on the political activities of judicial candidates.

With all due respect to my colleagues, they have not given appropriate scrutiny to Rule 100.5, much less the *strict scrutiny* that is required. Their statements that the Rule is "fair" and that it strikes a "reasonable balance" are the hallmarks of rational basis review, not strict scrutiny, and their statement that the Rule is "narrowly drawn"

because it prohibits political activity "with certain defined exceptions during a judge's own campaign for election" is tautological and fails to consider the overinclusiveness and underinclusiveness of the Rule.

Because I am bound by the contrary decision of the New York Court of Appeals in *Matter of Raab v. Comm. on Judicial Conduct*, 100 NY2d 305 (2003), I am constrained to concur in Judge Campbell's admonition. But I believe that the Supreme Court's analysis in *White* of the manner in which judicial First Amendment claims must be analyzed compels the opposite result.

Dated: November 12, 2004



Richard D. Emery, Esq., Member
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Commission on Judicial Conduct