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

CATHRYN M. DOYLE,

a Judge of the Surrogate's Court,
Albany County.

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THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission

Cade & Saunders (by William J. Cade and John D. Rodgers) for the Respondent

The respondent, Cathryn M. Doyle, a Judge of the Surrogate's Court, Albany County, was served with a Formal Written Complaint dated February 18, 2005,

containing two charges. Respondent filed a verified answer dated March 14, 2005.

On April 5, 2005, respondent filed a motion to dismiss the Formal Written Complaint. Commission counsel filed papers dated April 11, 2005, in opposition to the motion, and respondent filed a reply affirmation dated April 20, 2005. By order dated April 22, 2005, the Commission denied the motion to dismiss.

By order dated April 22, 2005, the Commission designated C. Bruce Lawrence, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 15 and 16 and October 20, 2005, in Albany (hereinafter "hearing before the referee"). The referee filed a report dated February 27, 2006.

The parties submitted memoranda with respect to the referee's report. Counsel to the Commission recommended that respondent be removed from office, and counsel to respondent recommended that the charges be dismissed. On December 7, 2006, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been the Surrogate of Albany County since January 1, 2000. Prior to that, she had served as the Chief Clerk of that court for 20 years.

As to Charge I of the Formal Written Complaint:

2. The charge is not sustained and therefore is dismissed.

As to Charge II of the Formal Written Complaint:

3. On February 11, 2004, and June 22, 2004, respondent gave testimony under oath (hereinafter "investigative testimony") during the Commission's investigation of a complaint concerning her alleged activities in connection with the Thomas J. Spargo Legal Expense Trust (hereinafter "*Spargo* trust"), a fund established to raise monies for the benefit of her friend, Supreme Court Justice Thomas J. Spargo. Respondent's investigative testimony concerning her knowledge of, and involvement in, the *Spargo* trust was inconsistent, misleading and evasive.

Background

4. In 2003 the *Spargo* trust was established for the purpose of paying legal expenses Judge Spargo was incurring in connection with federal litigation he had brought challenging the Commission's proceedings against him. The trust documents were prepared by Richard P. Wallace, a Troy attorney. Judge Spargo's mother, Olive Spargo, was the grantor of the trust; Brian Sanvidge and George Cushing were co-trustees.

5. In 2002 and 2003, there were numerous conversations in respondent's presence about the *Spargo* litigation and, specifically, a fund to raise money for Judge Spargo's benefit. Respondent had conversations on that subject with the key participants in the *Spargo* trust – Mr. Wallace, Olive Spargo, Mr. Sanvidge and Mr. Cushing – and with Mr. Cushing's wife, Susan Keating.

6. Respondent spoke with Olive Spargo, with whom she had a close

relationship, about contributing money to help Judge Spargo. Olive Spargo told respondent that she wanted to give money to Judge Spargo and wanted to raise money for that purpose from among her friends. Respondent heard many people say that they wanted to help Judge Spargo so she expected they would contribute money to help him.

7. Mr. Sanvidge, a long-time friend of respondent and a close friend of Judge Spargo, told respondent that he was looking into setting up a fund for Judge Spargo's benefit and had gotten the names of several attorneys, one of whom was Richard Wallace, whom he intended to contact about setting up such a fund.

8. Sometime after that conversation with Mr. Sanvidge, respondent encountered Mr. Wallace at a bar association event. Respondent asked Mr. Wallace, an attorney who had appeared before her, if he had ever heard of a "Clinton trust," and said that she had heard that "people are going to set one up." Mr. Wallace responded that he knew what a "Clinton trust" was, that it was a basic trust that anyone could do, and that he could do one. Thereafter, Mr. Sanvidge contacted Mr. Wallace about setting up the *Spargo* trust, and Mr. Wallace agreed to prepare the trust documents.

9. George Cushing and his wife, Susan Keating, are long-time friends of respondent with whom she talks frequently. Olive Spargo told respondent that Mr. Cushing "was going to handle the fund" for Judge Spargo. Mr. Cushing spoke to respondent about the *Spargo* trust and told her that he wanted to be the "manager" or "trustee" of the fund. Respondent had conversations with Mr. Cushing and Ms. Keating about the trust duties and whether Mr. Cushing would serve as a trustee. Respondent told

Mr. Cushing that there would be donors from outside the Capital district.

10. Respondent received the unsigned signature cards for the *Spargo* trust bank account in an envelope at her chambers, and she delivered the envelope containing the cards to Mr. Cushing at her home. After signing the cards, Mr. Cushing left the cards in respondent's kitchen. The signed cards were eventually returned by mail to Mr. Sanvidge.

11. Mr. Sanvidge asked respondent to obtain the *Spargo* trust tax I.D. number from Mr. Wallace's office. Respondent telephoned Mr. Wallace's office, got the number, and passed it on to Mr. Sanvidge.

Respondent's Investigative Testimony

12. On February 11, 2004, and June 22, 2004, when questioned under oath by Commission staff about her activities in connection with the *Spargo* trust, respondent testified that while she knew that a fund was being set up for Judge Spargo's benefit, she did not know that it was a trust. She testified further that she did not know anything about "the specifics" of the *Spargo* trust, did not know how the trust was set up, did not know how funds for the trust would be raised, and did not know who may have contributed. Respondent acknowledged that there were numerous conversations about the subject in her presence; she testified that it was a "general topic of conversation" and stated, "Everybody was talking about it."

13. When asked if she had spoken to Mr. Sanvidge directly about the trust

with anyone." Respondent testified that she had told Mr. Sanvidge that she "had nothing to do with" the trust, and she "didn't want to know anything about it."

14. Respondent testified that she did not solicit Mr. Cushing to be a trustee of the *Spargo* trust and did not know whether he was a trustee. She testified that Mr. Cushing "could very well be" a trustee of the fund and "may have" had a role in the trust but she did not know that "for a fact"; nor did she know "if he ever actually did anything." She testified that she did not recall any specific conversations with Mr. Cushing on the subject although, since they spoke frequently, she was certain Mr. Cushing "would have" talked to her about the possibility of his being a trustee. Respondent also testified that Mr. Cushing was "active" in talking about a trust and she "may have" told him that a trust was being created and "would have" told him "that they were using trustees...as a general point of conversation." In one conversation with Mr. Cushing, she probably told him there were donors "waiting in the wings," or words to that effect, but she does not recall.

15. Respondent testified that she had had no discussions with Mr. Wallace concerning the topic of a trust and did not know of any involvement he had in the *Spargo* trust.

16. Respondent testified that someone, whom she could not identify, left an envelope containing the unsigned signature cards for the *Spargo* trust in her chambers; that the envelope was marked for delivery to George Cushing; and that she gave the envelope to Mr. Cushing at her home without knowing the contents. Respondent testified

that she does not know what happened to the cards after Mr. Cushing signed them at her home.

Respondent's Letter to the Commission

17. Following her investigative testimony, the Commission sent a letter to respondent dated October 21, 2004, describing the testimony of various witnesses as to certain matters and asking if she wished to "amend, change, recant or withdraw" her prior testimony. In her written response dated November 19, 2004 (hereinafter "letter to the Commission"), respondent stated that while she did not wish "to amend, change, recant or withdraw" her prior testimony, she wished to "clarify and correct any mis-impression I have given you" by commenting further as to certain matters.

18. In her letter to the Commission, respondent stated that she had an "informal and casual" conversation with Mr. Wallace in which she asked him if he had ever heard of a "Clinton trust." Respondent acknowledged that this conversation occurred after Mr. Sanvidge had told her that he was looking into a setting up a fund for Judge Spargo's benefit and had gotten the names of several attorneys he intended to contact, one of whom was Mr. Wallace. Respondent's question to Mr. Wallace was "rather academic" since she "did not know if Mr. Sanvidge was even going to pursue the issue." Respondent also stated that she had obtained the *Spargo* trust tax I.D. number from Mr. Wallace's office and passed it on to Mr. Sanvidge after Mr. Sanvidge had asked her to verify the number. In other respects, respondent's letter to the Commission was generally consistent with her investigative testimony.

19. In her letter to the Commission, respondent stated *inter alia* that: (i) although she had "general knowledge," which came from hearing "sound bites" of conversations with mutual friends, that there was a legal defense fund created for Judge Spargo, she had "no particular recollection of any details"; (ii) when she had testified that she had no "direct conversations about the trust with anyone," she meant that she had no formal role, but she was present during numerous conversations on the subject and "may have been an idle observer of whatever process was used to create the final entity"; (iii) "to the best of [her] knowledge" she did not ask Mr. Cushing to serve as trustee, and it is her understanding that he had been asked to serve as "manager/trustee" of the *Spargo* trust by Mr. Sanvidge; (iv) she does not recall speaking to Mr. Cushing about trustee duties; (v) she told Mr. Cushing that there would be contributions to the *Spargo* fund from outside the Capital district since Judge Spargo's mother had told her that she and several friends were going to contribute to "help" Judge Spargo; and (vi) she does not know what happened to the signature cards after she gave them to Mr. Cushing; she either mailed them, gave them to someone or left them with Mr. Cushing.

Respondent's Hearing Testimony

20. At the hearing before the referee, respondent gave testimony that was generally consistent with her investigative testimony as modified by her November 19th letter to the Commission.

21. At the hearing, when questioned about her conversation with Mr. Wallace on the subject of a "Clinton trust," respondent stated under oath that she did not

know that President Clinton had been impeached and tried in the Senate.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2(A) 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 II of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established. Charge I is not sustained and therefore is dismissed.

Pursuant to its statutory authority (Jud. Law §44, subd. 3), the Commission sought respondent's testimony during an investigation of her alleged involvement in the Spargo Legal Expense Trust, a fund established to raise monies for the benefit of respondent's friend and fellow judge. Accompanied by counsel, respondent appeared on two occasions at the Commission's office and, under oath, testified extensively concerning her actions. We conclude that while the underlying allegations concerning her involvement in the *Spargo* trust have not been sustained, respondent's sworn investigative testimony concerning those matters violated her duty to be forthright and cooperative.

The record establishes that during the investigation respondent repeatedly minimized and distorted her knowledge of, and involvement in, the *Spargo* trust by making statements that were, on their face, inconsistent, evasive and obfuscatory. For example, respondent testified that she did not know that the *Spargo* fund was a trust,

although she "assume[d]" it was, and that she did not know anything about "the specifics" of the *Spargo* trust. We reject her defense that such testimony was technically accurate since she never actually saw the trust documents. A judge's duty to testify forthrightly is not satisfied by responses that are misleading and obstructionist.

Respondent conceded that there were numerous conversations about the general subject in her presence, although, in another overly technical response, she denied having "direct conversations" about the *Spargo* trust. While she may have attempted to distance herself from the trust's activities, it is crystal clear from her own testimony that she knew numerous details about the trust's origins and operations and that she had conversations related to the trust with all the key participants: attorney Richard Wallace, who prepared the trust documents; Olive Spargo, the grantor; and Brian Sanvidge and George Cushing, the co-trustees.

Throughout her investigative testimony, respondent engaged in similar equivocation and obfuscation. She testified that she did not solicit Mr. Cushing to be a trustee of the fund and did not know he was a trustee, although "he could very well be"; according to respondent, she did not know "for a fact" that Cushing had any role in the trust, although he "may have." Respondent insisted that she did not have a specific recollection of discussing the subject with Mr. Cushing, although she was sure he "would have" discussed the subject with her. Yet, in her investigative testimony, she conceded that she made a delivery to him which he identified as signature cards for the trust bank account; and at the hearing before the referee, she acknowledged that Mr. Cushing had

told her he wanted to be the "manager" or "trustee" of the fund, that Judge Spargo's mother had told her that Mr. Cushing "was going to handle the fund," and that she had discussed Cushing's duties as a potential trustee with Cushing's wife. In this light, her investigative testimony that Mr. Cushing "may have" had a role in the trust but she did not know that "for a fact" was evasive and deceptive.

In her investigative testimony, respondent also told an elaborate tale of receiving the *Spargo* trust signature cards in an envelope in her chambers and delivering the envelope to Mr. Cushing at her home, although she insisted that she had no idea who gave her the envelope, did not know its contents until she made the delivery, and did not recall what happened to the cards after Mr. Cushing signed them and left them in her kitchen. This account strains credulity. It seems far more likely that, in explaining her actions that were established through the testimony of others, respondent found it convenient not to know what was happening or to remember significant details.

As to another key incident, respondent was obliged to "clarify and correct" her investigative testimony after being confronted with contradictory testimony. After testifying that she had had no discussions with attorney Richard Wallace about the trust, respondent was advised of Mr. Wallace's testimony to the contrary and was given an opportunity to amend her testimony. In her subsequent letter to the Commission, respondent acknowledged that she had asked Mr. Wallace about a "Clinton trust," though she maintained that the conversation was so casual that it was insignificant to her at the time. Yet she conceded that that conversation occurred after Mr. Sanvidge had told her

that he was looking into setting up a fund for Judge Spargo's benefit and had gotten the names of several attorneys he intended to contact, one of whom was Mr. Wallace; moreover, following this conversation Mr. Sanvidge did indeed contact Mr. Wallace, who prepared the trust documents. In her investigative letter, respondent also acknowledged that, at Mr. Sanvidge's request, she obtained the *Spargo* trust tax I.D. number from Mr. Wallace's office and passed it on to Mr. Sanvidge.

Based on the record in its totality, we cannot conclude that respondent's involvement in the *Spargo* trust was, in itself, improper. We agree with the referee that respondent's discussions with respect to the trust among her circle of friends and acquaintances and her limited involvement in the trust activities did not constitute a misuse of the prestige of her judicial office or compromise the integrity of the judiciary, as alleged in Charge I. Nevertheless, the conclusion is inescapable that respondent's tortured efforts to minimize her role in the *Spargo* trust[1] and her purported lapses of memory as to pertinent matters violated her duty to be forthright, candid and cooperative. Respondent's own testimony established that she was in the middle of many ongoing discussions about the *Spargo* trust, and even as she insisted that she knew few details about it, her testimony revealed that she knew quite a lot. Since many of those involved in the matter were her close friends, and since even respondent concedes that there were

[1] Perhaps epitomizing respondent's strained attempts to distance herself from the *Spargo* trust was her belabored insistence at the hearing, on the subject of a "Clinton trust," that she did not know that President Clinton had been impeached and tried in the Senate since she did not pay attention to such matters (Tr. 463-65).

numerous conversations about the subject in her presence, it strains credulity that her knowledge of the subject and her participation in these events were as negligible as she has asserted.

In considering respondent's testimony, we recognize that the referee, who heard the witnesses' testimony at the hearing, concluded that respondent did not "knowingly and materially [give] testimony that was false, misleading and evasive" (Report, p. 12). Significantly, however, the referee not only characterized respondent's investigative responses as "overly technical" but cited her "initial lack of candor" in her investigative testimony (Report, pp. 12, 13). While we accord due weight to the referee's findings, we disagree with his conclusion that a judge's lack of candor in disciplinary proceedings "based upon a structured defense of deniability" does not constitute misconduct (*Id.* at 12). In our view, a judge's obligation to testify truthfully and forthrightly in a Commission proceeding is not satisfied by responses that are "overly technical," incomplete or otherwise misleading.

In considering an appropriate sanction, we are mindful of *Matter of Kiley*, 74 NY2d 364 (1989), in which the Court of Appeals, reducing the sanction from removal to censure, held that the Commission had unfairly attributed lack of candor to the judge for his explanation of why he had spoken about a friend's case to the prosecutor and the presiding judge. Stating that the Court "do[es] not condone 'lack of candor' as an aggravating factor if it unfairly deprives an investigated judge of the opportunity to advance a legitimate defense," the Court warned that "the use of a judge's 'lack of

candor' as an aggravating circumstance should be approached cautiously to minimize the risk that the investigative process itself will be used to generate more serious sanctions" (*Id.* at 370, 371). Accordingly, while "a judge's dishonesty or evasiveness before Commission investigators is not to be condoned," "inadvertent factual misstatements, testimonial inconsistencies or even poor judgment in responding to searching, unanticipated questions" should not form the basis for a lack of candor finding as an aggravating circumstance (*Id.* at 371).

Here, as the referee observed, many of the allegations involve conversations and incidents that may be subject to differing recollections. As the Court of Appeals has stated, "testimonial inconsistencies" and "discrepancies" do not necessarily establish that a judge's testimony was deliberately false. *Matter of Kiley*, *supra*, 74 NY2d at 371, 369; *see also*, *Matter of Skinner*, 91 NY2d 142, 144 (1997) (testimonial "discrepancies...[do] not necessarily reflect dishonesty or evasiveness"). We give respondent the benefit of the doubt as to "minor discrepancies in factual testimony, which may result from an honest difference in recollection" (*Matter of Kiley*, *supra*, 74 NY2d at 369). Nevertheless, based on the many inconsistencies and the shifting and evasive responses in respondent's testimony, we find a lack of candor that reaches a level of corrosiveness to the investigative and adjudicative processes that cannot be condoned.

Constrained by the Court's reasoning in *Kiley*, we cannot conclude, however, that respondent should be removed from office. We note that no other allegations of misconduct by respondent, apart from the issues related to her testimony,

were established in this proceeding. Clearly, respondent's misguided effort to minimize her rather limited involvement in the *Spargo* trust was far more serious than the acts she may have wished to conceal. Significantly, in no case has a judge been removed solely for testimony that lacked candor, absent any underlying misconduct. Indeed, in cases involving false testimony where judges have been removed, the underlying misconduct has been extremely serious. *See, e.g., Matter of Collazo*, 91 NY2d 251, 255 (1998); *Matter of Mogil*, 88 NY2d 749, 754-55 (1996); *Matter of Intemann*, 73 NY2d 580, 582 (1989); *Matter of Gelfand*, 70 NY2d 211, 218 (1987).

We have also considered that, in her investigative letter to the Commission following her testimony, respondent corrected and clarified her prior testimony in certain pertinent respects, especially with respect to her conversation with Mr. Wallace. As the referee suggested, respondent's letter "broadened her answers" and laid out additional facts "to be sure that she had not misled the Commission," which mitigated her initial lack of candor (Report, pp. 12, 13). *See, Matter of Redmond*, 1998 Annual Report 151 (Comm. on Judicial Conduct) (judge's "attempt[ ] to mislead" the Commission in his investigative testimony was mitigated by his subsequent letter providing correct information). We believe that respondent's truthful admissions, even if belated, are a mitigating factor on the issue of sanctions.

Further, we note that respondent is a respected judge who has had a lengthy career in public service and an unblemished record in seven years on the bench.

Weighing these factors against the standards set forth by the decisions of

the Court of Appeals, we do not see a sufficient basis to remove an otherwise qualified, capable judge. *See, Matter of Kiley, supra; Matter of Hart*, 7 NY3d 1, 10-11 (2006) (accepting the sanction of censure, the Court cited "several instances of conflicting testimony," among other "troubling" factors); *see also*, *Matter of Skinner*, 91 NY2d 142, 144 (1997) (sanction reduced from removal to censure notwithstanding "discrepancies" in the judge's testimony and a finding by the Commission that the testimony was "disingenuous and evasive"); *Matter of Edwards*, 67 NY2d 153 (1986) (reducing the sanction from removal to censure, the Court rejected the Commission's conclusion that the judge's testimony showed "lack of candor").

We have previously urged the legislature to consider a constitutional amendment providing suspension from office without pay as an alternative sanction available to the Commission (Commission Annual Reports, 2006, 2002, 2000, 1997). Were suspension available to us, we would impose it in this case to reflect the severity of respondent's misconduct. Absent that alternative, we have concluded that respondent should be censured.

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

Mr. Felder, Judge Klonick, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser and Judge Ruderman concur.

Mr. Coffey and Judge Peters did not participate.

CERTIFICATION

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

Dated: February 26, 2007

Raoul Lionel Felder, Esq., Chair
New York State
Commission on Judicial Conduct