STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

RICHARD S. LAWRENCE,

a Judge of the Family Court, Nassau
County.

- -

THE COMMISSION:

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

APPEARANCES:

Robert H. Tembeckjian (Vickie Ma, Of Counsel) for the Commission

Robert J. Miletsky for Respondent

The respondent, Richard S. Lawrence, a judge of the Family Court, Nassau County, was served with a Formal Written Complaint dated May 5, 2004, containing one charge. Respondent filed a verified answer dated June 14, 2004.

On March 2, 2005, the administrator of the Commission, respondent and respondent's counsel 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 and provide an opportunity for briefs and argument on the issue of sanctions or, in the alternative, that based upon the agreed facts the Commission issue a letter of caution. On March 10, 2005, the Commission approved the Agreed Statement of Facts and scheduled briefs and argument.

The parties submitted briefs on the issue of sanctions. Counsel to the Commission recommended that respondent be admonished, and respondent's counsel recommended a sanction no greater than a letter of caution. On June 23, 2005, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Family Court judge, Nassau County since August 1997.

2. The original complaint against respondent was filed with the Commission by Mark Schulman.

3. On November 14, 2002, respondent presided over various petitions that had been filed by litigants Eva Schulman and Mark Schulman against each other for a

family offense in which Ms. Schulman accused Mr. Schulman of domestic violence against her, and child custody/visitation matters arising out of an order of a different Family Court judge awarding joint custody to Mr. and Ms. Schulman of their two children.

4. Mr. Schulman appeared with his attorney, David Teeter. Also present were Ms. Schulman and her attorney, Robert Delcol; the law guardian, Jeffrey Halbreich; and the courtroom clerk, Janis Wong. The court reporter was Eric Fuchsman. Two court officers, Kellee A. Ross and Candace Seibt, were present throughout the proceedings.

5. Mr. and Ms. Schulman had appeared before respondent on prior occasions. Respondent noted on the record that there was a significant amount of ill will and acrimony between Mr. and Ms. Schulman evidenced in the prior proceedings before respondent and apparent at the hearing (at issue herein) before respondent on November 14, 2002. To respondent, Mr. Schulman seemed highly agitated at the beginning of and throughout the hearing, although respondent did not so state on the record.

6. On November 13, 2002 (one day prior to the hearing at issue before respondent), Mr. Schulman was found in civil contempt by Supreme Court Justice Robert Ross as a result of Mr. Schulman's failure to comply with a previous order of the Supreme Court and his failure to pay child support, maintenance, mortgage and other related expenses that he was previously ordered to pay. Mr. Schulman was sentenced to 120 days in jail for non-payment of support and related amounts due, which term of incarceration was to commence immediately. Mr. Schulman and his attorney, David

Teeter, were aware of this contempt holding and order of incarceration at the time that they appeared before respondent, the next day, on November 14, 2002. Neither Mr. Schulman nor his attorney advised respondent, at any time during the hearing, that Mr. Schulman had been held in contempt by Justice Ross one day earlier and that Mr. Schulman had been ordered incarcerated by Justice Ross. On November 14, 2002, respondent was not otherwise aware of the contempt and/or incarceration order.

7. During the proceeding on several occasions, Mr. Schulman sighed, *i.e.* exhaled audibly in a long, deep breath, while others were addressing the Court. (One witness characterized it as "harrumphing.") Mr. Schulman was also fidgeting and on several occasions turned around, with his back toward respondent, apparently to reach for his personal belongings on a chair behind him. Respondent believed Mr. Schulman's conduct to be disrespectful and disruptive, and on one occasion respondent gazed at him silently but intently. Court Officers Ross and Seibt warned Mr. Schulman about his conduct several times.

8. The court reporter, Eric Fuchsman, did not record or describe in the minutes of the hearing any of the conduct of Mr. Schulman or the court officers throughout the hearing. It is Mr. Fuchsman's practice not to take down, in the minutes, conduct by any of the parties, individuals or court officers present during a hearing.

9. While Mr. Delcol was addressing the court, Mr. Schulman sighed again and shook his head. At the time, respondent believed that Mr. Schulman's cumulative

behavior was disrespectful and disruptive. Respondent therefore declared Mr. Schulman in summary contempt and imposed a five-day jail sentence.

10. Respondent acknowledges that the transcript addresses the contempt determination in the following manner:

> Mr. Delcol: ...That we resisted --
> Respondent: Mr. Schulman, you make another sound you are going – hold Mark Schulman in summary contempt. He's sentenced to five days at the Nassau County Correctional Center.
> Mr. Schulman: I didn't say a word.
> Respondent: Quiet. Ten days.
> Mr. Teeter: Your Honor, with all due respect --
> Respondent: Twelve days. Twelve days in the Nassau County Correctional Center. Matter is on for hearing. Everything else is adjourned to the hearing date, December 4, 2:15 p.m. Twelve days. Take him out right now.
> Mr. Schulman: Please, your Honor.
> Mr. Teeter: With all due respect --
> Court Officer: Step out.

11. It is court reporter Eric Fuchsman's practice (a) only to take down the words of a judge when the judge and another individual are speaking at the same time and (b) not to make an indication in the transcript that the individual was talking at the same time as the judge. In the transcript excerpt above, respondent was cut off by Mr. Schulman at the point where respondent said, "Mr. Schulman, you make another sound you are going --". Respondent was starting to give Mr. Schulman the required warnings relative to summary contempt at this point, but was interrupted by Mr. Schulman.

12. Respondent acknowledges that he did not specifically warn Mr. Schulman that his conduct could result in a summary contempt holding. Respondent also

acknowledges that he did not provide to Mr. Schulman or his attorney an opportunity to make a statement in his defense or in extenuation of his conduct.

13. After the colloquy noted above, Mr. Schulman was handcuffed and taken into custody. Mr. Schulman was detained and spent the evening at the Nassau County Medical Center. On November 15, 2002, pursuant to Mr. Teeter's petition for a writ of habeas corpus, Supreme Court Justice Victor Ort granted a stay of respondent's contempt ruling upon Mr. Schulman's posting of $5,000 bail. Mr. Schulman was released at that time and ultimately did not serve any additional time as a result of the contempt determination by respondent. At the hearing on the writ, Justice Ort stated, *inter alia*, that "it could be argued" Mr. Schulman appeared before him with "unclean hands" but that it was not clear whether Mr. Schulman should still be incarcerated based on Justice Ross' order of November 13, 2002.

14. Respondent now acknowledges that, prior to holding Mr. Schulman in contempt, he should have given Mr. Schulman a clear warning that his conduct could result in a holding of contempt, and he should have given Mr. Schulman or his attorney a reasonable opportunity to make a statement in his defense or in extenuation of his conduct. Respondent very much regrets not having done so.

15. While respondent believed at the time that Mr. Schulman's ongoing conduct was disrespectful and disruptive, respondent states that if confronted by the same or similar conduct today, respondent would not hold the individual in summary contempt

and would consider other alternatives including directing that a short break be taken, or adjourning the matter to the next available and appropriate call of the calendar.

16. Respondent increased the time of Mr. Schulman's contempt term from five days to 10 days when Mr. Schulman started to speak, and then again to 12 days when Mr. Schulman started to speak again. Although the transcript excerpt in paragraph 10 above accurately shows Mr. Teeter saying "Your honor, with all due respect --", it does not show that Mr. Schulman was also starting to speak again, simultaneous to Mr. Teeter. Respondent recognizes that, notwithstanding his conclusion at the time that Mr. Schulman was acting disrespectfully toward the court, it was inappropriate for him to increase the contempt term without a separate warning and opportunity for Mr. Schulman or his lawyer to be heard. If confronted by the same or similar conduct today, respondent would not order an increase in incarceration time, without specifically providing to the individual and his counsel the required warnings and the opportunity to explain the conduct.

17. Respondent appreciates that the power to hold a person in summary contempt should be invoked with restraint. Respondent commits himself to exercise such restraint and to observe scrupulously the applicable statutory and Appellate Division mandates should he ever have occasion to exercise the summary contempt power in the future.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and 100.3(B)(3) of

the Rules Governing Judicial Conduct in that he failed to exercise properly the summary contempt power as required by Section 755 of the Judiciary Law and Sections 701.2(a), 701.2(c) and 701.4 of the Rules of the Appellate Division, Second Department (22 NYCRR §§701.2[a], [c], 701.4) ("Second Department 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 exercise of the enormous power of summary contempt requires strict compliance with mandated safeguards, including giving the accused an appropriate warning and an opportunity to desist from the supposedly contumacious conduct (Jud Law §755; 22 NYCRR §§701.2[a], [c], 701.4); *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]; *Loeber v. Teresi*, 256 AD2d 747 [3d Dept 1998]). Respondent did not comply with these well-established procedural safeguards on November 14, 2002, when he held Mark Schulman in summary contempt.

Respondent's adjudication of contempt, which resulted in the litigant's incarceration and detention, was unnecessarily hasty and without procedural justification. Since respondent believed that Mr. Schulman's conduct (fidgeting, sighing, turning his back to the court) was disruptive and disrespectful, it was his obligation to warn Mr. Schulman that his conduct could result in a summary contempt holding resulting in his incarceration and to give Mr. Schulman an opportunity to desist from the conduct. It is

no excuse that respondent did not provide the required warning simply because Mr. Schulman interrupted him. Clearly, notwithstanding the interruption, respondent was not precluded from completing the warning and did, in fact, continue to speak.

Respondent's failure to adhere to mandated contempt procedures -- which he clearly knew about but disregarded -- constitutes misconduct warranting public discipline. *See Matter of Mills*, 2005 Annual Report 185 (Comm on Judicial Conduct); *Matter of Teresi*, 2002 Annual Report 163 (Comm on Judicial Conduct); *Matter of Recant*, 2002 Annual Report 139 (Comm on Judicial Conduct); *see also, Matter of Hart* (decision issued today).

Regardless of whether Mr. Schulman's conduct provided sufficient basis for the initial contempt holding (*i.e.*, the "exceptional and necessitous circumstances" required by the Second Department Rules), it was clearly improper for respondent to repeatedly raise the sentence when Mr. Schulman and his lawyer attempted to object to respondent's peremptory ruling. Under these circumstances the escalation of the sentence -- from five days to ten days to twelve days -- was a gross abuse of discretion and a substantial overreaction to their efforts to protest his ruling.

We note that respondent commits himself in the future to observe scrupulously the statutory and Appellate Division mandates in exercising the summary contempt power.

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

Mr. Coffey, Ms. DiPirro, Mr. Emery, Judge Klonick, Judge Luciano and Judge Ruderman concur as to the disposition. Mr. Emery files a concurring opinion.

Mr. Goldman, Ms. Hernandez and Mr. Pope dissent as to the sanction and vote that the appropriate disposition is a letter of caution.

Mr. Felder did not participate.

Judge Peters was not present.

CERTIFICATION

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

Dated: October 20, 2005

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

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CONCURRING OPINION
BY MR. EMERY

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There can be no doubt that a judge must maintain control of, enforce decorum in, and require respect for his or her court. Among the tools to fulfill this responsibility is summary contempt; however, this power – to deprive a lawyer or litigant of liberty or impose a fine – is the "nuclear option" for judges faced with unruly behavior.

The Judiciary Law and the Rules of the Appellate Division, Second Judicial Department specifically delineate both the criteria and the procedure for imposing this extreme judicial sanction: they require, *inter alia,* that it be exercised "only in exceptional and necessitous circumstances" and that prior to such adjudication, the accused be given an opportunity to desist from the conduct and to make a statement explaining the conduct (22 NYCRR §§701.2[a],[c], 701.4; Jud. Law §755).

Too often this Commission confronts abuse of the summary contempt

power (*e.g.*, *Matter of Mills*, 2005 Annual Report 185; *Matter of Recant*, 2002 Annual Report 139; *Matter of Teresi*, 2002 Annual Report 163; *Matter of Sharpe*, 1984 Annual Report 134; the Commission has also cautioned judges for less serious abuses of this kind). Some judges repeatedly ignore both the basis and, even more frequently, the procedures on which any such finding and sanction may be legally premised. It is the essence of the statute, case law and rules that the potential contemnor must be warned and permitted to refrain from the behavior before the contempt sanction is imposed. Given the frequency of our public discipline for this unique abuse of judicial power, it is a mystery to me how any judge in New York could ignore the well-established rules that are fashioned to restrict and even defuse imposition of summary punishment.

At a minimum, every judge ought to know when and how she/he may summarily put a person in jail. The rules are clear and not hard to follow. When they are followed, the rules can alleviate the need for the contempt sanction entirely, or permit the contempt to be purged before jail is imposed. If jail is ultimately required, at least the rules assure that due process is provided for the person deprived of liberty.

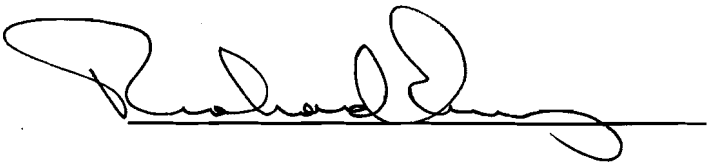
Respondent admits that he ignored the statute, the case law, and the Second Department rules and impetuously imposed escalating sentences of contempt on an unruly litigant. Most significantly, respondent gave no warning and twice increased the sentence when the litigant and his lawyer attempted to explain their conduct, as was their right. To the extent that the court transcript does not fully record the behavior of the litigant, it was respondent's obligation to show why he increased the jail term from five days to 10 days for no discernible reason, and from 10 days to 12 days when the litigant's

lawyer said, "Your Honor, with all due respect -- ." On its face, it appears that the lawyer's reasonable effort to protect his client's rights in the face of a summary adjudication led to an increased term of detention. The absence of any explanation on the record for the increased jail term -- an absence for which respondent is accountable -- hinders us from drawing any other conclusion.

To his credit, respondent now acknowledges that were he to face this situation again, he would resort to options other than contempt. Had respondent followed the rules on November 14, 2002, it is likely he would not ultimately have imposed a contempt finding.

Speculation aside, this is a profound, persistent, and troubling pattern of judicial misconduct. Given the clarity of the law and its violation in this case, I would impose public censure, but am constrained to vote for admonition since the Judiciary Law (§41[6]) requires a concurrence of six members for Commission action.

Dated: October 20, 2005



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

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DISSENTING OPINION
BY MR. GOLDMAN, IN
WHICH MS. HERNANDEZ
AND MR. POPE JOIN

I respectfully dissent from the Commission's sanction of admonition.

I agree with the majority that respondent acted injudiciously and excessively and, in his failure to give appropriate warnings and an opportunity to desist, erroneously. I agree further that the vast power given to judges to hold one in summary contempt and deprive him or her of liberty requires strict compliance with the law and serious restraint.

Nonetheless, based on the Agreed Statement of Facts, it appears that respondent's legal errors, made in a highly charged and disruptive proceeding, were procedural rather than substantive. I find that these errors were not so blatant that they demonstrate lack of competence in the law and thus constitute misconduct. I believe that under all the circumstances the appropriate disposition should be a private letter of caution.

The essential facts in this case, as stipulated by the parties, are as follows:

During a court proceeding relating to a family offense and custody and visitation matters, Mark Schulman, a litigant, performed certain actions -- audibly sighing, turning his back on the judge, and staring intently at him -- which respondent believed were deliberately disruptive of the proceedings and which caused the court officers to caution Mr. Schulman about his conduct. Then, while his wife's attorney was addressing the court, Mr. Schulman began to sigh audibly and shake his head. Respondent, believing that Mr. Schulman's cumulative behavior was disrespectful and disruptive, started to warn Mr. Schulman that if he uttered another word, he would be held in contempt. Before respondent had finished the warning, Mr. Schulman interrupted him; respondent then held Mr. Schulman in summary contempt and sentenced him to five days in jail. Mr. Schulman then protested that he did not say a word; respondent increased the sentence to ten days. When Mr. Schulman again started to speak, respondent increased the sentence to twelve days.[1] Ultimately, Mr. Schulman, who had, unknown to respondent, been sentenced by another judge the previous day to 120 days in jail for non-support, did not serve any additional time as a result of the contempt finding.

Respondent now concedes that, if confronted by similar conduct today, he would not hold an individual in summary contempt. He further acknowledges that, prior

[1] While the transcript fails to show Mr. Schulman's interruptions, according to the Agreed Statement Mr. Schulman did interrupt respondent both times before respondent increased the sentence (par. 16). In the Agreed Statement, the parties stipulated that the standard practice of the court reporter was to take down only the words of the judge when he and another individual were speaking simultaneously and not to indicate in the record that there was cross-talking (par. 11). Thus, the quoted transcript is incomplete in that it fails to show Mr. Schulman's interruptions.

to holding Mr. Schulman in contempt, he should have given him a clear warning that his conduct could result in his being held in contempt and he should have given Mr. Schulman or his attorney a reasonable opportunity to make a statement in defense or mitigation.

In view of respondent's acceptance of responsibility, the emotional atmosphere in which the events occurred, the nature of the legal error and the absence of actual loss of liberty, I do not believe a public sanction is warranted. I would issue respondent a private letter of caution.

Dated: October 20, 2005

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