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

LARRY M. HIMELEIN,

a Judge of the County Court, Family
Court and Surrogate's Court, Cattaraugus
County.

DETERMINATION

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THE COMMISSION:

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

APPEARANCES:

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

Connors & Vilardo, LLP (by Terrence M. Connors) for the Respondent

The respondent, Larry M. Himelein, a Judge of the County Court, Family Court and Surrogate's Court, Cattaraugus County, was served with a Formal Written

Complaint dated March 3, 2009, containing one charge. The Formal Written Complaint alleged that in connection with pending litigation and other efforts by judges to secure enactment by the Legislature of a pay raise for the judiciary, respondent: (A) disqualified himself from cases in which parties were represented by law firms that include members of the Legislature, not because he could not be impartial but as a tactic intended to force the Legislature to pass a judicial pay raise, (B) encouraged other judges to recuse themselves from cases involving legislators or their law firms, without regard to their ability to be impartial, as a "weapon" in the effort to secure a pay raise, and in doing so denigrated those judges who refused, (C) made public comments concerning the pay raise litigation, and (D) made denigrating comments about legislators and, in particular, Assembly Speaker Sheldon Silver. Respondent filed a verified Answer dated April 23, 2009.

By order dated May 20, 2009, the Commission designated the Honorable Richard D. Simons as referee to hear and report findings of fact and conclusions of law. A hearing was held on July 22, 2009, and a schedule was set for the submission of post-hearing briefs.

On December 4, 2009, prior to the issuance of a report by the referee, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On December 9, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the County Court, Family Court and Surrogate's Court, Cattaraugus County, since 1993. He served as an Acting Justice of the Supreme Court intermittently between 1997 and 2004, and continuously from 2004 to the present. Respondent served as District Attorney of Cattaraugus County from January 1, 1982, through December 31, 1992. He was admitted to the practice of law in 1976.

Respondent's General Practice as to Recusals

2. Over the years, respondent has recused himself in several cases where he was familiar with a party or otherwise felt his impartiality might reasonably be questioned.

3. For example, in 1993 respondent presided over a criminal case in which two defendants were charged with stealing from Bush Industries, a company located in Western New York. Respondent disclosed that he owned 100 shares of Bush Industries stock. The defense asked respondent to recuse for that reason. Respondent believed that Judiciary Law Section 14 required his recusal and granted the request.

4. In June 2009 respondent recused himself from a criminal case because the defendant is the son of a court clerk with whom respondent works.

As to Charge I of the Formal Written Complaint:

5. In April 2005 the New York State Legislature considered but failed

to enact legislation that would increase the salaries of the so-called "state-paid judges."[1]

6. On January 2, 2007, certain members of the New York State judiciary commenced *Maron v. Silver,* an Article 78 proceeding to compel the New York State Comptroller to disburse funds for a judicial pay raise. Respondent was not a party to this litigation. The matter is still pending.

7. In March 2007 the Legislature and then-Governor Eliot Spitzer considered but failed to reach agreement on proposed legislation to increase the salaries of the state-paid judges.

8. By June 2007, respondent had developed strong personal feelings about the Legislature's failure to enact judicial pay raise legislation and began considering whether to recuse himself from cases involving lawyer/legislators or members of their law firms.

9. On June 22, 2007, respondent sent a letter to two law firms – Hiscock & Barclay and Harris Beach – referring to the pay raise litigation, advising of his intention to contribute to the litigation, and announcing his decision to disqualify himself from litigation involving the two firms because of their affiliation with legislators. The letter read as follows:

> As I am sure you are aware, several judges and judicial organizations have commenced lawsuits against the governor, the state senate and the state assembly contesting what many believe is the unlawful reduction of judicial salaries during a term of office. I intend to make a contribution to that

[1] "State-paid judges" refers to all judges of the state unified court system except town and village court justices.

> litigation and thus, I have an economic interest in its success. It is my belief that because I have a financial interest in litigation against the New York State Legislature, the ethical rules mandate my disqualification in any case in which a legislator is a member of one of the firms.
>
> Accordingly, because you have a legislator affiliated with your firm, I write to inform you that I am disqualifying myself from any litigation in which your firm is involved.

10. At the time respondent sent the June 22, 2007 letter, he was familiar with Opinion 89-93 of the Advisory Committee on Judicial Ethics ("Advisory Committee"), holding that a judge need not recuse where a legislator or a member of a legislator's firm appears because of the legislator's role in setting the judge's salary. Respondent was also aware of Opinion 07-25, in which the Advisory Committee stated that it would not be consistent with the Rules Governing Judicial Conduct for a judge to recuse in cases involving legislators or their law firms because of the longstanding dispute over judicial salary increases.

11. Prior to sending his letter of June 22, 2007, no legislator had ever appeared before respondent representing a party. Consequently, respondent had never disqualified himself from a case involving a legislator or a legislator's firm.

12. On July 10, 2007, respondent sent a so-called "blast" e-mail[2] to numerous judges throughout New York State, by hitting "reply all" to a prior e-mail. Respondent's e-mail stated in part:

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[2] A "blast" e-mail is an electronic mailing sent simultaneously to a large mailing list. Blast lists of judges are available on the court system's e-mail server system.

> Does anyone really think that banding together or lobbying together or doing anything together will have any effect on those people in Albany?? I remain convinced that the only weapon in our arsenal is recusal on all cases where a firm has a legislator or a relative of a legislator in a firm ... Some of us may not want to poke our fingers in the eyes of the politicians (some of us, however, might like to do exactly that) but I firmly believe that [recusal] is the only weapon we have that has any likelihood of making some of those clowns suffer for their actions...

13. On July 11, 2007, respondent sent a blast e-mail to numerous judges throughout New York State in which he explained that he was disqualifying himself from cases involving lawyer/legislators' law firms, stating:

> My feeling is that I would not be recusing because I could not be impartial. I would be recusing because it is mandatory. I view it this way: I made a contribution to a lawsuit where the legislature is a named defendant. I have a direct interest in the plaintiffs' success in the lawsuit, a direct financial interest.

He further stated:

> Once the lawsuit is over, the reasons for the recusal are also over. It has nothing to do with whether I could be impartial. I really believe this is the only weapon we have ... there are enough lawyers in the senate who would be very unhappy if their cases could not be heard and their firms started letting them go...

14. On September 12, 2007, several judges, including respondent's co-Judge Michael L. Nenno, commenced *Larabee v. Spitzer*, an action seeking a judgment declaring that the Legislature's failure to provide judicial pay raises violated the state constitution. Respondent was not a party to this litigation. The matter is still pending.

15. On September 21, 2007, respondent sent a blast e-mail to numerous

judges throughout New York State, stating:

> I am sending my check this weekend to support the litigation and will send a letter to all firms in our area that have a legislator affiliated with the firm recusing myself from their cases as long as the litigation is pending. I continue to view this as an automatic recusal. Not until these firms start letting their legislators go will we have any standing at all with those clowns...

16. On September 24, 2007, respondent sent a check for $100 to Steven Cohn, P.C., the attorney for the petitioners in *Maron v. Silver*, to support the cost of litigation.

17. Respondent's $100 contribution did not make him a party in *Maron*, did not underwrite the action and did not affect the continuation of the action.

18. On September 25, 2007, respondent sent a letter to the law firms of Harris Beach and Hiscock & Barclay. In his letter, respondent stated that he had contributed to a lawsuit against the Legislature, that he stood to benefit financially from a successful outcome, and that he believed the Code of Judicial Conduct required his recusal from any litigation involving their firms because they were affiliated with a member of the Legislature.

19. Michael Nozzolio, Esq., has served in the New York State Senate since 1993 and is a member of the law firm Harris Beach. Neil Breslin, Esq., has served in the New York State Senate since 1997; William Barclay, Esq., has served in the New York State Assembly since 2003; both Mr. Breslin and Mr. Barclay are members of the law firm Hiscock & Barclay.

20. From September 25, 2007, to July 16, 2008, respondent recused himself from eleven cases involving legislators or members of a legislator's law firm.

21. Before recusing himself from these cases, respondent was aware of Advisory Opinion 89-93, Advisory Opinion 07-25 and Advisory Joint Opinion 07-84 and 07-140, which hold that a judge is not required to exercise recusal when a legislator, or a member of the legislator's firm, appears before the judge, notwithstanding that the New York State Legislature sets judicial salaries or that a judge or judges' association has filed a lawsuit against the Legislature seeking a judicial pay raise. He was also aware of other opinions relevant to this issue, Joint Opinion 88-17(b) and 88-34, and Opinion 88-41.

22. On September 25, 2007, respondent recused himself from *H. John Wild v. Betty Clarke, et al. (Passenger Bus Corp.)*, a civil action for damages commenced on October 30, 2006, in Supreme Court, Cattaraugus County, in which Hiscock & Barclay represented the defendant.

23. On September 25, 2007, respondent recused himself from *Niagara Mohawk Power Corporation, d/b/a National Grid v. Town of Machias Assessor, et al.,* a real property tax certiorari commenced on July 17, 2007, in Supreme Court, Cattaraugus County, in which Hiscock & Barclay represented the petitioner.

24. On September 25, 2007, respondent recused himself from *Niagara Mohawk Power Corporation, d/b/a National Grid v. Town of New Albion Assessor, et al.,* a real property tax certiorari commenced on or about July 17, 2007, in Supreme Court, Cattaraugus County, in which Hiscock & Barclay represented the petitioner.

25. Sheldon Silver has served in the New York State Assembly since 1977. Mr. Silver has been Speaker of the Assembly since 1994. He is an attorney and a member of the law firm Weitz & Luxenberg.

26. On October 15, 2007, respondent recused himself from *Estate of Raymond J. Dombek*, a probate proceeding in the Cattaraugus County Surrogate's Court, commenced on October 15, 2007, in which Weitz & Luxenberg represented the petitioner.

27. On October 15, 2007, respondent sent a letter to Weitz & Luxenberg, stating that he had contributed to a lawsuit against the Legislature, that he stood to benefit financially from a successful outcome, and that he believed that the Code of Judicial Conduct required his recusal from any litigation involving the firm because of its affiliation with a member of the Legislature. Respondent further stated, "Because your firm is counsel to a party in the [*Dombek*] case, the case will have to be re-assigned to a judge able to hear your case."

28. On December 3, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating in reference to the *Maron* case:

> Given that decision, and assuming that we will get boned by the legislature again, is there anyone who still believes we shouldn't recuse?

29. On January 3, 2008, respondent recused himself from the *Estate of Joseph E. Zynczak*, a probate proceeding commenced on June 25, 2004, in Surrogate's Court, Cattaraugus County, in which Harris Beach represented the estate.

30. On January 3, 2008, respondent wrote to the attorneys in the *Zynczak* matter stating that he believed that he was "mandatorily recused" from any case involving Harris Beach because he had contributed to litigation against the Legislature and Harris Beach employed a legislator. Respondent further stated, "I believe Judge Nenno, the only other judge in our county, has also recused so you will probably have to contact the administrative judge to find a non-self respecting judge to hear your case."

31. Judge Michael Nenno had recused himself from cases involving state legislators or their law firms because he was a party to *Larabee v. Spitzer*. Prior to his own recusal from such cases, respondent was the only Cattaraugus County judge hearing cases involving legislators and their law firms. After respondent's recusal, all cases involving legislators and their law firms had to be transferred to judges in adjoining counties.

32. On January 18, 2008, respondent recused himself from *Jason R. Clemons v. Olean General Hospital, et al.,* a medical malpractice action commenced on or about January 26, 2007, in Supreme Court, Cattaraugus County, in which Hiscock & Barclay represented the defendant.

33. On February 28, 2008, respondent recused himself from the *Estate of Robert J. Wagner*, a probate proceeding commenced on or about February 27, 2008, in Surrogate's Court, Cattaraugus County, in which Weitz & Luxenberg represented the petitioner.

34. On April 10, 2008, then-Chief Judge Judith Kaye commenced a

lawsuit, *Kaye v. Silver*, seeking *inter alia* an order retroactively adjusting the salaries of state-paid judges.

35. On April 24, 2008, the Advisory Committee issued Joint Opinion 08-76, 08-84, 08-88 and 08-89, holding *inter alia* that state-paid judges are not parties to the Chief Judge's lawsuit and are not required to recuse when a legislator or a member of the legislator's firm appears. Respondent was aware of Joint Opinion 08-76, 08-84, 08-88 and 08-89.

36. On May 6, 2008, respondent recused himself from the *Estate of Eloise J. Fall*, a probate proceeding commenced on May 5, 2008, in Surrogate's Court, Cattaraugus County, in which Harris Beach represented the petitioner.

37. On July 1, 2008, respondent recused himself from the *Estate of Henry G. Ruth*, a probate proceeding commenced on June 4, 2008, in Surrogate's Court, Cattaraugus County, in which Weitz & Luxenberg appeared for the petitioner.

38. On July 16, 2008, respondent recused himself from the *Estate of Donald C. Bliven*, a probate proceeding commenced on March 7, 2005, in Surrogate's Court, Cattaraugus County, in which Weitz & Luxenberg represented the petitioner.

39. On July 16, 2008, respondent recused himself from the *Estate of Claude F. Glenn*, a probate proceeding commenced on or about August 16, 2007, in the Surrogate's Court, Cattaraugus County, in which Weitz & Luxenberg represented the petitioner.

40. Respondent's decision to recuse himself from cases involving the

law firms of Hiscock & Barclay, Harris Beach and Weitz & Luxenberg was unrelated to his ability to be impartial with respect to the litigants represented by those firms or the individual lawyers who appeared on their behalf.

41. Respondent did not attempt to obtain a remittal of disqualification in any of the eleven cases in which he exercised recusal due to the involvement of a legislator's law firm.

42. Respondent disqualified himself from cases involving the law firms of Hiscock & Barclay, Harris Beach and Weitz & Luxenberg because of his own interpretation of the Rules, while also expressing his opinion that recusal was proper as a tactic in furtherance of the judiciary's interest in having the Legislature approve pay raises for the judiciary.

43. Between July 10, 2007, and April 23, 2008, respondent sent eleven blast e-mails to numerous judges throughout New York State, concerning the failure of the Legislature and the Governor to enact pay raise legislation. In each instance, respondent hit "reply all" to respond to a prior e-mail, without knowing who, or how many people, would receive his e-mail.

44. On November 9, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> Both of us in Cattaraugus County have recused ourselves (I even got a case from the speaker's firm from which I could gleefully recuse myself). Why doesn't every judge in the state immediately recuse? Grow some stones people. It will always be the only weapon we have. Use it or lose it!

45. On December 19, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating *inter alia*:

> How can any self respecting judge even consider sitting on a case with a legislator in a firm? When Shelley's firm can't get a divorce heard or will probated or a trial date, see if that doesn't spur some action. And maybe some of his contributors could ask for their money back...

46. On December 20, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> The problem is that most of the NYC judges are too gutless to recuse themselves from that firm's cases ... [R]ecusal is the best weapon we have but it requires every judge in the state in order to be successful. I would hope that Judge Kaye would simply mandate it.

In another blast e-mail to numerous judges on the same date, respondent listed the counties in which Speaker Silver's law firm, Weitz & Luxenberg, had cases pending, and asked, "How about everyone recuses by 5:00 today???"

47. On January 4, 2008, respondent sent a blast e-mail to numerous judges throughout New York State, in reply to an e-mail from then-Chief Judge Kaye and Chief Administrative Judge Ann Pfau, stating:

> The ONLY way anything will happen is if you exercise some leadership and commence a lawsuit and MANDATE that all judges in the state recuse themselves from any civil cases where a law firm has any connection to a legislator ... If you don't mandate it, the wimp judges in the city won't recuse.

48. On April 1, 2008, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> [Recusal] should NOT be personal. It should be mandated in all cases. If its personal, its useless.

49. On April 3, 2008, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> [W]e would need the chief judge to mandate recusal. If left to the individual judges, too many wouldn't do it. Some would recuse only for one house or the other and the lackies in the city would be afraid to offend the powers that be.

50. On April 23, 2008, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> [M]ost of the judges in the city are absolute wusses ... I now know why so many upstaters would like nyc to become a separate state. The upstaters would get a raise and the ones in the city could stay being toadies for the politicians.

51. Respondent's e-mails were an attempt to encourage other judges to recuse in lawyer/legislators' law firm cases, not because they could not be impartial but as a litigation tactic in the judiciary's ongoing battle for a pay raise.

52. Respondent intended to use recusal as a "weapon" to create a hardship for lawyer/legislators by causing their clients to discharge them, forcing them to find alternative venues for their litigation, creating difficulties for them within their law firms, and otherwise causing the lawyer/legislators to suffer financially and perhaps lose their law firm jobs.

53. Respondent intended that these financial hardships would bring "pressure to bear upon" the lawyer/legislators to enact a judicial pay raise.

54. Respondent stood to gain thousands of dollars per year were pay-

raise legislation to be enacted.

55. In 2007 respondent sent a blast e-mail to numerous judges throughout New York State in which he referred to Mr. Silver as a "slug." Respondent defines the term slug as a distasteful creature that is large, slimy and worm-like.

56. In April 2008, Bruce Golding, a reporter for the *New York Post*, called respondent at his chambers, identified himself as a reporter, and asked respondent whether he planned to recuse himself from cases involving Weitz & Luxenberg. Respondent acknowledged that he was recusing himself from Weitz & Luxenberg's cases. Respondent confirmed to Mr. Golding that he had written an e-mail to fellow judges. In that e-mail he referred to Speaker Silver as a "slug." Respondent made no effort to retract, temper or otherwise persuade Mr. Golding not to report his reference to Speaker Silver as a "slug."

57. On April 27, 2008, in both its print and website editions, the *New York Post* published Mr. Golding's article on his conversation with respondent. The article included a picture of respondent, which respondent had provided on Mr. Golding's request.

58. On April 29, 2008, Erin Billups, a reporter for *News 10 Now*, called respondent. Ms. Billups identified herself as a reporter and asked respondent about judicial recusal from cases involving law firms associated with members of the New York State Legislature.

59. Respondent told Ms. Billups that he believed that when then-Chief

Judge Kaye filed her lawsuit, she should have made recusal mandatory for all judges when a legislator or a legislator's firm appears on behalf of a party. He also told Ms. Billups that there were a number of judges, especially upstate, who will continue to recuse themselves until they get a pay raise.

60. On April 29, 2008, an article written by Ms. Billups was published on *www.capitalnews9.com*, and her report ran on television Channel 10 in Albany.

61. Ms. Billups' article quoted respondent as saying, "I think it's unfair, I think it's a conflict of interest. I think it's always been a conflict of interest and the legislature has no one but themselves to blame for having brought it up now." The article also quoted respondent as saying:

> The judges in NYC, who by in large are appointed by the politicians don't have the guts to do it, and that's where most of the lawyer legislature is from ... What we're saying is you'll have to get a different lawyer. That doesn't do anything to the merits of the person's case.

62. Respondent made the statements attributed to him in Ms. Billups' article.

63. Respondent had prior experience as a judge dealing with reporters, and he was aware that the Rules Governing Judicial Conduct prohibited judges from making public comments on pending cases.

64. Respondent knew that the *Maron* case, the *Larabee* case and the Chief Judge's case were pending when he spoke to Mr. Golding and Ms. Billups.

65. Respondent knew that he could have ended the conversations with

Mr. Golding and Ms. Billups at any point.

Facts in Mitigation

66. On reflection and after the hearing before the referee in this matter, respondent recognizes that it was wrong for him to use recusal as tactic in furtherance of his interest in achieving legislative approval of a judicial pay raise, that it was wrong for him to encourage other judges to use recusal for the same purpose, and that it was wrong for him to disparage those judges who did not recuse themselves from cases as he did for that purpose, and that it was wrong for him to refer to a party to the judicial compensation litigation, Assembly Speaker Sheldon Silver, as a "slug" in a widely circulated e-mail.

67. As to the cases at issue involving clients of Hiscock & Barclay, Harris Beach and Weitz & Luxenberg, although other judges had to preside over such cases after respondent recused himself, there is no evidence in the record of detriment to the litigants or lawyers, whose cases were heard by other judges in Cattaraugus County.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(4), 100.3(B)(6), 100.3(B)(8), 100.4(A)(1), 100.4(A)(2) and 100.4(A)(3) 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. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

The record establishes that respondent disqualified himself from numerous cases involving legislators' law firms, and urged other judges to do the same, not because recusal was required by the ethical rules but for a strategic, selfish purpose: as a retaliatory "tactic" and a "weapon" to further the judges' interests in achieving legislative approval for a pay raise. He did so for reasons that had nothing to do with his ability to be impartial, and despite knowing that the Advisory Committee on Judicial Ethics had specifically advised judges that recusal on that basis, standing alone, was not proper. His recusals, which had no adequate legal basis, were inconsistent with the fair and proper administration of justice and placed an unnecessary burden on court administration. Respondent has stipulated that his conduct was contrary to the ethical rules[3] and warrants censure.

Disqualification is mandated in any proceeding "in which the judge's impartiality might reasonably be questioned" (Rules, §100.3[E]). As early as 1989, the Advisory Committee had advised judges that the State Legislature's authority to set the salaries of state-paid judges does not, in itself, require recusal when a lawyer-legislator appears before the judge (Adv Op 89-93). In 2007, in light of the longstanding dispute over the lack of judicial pay raises and the pending litigation commenced by certain judges with respect to the issue, the Advisory Committee reiterated and underscored that view. In a series of opinions, the Advisory Committee again declared that recusal in

[3] It has also been stipulated that respondent's comments to two reporters about the subject were inappropriate.

cases involving legislators or their law firms is not required provided that the judge believes that he or she could be impartial; further, the Committee stated, opting for disqualification on that basis alone would "erode public confidence in the integrity, impartiality and independence of the judiciary," and a "judge should not consider recusal unless he or she believes that he or she could not be impartial" (Adv Op 07-25 [issued 2/22/07]; *see also*, 07-84 and 07-140 [issued 9/6/07], 07-190 [issued 12/6/07]).

Over a ten-month period beginning in September 2007, respondent disqualified himself from eleven cases involving legislators or members of their law firms as a "weapon" in an attempt to force a pay raise by creating economic hardship for legislators and their firms. The record is clear that respondent's recusals were unrelated to whether he could be impartial – indeed, in an e-mail message to other judges, he bluntly acknowledged, "It has nothing to do with whether I could be impartial." Rather, respondent viewed recusal as a tactic to put pressure on legislators to enact a judicial pay raise. Recusal would (he hoped) create difficulties for the legislators within their firms, cause their clients to discharge them, and cause the legislators to suffer financially. He reiterated this theme in numerous e-mail messages to other judges (*e.g.*, "[Recusal] will always be the only weapon we have"; it "is the only weapon we have that has any likelihood of making some of those clowns suffer for their actions").

Although respondent rationalized at various times that his recusal was required because of the pending lawsuits about judicial pay raises, in which he had "a direct financial interest," and/or because of a $100 contribution he had made to the

litigation, it is clear that from the beginning, the driving reason for his recusals was strategic, not ethical. As numerous Advisory Opinions had made clear, neither the pay raise controversy nor the pending litigation (to which respondent was not a party) required recusal, and respondent's modest financial contribution to the litigation did not materially elevate his interest in the matter or in itself provide a basis for recusal (*see, e.g.*, Adv Op 04-140, 95-131 [making a contribution to the Legal Aid Society does not require recusal from the Society's cases]). Indeed, if respondent believed that making a contribution *per se* would require his recusal, he should not have made it, since a judge must conduct extra-judicial activities so as to minimize the risk of conflict with judicial obligations and not interfere with the proper performance of judicial duties (Rules, §100.4[A][1], [3]).

Section 100.3 of the Rules provides that "the judicial duties of a judge," which include "all the duties of a judicial office prescribed by law," "take precedence over all the judge's other activities." Implicit in this mandate is the duty not to disqualify unnecessarily, for reasons of personal convenience or based on personal pique. There is clearly no justification for refusing to discharge one's judicial duties for a retaliatory purpose or as a tactic to achieve a pecuniary or political aim. *See Matter of Leff*, 1983 Annual Report 119 (Supreme Court justice censured for refusing to hear any cases for six months as a protest against his reassignment from a criminal to a civil part).

Respondent's behavior is aggravated by his wide dissemination of e-mail messages encouraging other judges to join him in recusing from the cases of legislators'

law firms as a litigation tactic. His messages made plain that the purpose for recusing was to "spur some action" ("We either take serious action or we will forever be in the same position we are today"). Chiding, browbeating and insulting judges who did not recuse (calling them "wusses," "non-self-respecting," "gutless," and "wimp[s]"), denigrating downstate judges in particular ("lackies" and "toadies for the politicians") and telling them to "grow some stones," respondent repeatedly urged his judicial colleagues to recuse en masse ("How about everyone recuses by 5:00 today???"). Referring to Assembly Speaker Sheldon Silver as a "slug," he also told his judicial colleagues that if Silver's firm could not get its cases heard because of mass recusals, that would "spur some action" on the pay raise issue, and that once a pay raise was enacted, the need for such disqualifications would end. By encouraging other judges to abrogate their professional duty by engaging in conduct that was patently improper, respondent compounded his misconduct.

It is stipulated that respondent sent these so-called "blast" or mass e-mails to other judges by hitting "reply all" in response to messages he had received on the court system's e-mail server, without knowing who or how many people would receive his messages. Arguably, because of the unknown but presumably large number of recipients, these comments were not made with a reasonable expectation of privacy, but were intended to be and were in fact widely disseminated. *See Matter of Fiechter*, 2003 Annual Report 110 (censuring judge, *inter alia*, for sending copies of a letter containing inaccurate, unsubstantiated allegations denigrating another judge to 89 judges and 12

State senators). The message respondent conveyed – widely and repeatedly – was highly prejudicial to the proper administration of justice. His stated aim – to deprive lawyer-legislators of their livelihood and to deprive their clients of access to the courts until judges received a pay raise – was inconsistent with a judge's obligation to refrain from conduct that interfered with the proper performance of judicial duties, to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and to accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law (Rules, §§100.2[A], 100.3[B][4], 100.4[A][3]).

In its totality, respondent's conduct reflected adversely on the judiciary as a whole. Accordingly, we accept the stipulated sanction of censure.

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

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

Mr. Belluck did not participate.

CERTIFICATION

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

Dated: December 17, 2009

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