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

NILDA MORALES HOROWITZ,

a Judge of the Family Court, Westchester
County.

DETERMINATION

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 (Alan W. Friedberg, Of Counsel) for the Commission

Deborah A. Scalise for Respondent

The respondent, Nilda Morales Horowitz, a judge of the Family Court, Westchester County, was served with a Formal Written Complaint dated July 21, 2004,

containing three charges. Respondent filed a verified answer dated August 13, 2004.

On November 30, 2004, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts, stipulating that the Commission make its determination based upon the agreed facts. The Commission approved the agreed statement on December 10, 2004.

Each side submitted memoranda as to sanction. On February 7, 2005, the Commission heard oral argument, at which respondent and her counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been a judge of the Family Court, Westchester County, since 2001. Respondent previously served as an administrative law judge and as a law guardian and hearing examiner in Family Court. Respondent is an attorney.

As to Charge I of the Formal Written Complaint:

2. Beth Martin is a personal friend of respondent and was a teacher of respondent's child.

3. Beth Martin had appeared as a litigant in a Family Court matter before Westchester Family Court Judge David Klein prior to May 30, 2003.

4. Within a few days of May 30, 2003, respondent spoke to Ms. Martin, who stated that she was considering the commencement of additional proceedings in the Family Court in the future and wished to have her case assigned to a judge other than Judge Klein. At the time, respondent informed Ms. Martin that she could not preside over her matter.

5. On May 30, 2003, respondent telephoned Judge Klein's court attorney, Kathryn Ritchie, Esq., who formerly served as respondent's court attorney, and requested her help in getting Judge Klein to recuse himself from Ms. Martin's matter, by leaving the following voice mail message for Ms. Ritchie:

> It's Nilda. How you doin'? Give me a call on Monday. I need to ask a favor and see whether or not this can be done. Basically, I'll tell you briefly so you have an idea. There was a matter, there have been matters before your judge dealing with Beth Martin. She's a personal friend of mine. She's my kids' teacher for a couple of years and she's beside herself, something happened recently with her husband and she said she's had issues with Judge Klein and she's written letters against him. So, I told her to file her petitions in White Plains. [Supervising Family Court] Judge Cooney said that unless Judge Klein recuses himself we wouldn't be able to hear her case here, not me obviously but somebody else. So, I'm reaching out to you to get suggestions, as to how we could get him to do that. I don't know if he would, for whatever reason. But apparently they have not had a good rapport and she definitely has major issues she needs to modify with regard to her divorce decree and her husband. So if you want to get back to me I'll give you a little more information and you could give me your ideas. Call me back Monday.

6. Ms. Martin did not subsequently commence additional proceedings in Westchester County Family Court or have any additional conversations with respondent concerning the proceedings.

7. Respondent now recognizes that her conduct in paragraph 5 above was improper.

As to Charge II of the Formal Written Complaint:

8. Respondent is a close friend of Jeff Higdon and Barbara Antmann, a

married couple, and has socialized often with them over the past several years.

9. Respondent knew that Mr. Higdon and Ms. Antmann were involved in a custody dispute in the New Jersey courts concerning a child who was living with them, but who was not their biological or adopted child. Respondent frequently came into contact with the child when visiting at the Higdon/Antmann home. Respondent advised Mr. Higdon and Ms. Antmann that she could not preside over their matter should a proceeding be commenced in Westchester County Family Court because of the personal nature of their relationship.

10. On June 5, 2003, Mr. Higdon called respondent at her court and advised her that the matter had been dismissed in New Jersey and that he and his wife were considering commencing a proceeding in respondent's court against the child's biological parents, Motke and Shoshona Barnes.

11. On June 5, 2003 and June 6, 2003, Family Court Supervising Judge Joan O. Cooney was assigned to preside over emergency applications and *ex parte* proceedings.

12. On June 5, 2003, without identifying them by name, respondent advised Judge Cooney that her friends, meaning Mr. Higdon and Ms. Antmann, would be coming to court seeking an order of protection. Judge Cooney advised respondent that the matter must proceed in the normal manner.

13. On June 6, 2003, immediately prior to Judge Cooney's presiding over the matter commenced by Mr. Higdon and Ms. Antmann, respondent advised Judge Cooney that the petitioners were respondent's friends. Judge Cooney reiterated that the

matter must proceed in its normal course.

14. Judge Cooney presided over the matter on June 6, 2003, issued an *ex parte* order of protection in favor of Mr. Higdon and Ms. Antmann and against Mr. and Mrs. Barnes, and granted Mr. Higdon and Ms. Antmann temporary custody of the child. Judge Cooney then assigned the matter to Family Court Judge Sandra B. Edlitz.

15. Prior to the first appearance of Mr. Higdon and Ms. Antmann before Judge Edlitz, respondent spoke to Senior Court Clerk Edward Edmead, the court clerk assigned to Judge Edlitz's part, and told Mr. Edmead that the petitioners, Mr. Higdon and Ms. Antmann, were respondent's friends and were really nice people. Respondent also asked Mr. Edmead to look out for them.

16. In June 2003, in a courthouse hallway, respondent encountered Judge Edlitz's court attorney, Susan Pollet, and told Ms. Pollet that the petitioners in the *Higdon* matter were respondent's friends.

17. Subsequently, during the summer of 2003, respondent came into Ms. Pollet's office in the courthouse and stated that she knew Mr. Higdon and Ms. Antmann in the matter from Scarsdale (where respondent, Mr. Higdon and Ms. Antmann reside) and was friendly with them. Respondent also stated that Mr. Higdon and Ms. Antmann were good people and good parents. Ms. Pollet would testify that this was the first time since respondent had become a judge that she had come into Ms. Pollet's office. Respondent would testify that she had previously been in Ms. Pollet's office on several occasions.

18. In August 2003, respondent entered Judge Edlitz's chambers and had

a conversation with Judge Edlitz. Judge Edlitz would testify that, initially during the conversation, respondent told Judge Edlitz that the petitioners, Mr. Higdon and Ms. Antmann, were her friends and that they were very nice people and that respondent and Judge Edlitz then discussed several unrelated matters. Respondent would testify that, during the course of a conversation concerning several matters, she told Judge Edlitz that the petitioners, Mr. Higdon and Ms. Antmann, were her friends and that they were very nice people.

19. On August 18, 2003, Judge Edlitz recused herself from the matter commenced by Mr. Higdon and Ms. Antmann because of respondent's unauthorized *ex parte* communications on behalf of the petitioners, Mr. Higdon and Ms. Antmann. Judge Edlitz did not state a reason for the recusal on the record. The matter was then transferred to Rockland County, and was later transferred again to New York County.

20. In September 2003, Judge Cooney told respondent that the matter commenced by Mr. Higdon and Ms. Antmann was transferred out of Westchester County because of respondent's intervention. Respondent replied that Judge Cooney was "being ridiculous" and that "everybody does it."

21. Respondent now recognizes that her conduct in paragraphs 12, 13 and 15-18 above was improper.

As to Charge III of the Formal Written Complaint:

22. On December 4, 2003, respondent testified before the Commission concerning a complaint alleging that respondent had sought special consideration on

behalf of Beth Martin. At the time, the Commission had not received a complaint concerning respondent's conduct in connection with the matter commenced by Mr. Higdon and Ms. Antmann.

23. On December 4, 2003, respondent testified concerning her voice mail message of May 30, 2003, to Kathryn Ritchie, Esq., concerning Beth Martin.

24. Respondent was asked if there were any other pending or impending matters, involving litigants whom she knew, as to which she had communicated with another judge or court attorney. Respondent testified as follows:

Q: Have you ever attempted to communicate with any other judge concerning a pending matter or an impending matter on behalf of an individual?
A: On behalf? No. Conversations about cases that we know, sure, but not on -- no.
Q. Did you ever have a conversation with a judge about - - another judge about a pending matter or an impending matter in which you knew a litigant?
A. In which I knew a litigant?
Q. Yes.
A. Maybe.
Q. Could you explain?
A. I mean, at one point or another, all of us have people in front of us that we know, so - - and we discuss these matters all the time. "Oh, did you see so-and-so, he was here," and, you know, "that one's attorney is, you know, filing for orders of protection." And so those conversations are - -
Q. Other than just referring to a case, that "X" was here, did you have any other conversations?
A. No, no.
Q. Of that nature?
A. No.
Q. Did you ever have a conversation with another court attorney, not your own court attorney, but another court attorney, concerning a pending or impending matter in which you knew one of the litigants?
A. Probably the same type of conversation we've had with the

judge.
Q. Just informational, "did you see who was here?"
A. Yes, right, you know.
Q. Anything other than that?
A. No, no.

25. Respondent now recognizes that her testimony was not accurate and that, in response to the questions posed to her in paragraph 24 above, she should have advised the Commission about the *Higdon* matter.

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(B), 100.2(C), 100.3(B)(6) and 100.4(A)(1) 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. Charges I through III of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

It is improper for a judge to intervene in official matters when he or she is known as a judge, even in the absence of an explicit request for special consideration. *Matter of Edwards v. Comm. on Judicial Conduct*, 67 NY2d 153, 155 (1986) (non-lawyer town justice was censured for identifying himself as a judge while inquiring about procedures in his son's traffic case). Such conduct constitutes an improper assertion of judicial influence, which has long been condemned as favoritism and "is wrong, and always has been wrong." *Matter of Byrne*, 47 NY2d (b), (c) (Court on the Judiciary 1979); Rules Governing Judicial Conduct, §100.2(C).

In a 1977 report about the assertion of influence in traffic cases, the Commission stated that such conduct results in "two systems of justice, one for the average citizen and another for people with influence" ("Ticket-Fixing: Interim Report," June 20, 1977, p. 16). A judge who asserts the influence of judicial office by speaking favorably about a litigant to the presiding judge does a grave injustice to the judicial system since such conduct implies that, as a result of such private communications, a litigant with the right "connections" might receive special treatment. Respondent's conduct diminishes respect for the judiciary because it strikes at the heart of the justice system which is based on equal justice and the impartiality of the judiciary.

Here, respondent interceded on behalf of friends in two cases that were pending or impending before other judges in Family Court. In the first matter, respondent believed a proceeding was about to be filed, and she left a message for the judge's court attorney (respondent's former court attorney), seeking the attorney's assistance in conspiring how to persuade the judge to recuse himself. In her message, respondent described her personal relationship with the prospective litigant, told the court attorney that her friend did not have "a good rapport" with the judge, and solicited the court attorney's "ideas" as to "how we could get [the judge] to do that [*i.e.*, disqualify himself]." This approach was especially harmful since it tried to entice an attorney who worked for another judge to manipulate the system, rather than allow the case to proceed in the normal course. It is immaterial that no new proceeding was ever initiated. It is especially troubling that respondent indicated to the Commission that if she had a closer relationship to the presiding judge, she would have gone to him directly with the request

(Oral argument, p. 69). This indicates that respondent lacks an essential understanding of why her conduct was improper.

Five days later, respondent engaged in another improper *ex parte* communication about a pending matter. Respondent advised her supervising judge that respondent's friends would be seeking an order of protection. The judge informed respondent that the matter must proceed in the normal course. Undeterred by this response, the next day respondent reminded the judge, who was about to preside over respondent's friends' petition, that the litigants were her friends. Once again, the judge told respondent that the matter must proceed in its normal course. The judge issued an order of protection in favor of respondent's friends, granted temporary custody of the child to respondent's friends, and assigned the case to another judge.

Despite having twice been warned that the case had to proceed in the normal course, respondent then told the senior court clerk that the petitioners were respondent's friends and "were really nice people," and asked the clerk to "look out for" her friends. Respondent also told the court attorney of the judge assigned to the case that the petitioners were respondent's friends and, a few weeks later, again told the court attorney that the petitioners were her friends and were "good people" and "good parents." Finally, respondent repeated that message—that the petitioners were her friends and were "very nice people"—to the presiding judge while visiting the judge in chambers. Because of that highly improper *ex parte* communication, the judge recused herself from the case, which was transferred to another county.

Later, when respondent's supervising judge commented that because of

respondent's intervention the case had been transferred out of the county, respondent replied, "That's ridiculous" and said, "Everybody does it." Respondent has explained that her comment, "That's ridiculous" meant that there were other reasons why the case had been transferred, and that "Everybody does it" meant only that judges often speak about their cases to other judges. Obviously, there is a significant difference between casual discussion of pending cases and communications that convey, implicitly or explicitly, a request for special treatment. Regardless of what respondent claims she meant, her comments reflect a lack of sensitivity to judicial ethics.

Arguably, respondent's conduct to advance her friends' interests was far more harmful than seeking special consideration in traffic cases or telling a prosecutor or even a judge favorable background material about a defendant in a criminal case in regard to a determination of sentence (*see Matter of Kiley*, 74 NY2d 364 [1989]). In Family Court cases, there often are opposing parties whose competing interests impact the lives of children. When a judge seeks to privately impart favorable information about a litigant to the judge presiding over a matter, the entire system of justice in Family Court is subverted.

Respondent was charged with lack of candor during the investigation when, testifying about the earlier incident, she was asked whether she had engaged in similar *ex parte* communications about any other pending matters. Respondent testified under oath that she had not done so, which clearly was inaccurate since the events covered by Charge II had occurred only a few months earlier. Respondent conceded in the Agreed Statement of Facts that she should have disclosed the prior events and that her responses were "not

accurate."

In determining the appropriate sanction, we find precedent in the decisions of the Commission and the Court of Appeals in which judges have been disciplined for the improper assertion of influence. The Court of Appeals has stated that '[t]icket-fixing is misconduct of such gravity as to warrant removal," even for a single transgression. *Matter of Reedy v. Comm. on Judicial Conduct*, 64 NY2d 299, 302 (1985); *Matter of Edwards v. Comm. on Judicial Conduct, supra* ("as a general rule, intervention in a proceeding in another court should result in removal" [67 NY2d at 155]). The Court has also observed that mitigating factors should be considered in deciding whether a sanction less severe than removal would be appropriate. *Matter of Edwards, supra*. In numerous cases, both the Court and the Commission have admonished or censured judges for such conduct. *See, e.g., Matter of Lonschein*, 50 NY2d 569 (1980); *Matter of Calabretta*, 1985 Annual Report 112 (Comm. on Judicial Conduct); *Matter of Cipolla*, 2003 Annual Report 84 (Comm. on Judicial Conduct); *Matter of Martin*, 2002 Annual Report 121 (Comm. on Judicial Conduct), *revised*, 6/6/02; *Matter of LoRusso*, 1988 Annual Report 195 (Comm. on Judicial Conduct); and, recently, *Matter of Bowers*, 2005 Annual Report ___ (Nov. 12, 2004), http://www.scjc.state.ny.us/Determinations/B/bowers.htm (town justice was censured, upon a joint recommendation of Commission Counsel and the judge, for sending a letter requesting special consideration for a defendant in a traffic case, untruthfully identifying the defendant as his relative).

In *Matter of Kiley, supra*, the Court rejected a Commission determination that a full-time judge be removed for seeking special consideration from a prosecutor in

one case and from a prosecutor and the judge presiding in another case. Holding that the judge had "lent and appeared to lend the prestige of his office to advance the respective defendant's private interests," the Court noted that, as to one case, the judge was motivated by sympathy for the defendant's family and sought to help his friends through an emotional trauma (74 NY2d at 368, 370). As to both cases in which he interceded on behalf of defendants, the judge "was not motivated by personal gain, and totally absent from his conduct was any element of venality, selfish or dishonorable purpose"; there were "no aggravating factors and thus a sufficient basis for removal is lacking" (*Id.* at 370).

The decision in *Kiley* is especially instructive here since the facts are somewhat similar. In this case, however, respondent ignored warnings by her supervising judge, had improper conversations with court personnel as well as two judges presiding over her friends' case, and tried to enlist a judge's court attorney to achieve the result that respondent's friend wanted: the judge's recusal. Although the misconduct here is more serious than in *Kiley*, one mitigating factor in that case is applicable here: respondent's motivation in advancing her friends' cause was sympathy for her friends and a strong belief in them as parents.

The only other mitigating factor in this case is the stipulation by respondent, her attorney and Commission counsel that respondent now understands that her conduct was improper.

Left to choose between censure and removal, we decide not to remove respondent from office. We emphasize that the misconduct here is extremely serious and

cannot be tolerated. Every judge is obliged to learn and abide by the ethical rules. If parties in court proceedings are to have faith in the decisions of judges, they must have assurance that *ex parte* communications of the kind respondent initiated will be condemned by strong measures.

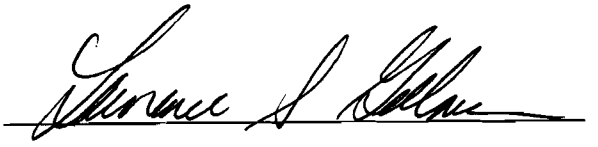
By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur. Mr. Goldman dissents only as to sanction and votes that the appropriate disposition is removal.

CERTIFICATION

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

Dated: March 25, 2005



Lawrence S. Goldman, Esq., Chair
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Pursuant to Section 44, subdivision 4,
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a Judge of the Family Court, Westchester County.

DISSENTING OPINION BY MR. GOLDMAN

I respectfully dissent from the determination of censure, and vote to remove respondent. I believe her persistent misconduct in interfering in cases before other judges, her evasive testimony during the investigation by Commission staff and her failure to recognize the gravity of her misconduct demonstrate her lack of fitness to serve as a judge.

Respondent abused her position as a judge in two separate matters before other judges in her own court by making statements that could only have been meant, and understood, as seeking preferential treatment for her friends. Obviously, such beneficial treatment, if it had been given, would have been to the detriment of the litigants on the other side of the lawsuit.

In one instance, when a friend was unhappy with the judge previously assigned to her case, respondent by voicemail importuned the judge's court attorney, who had been her own court attorney, to help her find a way to get the judge to recuse himself

so that her friend would have a more favorable judge.

In another case, she persistently sought favorable treatment for a couple involved in a custody suit: twice to the supervising judge, to whom she mentioned that the litigants were her friends; once to a court clerk, to whom she said that the litigants were her friends and were nice people and to look out for them; twice to the assigned judge's court attorney, to whom she said that the litigants were her friends and good people and good parents; and once to the assigned judge herself, to whom she said the litigants were her friends and very nice people. When told by her supervising judge that the matter had to be transferred out of the county because of her intervention, she replied that the judge was being "ridiculous" and that "everybody does it."

Under the test enunciated by the Court of Appeals, that conduct alone might well warrant removal. In *Matter of Edwards v. Comm. on Judicial Conduct*, 67 NY2d 153, 155 (1986), where the judge intervened in another court concerning his son's traffic ticket, the Court wrote: "[A]s a general rule, intervention in a proceeding in another court should result in removal." Here, there is far more than the single instance of intervention, and here, of course, the matters were not in "another" court but in the very court in which respondent sat. Thus, respondent's misconduct is more pernicious than that in *Edwards*. Requests for favorable treatment from a judge of the same court, or from a judge to a lower-ranking official in the same court, are more difficult to ignore and thus more likely to succeed.[1] On the other hand, the "general rule" has been honored

[1] To their credit, those who were approached by respondent gave no favorable treatment to her friends.

more in the breach than in the observance and cases involving requests for favoritism have generally occasioned a sanction less than removal. *See, e.g., Matter of Kiley*, 74 NY2d 364 (1989); *Matter of Pennington*, 2004 Annual Report 139 (Comm. on Judicial Conduct).

Respondent's misconduct, however, is not limited to her two (or seven, depending how one counts) instances of intervention. Called to testify during the Commission staff's investigation of the first instance, involving the voicemail message,[2] respondent gave evasive, if not false, testimony in denying that she had ever, aside from that single incident, communicated with a fellow judge or court attorney on behalf of a litigant. I find unconvincing respondent's explanation, given during oral argument before the Commission, that she had forgotten about the second series of entreaties. Her testimony occurred only four to six months after she made six requests for favorable treatment and only three months after she was rebuked by her administrative judge for causing the assigned judge to recuse herself so that the case had to be sent to another county. These events were certainly memorable. This evasive (or perhaps deliberately false) testimony itself is grounds for severe sanction, possibly removal. *See, e.g., Matter of Collazo*, 91 NY2d 251, 255 (1998) ("deception is antithetical to the role of a Judge who is sworn to uphold the truth").[3]

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[2] At the time Commission staff was unaware of respondent's requests for favorable treatment in the other matter.

[3] Indeed, if such a serious matter had been in fact so soon forgotten, even after a Commission investigation into similar interference, it would indicate that respondent did not view her misconduct very seriously.

Lastly, in her appearance before the Commission (as well as in her remarks to her supervising judge when told of the transfer of the case), respondent demonstrated a lack of awareness of the extent and gravity of her wrongdoing. Although she stipulated to a finding of misconduct, she continually denied that she had intended to seek favorable treatment and intervene with the judicial process, maintaining that she spoke to court staff only to remind them that she could not hear the case. She viewed her overtures to court officials as improper only because they may have been misconstrued and appeared improper to others. While she admitted making "mistakes," she stated that she "can't control th[e] perception" of others. When asked if she thought that she did something wrong, she allowed only that she should not have called people or left messages "that...can...be interpreted in any way, shape or form ...as something that is asking for any special consideration" and that she "let the boundaries get kind of fuzzy."

I recognize that respondent's conduct was not motivated by personal gain, but out of concern for friends. I realize that the sanction of removal is reserved for "truly egregious circumstances." *Matter of Steinberg*, 51 NY2d 74, 83 (1980). I believe respondent's combined misconduct, considered with her inability to comprehend the severity of that misconduct, meets that standard. Her "failure to recognize and admit wrongdoing strongly suggests that, if [s]he is allowed to continue on the bench, we may expect more of the same." *Matter of Bauer*, 3 NY3d 158, 165 (2004).

I vote for removal.

Dated: March 25, 2005

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