

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

MARK G. FARRELL,

a Justice of the Amherst Town 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

Hon. Mark G. Farrell, *pro se*

The respondent, Mark G. Farrell, a justice of the Amherst Town Court, Erie
County, was served with a Formal Written Complaint dated October 28, 2003, containing

one charge. Respondent filed an answer dated January 16, 2004.

On April 28, 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 May 6, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Amherst Town Court, Erie County since 1993. Respondent is an attorney.
2. Respondent was a candidate for the Erie County Democratic party's nomination for Erie County Supreme Court Justice in 1999.
3. At the request of G. Steven Pigeon, the Chairman of the Erie County Democratic Committee in September 1999, respondent, in an attempt to help secure the Chairman's support for his nomination, made calls to approximately 50 members of the Amherst Democratic Committee but was able to speak with only 20 members. During discussions with those 20 members, respondent solicited their support for the Chairman's re-election by telling them that the Chairman was expecting a call of support from each of them. Respondent also advised the members that they should use their own judgment in determining whether to vote for the Chairman. Respondent did not have follow-up discussions with anyone that he called.
4. Respondent did not identify himself as a judge during any of these

calls. He referred to himself as “Mark Farrell.” Respondent believed that some of the members he called knew him to be an Amherst town justice.

5. At the time respondent made these calls, he was aware of the prohibitions against engaging in partisan political activity and permitting his name to be used in connection with the activity of a political organization.

6. On September 27, 1999, respondent’s campaign committee contributed \$7,500 to the Erie County Democratic Committee. Respondent’s committee had never received an itemized bill or invoice relating to services provided to it by the Erie County Democratic Committee, and the amount of the \$7,500 payment exceeded the reasonable value of any services provided by the Erie County Democratic Committee to respondent’s election campaign.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(1)(c), 100.5(A)(1)(d) and 100.5(A)(1)(h) of the Rules Governing Judicial Conduct and should be disciplined for cause pursuant to Article 6, Section 22 of the New York State Constitution and Section 44(1) of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

While permitting judges and judicial candidates to engage in significant political activity on behalf of their own campaigns for judicial office, the ethical standards strictly prohibit their participation in the political campaigns of others (Section 100.5[A][1][c] and [d] of the Rules Governing Judicial Conduct). These provisions

address “the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary” and were designed to minimize the risk that judges could be perceived “as beholden to a particular political leader or party after they assume judicial duties.” *Matter of Raab v. Commn on Jud Conduct*, 100 NY2d 305, 316 (2003).

Notwithstanding that he had been a judge for six years and was aware of the restrictions on his political activity, respondent, at the request of the County Party Chairman, made numerous calls to party officials supporting the Chairman’s re-election. Respondent’s partisan political activity conveyed an impression of allegiance to the party leader and clearly violated the ethical rules. *See Matter of Raab, supra; Matter of Cacciatore*, 1999 Ann Rep 85 (Commn on Jud Conduct, Feb 6, 1998); *Matter of Decker*, 1995 Ann Rep 111 (Commn on Jud Conduct, Jan 27, 1994). Although respondent did not identify himself as a judge during the calls, he believed that some of the party officials he called knew of his judicial status. Respondent should not have permitted his name and judicial prestige to be used in promoting the political interests of another.

It was also improper for respondent’s campaign committee to make a \$7,500 payment to the County Democratic Committee without an itemized bill of the services provided to support the expenditure. As respondent has stipulated, the amount exceeded the reasonable value of any services actually provided by the Committee to respondent’s election campaign. Such a payment was not a mere technical violation of the ethical rules, but a prohibited political contribution. *See Section 100.5(A)(1)(h) of the Rules; Matter of Salman*, 1995 Ann Rep 134 (Commn on Jud Conduct, Jan 26, 1994);

Matter of Raab, supra. Prohibiting such payments is essential to maintaining public confidence in the integrity of the judiciary, as the Court of Appeals stated in *Matter of Raab*:

The contribution limitation is intended to ensure that political parties cannot extract contributions from persons seeking nomination for judicial office in exchange for a party endorsement. It achieves this necessary objective by preventing candidates from making contributions in an effort to buy -- and parties attempting to sell -- judicial nominations. It also diminishes the likelihood that a contribution, innocently made and received, will be perceived by the public as having had such an effect. Needless to say, the State's interest in ensuring that judgeships are not -- and do not appear to be -- "for sale" is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function.

100 NY2d at 316

Respondent has not challenged the constitutionality of the rules under which he has been charged with misconduct. Indeed, he has joined the Administrator of the Commission in petitioning us to accept an agreed statement of facts and proposed sanction of admonition. Under the circumstances, in response to the concurrence, we need only note that it is our obligation to accept the law as interpreted by the State's highest court.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr.

Felder, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

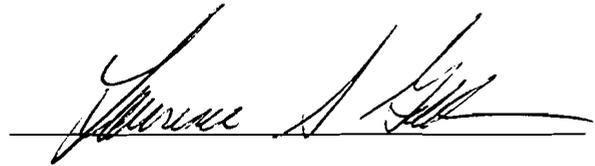
Mr. Emery filed a concurring opinion, in which Mr. Coffey and Ms. DiPirro join.

Mr. Pope was not present.

CERTIFICATION

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

Dated: June 24, 2004

A handwritten signature in black ink, appearing to read "Lawrence S. Goldman", is written over a horizontal line.

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

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CONCURRING OPINION
BY MR. EMERY
IN WHICH MR. COFFEY
AND MS. DIPIRRO JOIN

Today the Commission admonishes Judge Mark G. Farrell because he engaged in political activity – making telephone calls supporting his party leader’s bid for re-election, and effectively making a financial contribution to his party – during a time when he was a candidate for Supreme Court. Judge Farrell acknowledges that he was aware of Rule 100.5, and that he knowingly violated it. Because Judge Farrell has not argued that Rule 100.5 violates the First Amendment, and because the New York Court of Appeals recently rejected such an argument in *Matter of Raab v. Commn on Judicial Conduct*, 100 NY2d 305 (2003), I am compelled to concur in his admonition. I write separately, however, to express my firm conviction that Rule 100.5 is unconstitutional.

I emphasize at the outset that to the extent Judge Farrell is a political animal, he plainly is a political animal of the State’s own creation. After all, New York has chosen to inject its judiciary into the political process by affirmatively requiring most judges to run for office in partisan judicial elections. It is no secret that, owing to the

nature of New York's closed judicial nominating conventions, and the domination of those conventions by party leaders, judges who wish to sit on the Supreme Court have virtually no chance of being nominated – let alone elected – without the support of their local party leaders. It is therefore no wonder that Judge Farrell felt compelled to make phone calls on the leader's behalf, and to make what amounted to a donation to the party's general fund. Judge Farrell may not have acted in a manner that is conducive to a healthy judiciary, but he did precisely what our system of judicial selection effectively requires of judicial candidates.

In any event, it is clear to me that under any fair reading of *Republican Party of Minnesota v. White*, 536 US 765 (2002), the Rule Judge Farrell has been admonished for violating cannot survive First Amendment scrutiny.

There is no doubt that Rule 100.5 is subject to strict scrutiny, for it imposes content-based restrictions on the ability of judges to exercise their right to speak. Judges may speak, but only so long as the subject matter of their speech is not political. *See* Rule 100.5(A)(1) (judges and judicial candidates shall not “directly or indirectly engage in any political activity”); Rule 100.5(A)(1)(a)-(i) (prohibiting judicial candidates from being a member of, acting as a leader of, or holding office in a “political organization”; from engaging in “partisan political activity” or “participating in any political campaign,” including “publicly endorsing or publicly opposing” other candidates for public office; from “attending political gatherings” or “making speeches on behalf of” another

candidate; and from “soliciting funds for” political candidates, including “purchasing tickets for politically sponsored dinners”). During the “Window Period,” judges may engage in certain types of political speech, but only so long as the subject matter of their speech relates to their own campaigns and not to the campaigns of other elected officials. *See* Rule 100.5(A)(2) (allowing a judicial candidate to “participate in his or her own campaign” for judicial office during the window period). The fact that Rule 100.5 restricts speech on the basis of content is more than sufficient to trigger strict scrutiny. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 US 803, 811-12 (2000).

Strict scrutiny is warranted for the independent and even more fundamental reason that Rule 100.5 restricts speech that is “at the core of our First Amendment freedoms – speech about the qualifications of candidates for public office.” *White*, 536 US at 774 (quotation omitted). “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 US 214, 218 (1966). “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 US 64, 74-75 (1964). Because freedom of speech is valuable not only as a personal liberty but also for the role it plays in the proper functioning of our entire democratic form of government, the Supreme Court has repeatedly recognized that the First Amendment

“‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco Democratic Comm.*, 489 US 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 US 265, 272 [1971]). For these reasons, the State bears the heavy burden of proving that Rule 100.5 is narrowly tailored to serve a compelling government objective. This is a particularly exacting standard.

The first task in applying strict scrutiny is to identify the objective that is served by the Rule. The Commission has previously stated that the purpose of Rule 100.5 is to safeguard the “independence and integrity of a judiciary whose decisions are or may reasonably appear to be subject to undue political influence.” See NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, 25TH ANNUAL REPORT (2000) at 30. I take the Commission’s statement regarding the need to protect judges from “undue political influence” to mean that one purpose behind Rule 100.5 is to remove the judiciary from the political process – *i.e.*, to insulate judges from the compromises of consensus building, from *quid pro quo* politics, and from the flow of money that is the lifeblood of political campaigns.

I agree that the State has a compelling interest in removing judges from the political process *altogether* – as the federal government and many state governments have done – in order to ensure that judges decide cases without reference to the politics of how their decisions will be received by their potential supporters and by the electorate. But New York has affirmatively chosen not to go that route; to the contrary, we have chosen

to throw most of our judges headfirst into the political process by requiring them to run in partisan judicial elections. We could have opted to appoint our judges, or to follow the so-called “Missouri Plan” (through which judges are appointed and then stand for unopposed retention elections), or at least to elect our judges in non-partisan elections. Given the choice that New York has made, the State – and, by the same token, our Commission – cannot now complain, against the backdrop of its own self-imposed system of selecting judges through popular elections, that it is entitled to forbid its judges from engaging in core political expression on the theory that doing so would allow judges to be too “political.”

This is precisely what the Supreme Court held in *White*. *White* held that the First Amendment forbids a state from compelling judicial candidates to run for office and then unnecessarily restricting the scope of their core political expression:

If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.

White, 536 US at 788. As Justice O’Connor put it in her concurring opinion:

[By] cho[osing] to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system . . . the State has voluntarily taken on the risks to judicial bias As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, *it is largely one the State brought upon itself by continuing the practice of popularly electing judges.*

Id. at 792 (O'Connor, J., concurring) (emphasis added); *see also id.* at 795 (Kennedy, J., concurring) (“The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech”). If the State were genuinely concerned about insulating its judges from politics, then the State could, and would, abolish judicial elections altogether.

The Commission’s statement of purpose also reveals that Rule 100.5 is designed to safeguard the “independence and integrity” of the judiciary. Thus, the Rule has a second purpose: to preserve the impartiality, and the appearance of impartiality, of the judiciary. The State certainly has a compelling interest in ensuring that its judges are not, and do not appear to be, biased for or against particular parties appearing before them. As in *White*, however, Rule 100.5 is nowhere near narrowly tailored to achieve even this laudable goal.

Rather than drawing a distinction between a judge’s political expression that is likely to implicate the interests of litigants who might appear before him versus the kind of political expression that is not likely to do so, Rule 100.5 instead draws an irrelevant distinction – between judicial candidates engaging in political activity on their *own* behalf versus judicial candidates engaging in political activity on behalf of *other* candidates for elected office. Judge Farrell may conduct a phone bank on his own behalf – indeed, he may make non-anonymous calls directly to voters, even those who are lawyers and litigants who regularly appear before him – but Judge Farrell may not even

set foot in a room in which a phone bank for his party's leader is taking place. Judge Farrell may contribute generously to his own campaign for judicial office, but if he reimburses his party for expenditures made on his behalf, he must take care to get an itemized accounting of such expenditures in order to ensure that he is not overpaying, and thus effectively contributing to the campaigns of other candidates.

By drawing this basic distinction between personal politicking and politicking for others, Rule 100.5 is anything but narrowly tailored to the goal of ensuring that judges are not, and do not appear to be, biased for or against particular parties to judicial proceedings. To begin with, this Rule is enormously overinclusive. How does prohibiting a judge from making phone calls on behalf of another candidate for office even begin to avoid bias against particular litigants, when the vast majority of such other candidates would never be interested in, much less parties to, any litigation pending before that judge? What does the fact that Judge Farrell over-reimbursed his party have to do with litigants that might appear before him?

Because of this fundamental disconnect between means and end – between the goal of avoiding judicial bias for or against *litigants*, and the scheme of regulating judges' conduct vis-a-vis fellow *candidates* – Rule 100.5 proscribes a wide array of protected expression that has no connection whatsoever with the State's compelling interest in safeguarding judicial impartiality. If the concern is that a judge might preside over a case involving a candidate or political party the judge has supported, a Rule

requiring recusal would be the appropriate narrowly tailored response.

In addition to this obvious overinclusiveness, Rule 100.5 is also, to quote *White* again, “woefully underinclusive.” *White*, 536 US at 780. Judicial candidates are forbidden from “making speeches on behalf of . . . another candidate” for public office and from “attending political gatherings,” Rule 100.5(A)(1)(f), (g), but in connection with his or her own campaigns, a judicial candidate is expressly permitted to “attend and speak to gatherings on his or her own behalf.” Rule 100.5(A)(2)(i). Judicial candidates are forbidden from contributing to the campaigns of other candidates for elected office, but judicial candidates are expressly permitted to contribute to their own campaigns and to accept campaign contributions from others. *See* Rules 100.5(A)(2) and (A)(5). Judicial candidates are even permitted to accept campaign donations (through appropriate committees) from lawyers and litigants *who regularly appear before them and who are likely to appear before them in the future*, and there is no prohibition on judicial candidates knowing the identity of such donors and exactly how much they contributed.

Of particular significance in this case, the Rules permit Judge Farrell to solicit and accept (through an appropriate campaign committee) non-anonymous campaign contributions *from the very party leader the Commission is now admonishing him for assisting*. *See* Rule 100.5(A)(5). How is it even rational, let alone narrowly tailored to the goal of safeguarding judicial impartiality, for the Rules to forbid Judge Farrell from making phone calls on behalf of the party leader, but to allow the judge to

solicit and accept non-anonymous campaign contributions from that very party leader?

If safeguarding impartiality really is the goal, then there cannot possibly be any principled basis for prohibiting judges from contributing to or campaigning on behalf of others, but allowing them to raise money in this manner and campaign for themselves. As the Supreme Court has made clear time and again, such glaring underinclusiveness is constitutionally fatal, because it “diminish[es] the credibility of the government’s rationale for restricting speech.” *See, e.g., City of Ladue v. Gilleo*, 512 US 43, 52-53 (1994).

Making matters even worse, Rule 100.5 is not merely overinclusive and underinclusive, but also internally contradictory. Despite the ban on contributing to the campaigns of other candidates – a ban purportedly so crucial to the “independence and integrity” of the judiciary that it justifies compromising the rights of judicial candidates to engage in core political expression – judicial candidates are nonetheless expressly permitted to purchase two tickets (but in no case more than two tickets) to a politically sponsored dinner on behalf of another candidate. *See* Rule 100.5(A)(2)(v). Indeed, it does not matter how much these two tickets cost, and it is not a problem if the cost of the tickets far exceeds the actual cost of the food and beverages served. *See id.*

There is no attempt to disguise the fact that this provision effectively allows judicial candidates to contribute to the campaigns of other candidates; to the contrary, this provision obviously was crafted to facilitate such contributions, albeit under carefully

controlled circumstances. Again, however, there cannot possibly be any principled basis for forbidding judicial candidates from making political contributions but allowing them to buy two \$500-per-plate tickets to a political dinner – much less a basis for allowing judicial candidates to purchase two \$500-per-plate tickets but not three \$50-per-plate tickets. It is difficult to imagine how the State could even begin to contend that this Rule is “narrowly tailored” under the strict scrutiny test that applies here.

Tellingly, the Rules contain numerous other provisions that demonstrate how easy it is to craft prohibitions that, at least arguably, do not restrict more speech than is necessary to preserve the integrity and impartiality of the judiciary. *See* Rule 100.3(B)(8) (prohibiting a judge from commenting publicly on pending proceedings); Rule 100.3(B)(9) (prohibiting a judge from criticizing jurors for their verdict other than in a court order or opinion); Rule 100.3(B)(4) (prohibiting a judge from manifesting bias or prejudice against or in favor of parties). *This* is the stuff of narrow tailoring – at least arguably – for each of these subsections of Rule 100.3 is based upon an obvious connection between the prohibited conduct and the effect it might have on judicial impartiality. The stark contrast between the narrow focus of Rule 100.3 and the utter lack of focus of Rule 100.5 demonstrates why the latter cannot survive the searching constitutional scrutiny that the Supreme Court requires.

Far from narrowly tailored, Rule 100.5 regulates the political activities of judges in precisely the opposite way one would expect in order to safeguard judicial

integrity. The State should forbid judicial candidates from accepting campaign contributions from lawyers and litigants who might appear before them, but allow judges to make otherwise lawful campaign contributions to candidates they find worthy of support. The State should relieve judges of the burden of worrying about how their decisions will be received by a fickle, often uninformed electorate, but allow them to support the campaigns of other candidates who have nothing whatsoever to do with anything that goes on in their courtrooms.

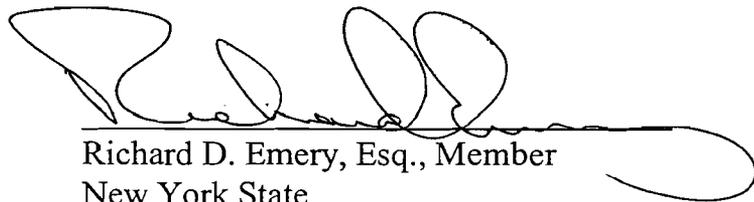
As I acknowledged at the outset, and as the Commission understandably emphasizes, the New York Court of Appeals recently rejected a constitutional challenge to Rule 100.5 in *Raab* on very similar facts to those presented here. With all due respect to the Court of Appeals, however, its opinion in *Raab* comes nowhere close to explaining how Rule 100.5 can possibly be deemed narrowly tailored when it prohibits judges from – at *worst* – becoming “beholden to a particular political leader or party” (*id.* at 316), but permits judges to accept *non-anonymous campaign donations* from lawyers and corporations *that regularly litigate before them*, not to mention *from the very party leaders* to whom we purportedly are so concerned judges will become beholden. That glaring omission continues to baffle me.

The Commission relies on *Raab* and, inferentially, on *White*. But *White* emphasizes repeatedly that elected judges have First Amendment rights; that the states cannot restrict the political activities of elected judges except in a manner that is narrowly

tailored to a compelling objective; and that narrow tailoring requires not just that the restriction address the problem, but that it address the problem in a manner that is neither overinclusive nor underinclusive. *White* is certainly distinguishable on its facts, but there is no way that Rule 100.5 can survive constitutional scrutiny under the analytical methodology that *White* requires.

It is no secret that my law firm represented the petitioner in *Raab* before I was appointed to this Commission, and the views I express in this concurrence are animated in large part by my experience in that case. I certainly accept the decision of the Court of Appeals in *Raab*, and I acknowledge the Commission and I are bound by it. For this reason, I concur rather than dissent. But I cannot in good conscience stand mute on an issue with such important First Amendment implications. *Raab* simply cannot be reconciled with *White*, and I believe that a federal court would (and will) strike down Rule 100.5 as unconstitutional.

Dated: June 24, 2004



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