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

JEAN MARSHALL,

a Justice of the Cuyler Town Court,
Cortland County.

- -

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser[1]
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

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

Lawrence J. Knickerbocker for the Respondent

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[1] Judge Konviser was appointed to the Commission on November 6, 2006. The vote in this matter was taken on October 30, 2006.

The respondent, Jean Marshall, a Justice of the Cuyler Town Court, Cortland County, was served with a Formal Written Complaint dated June 21, 2005, containing two charges. Respondent filed an answer dated August 10, 2005.

By Order dated September 13, 2005, the Commission designated William C. Banks, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 18, 2006, in Syracuse. The referee filed a report dated June 19, 2006.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and counsel for respondent recommended a letter of caution. On October 30, 2006, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Cuyler Town Court since 1999. She is not an attorney. Respondent regularly holds court on Monday night.

As to Charge I of the Formal Written Complaint:

2. In *Town of Cuyler v. Ken and Lisa Covney*, Douglas Staley, the code enforcement officer for the Town of Cuyler, issued an Order to Remedy dated May 23, 2003, alleging that the Covneys had erected a barn without a permit and giving them 30 days to comply with the town code. Thereafter, Mr. Staley filed an Accusatory Instrument dated August 18, 2003.

3. Respondent sent Ken Covney a notice to appear in the Cuyler Town Court on November 17, 2003. On that date, Victoria Monty, Esq., the town attorney, appeared in court on behalf of the Town of Cuyler. Mr. Covney did not appear. Respondent adjourned the case to December 29, 2003.

4. On December 8, 2003, Gina Blasdell, Esq., the Covneys' attorney, sent a letter to respondent and Ms. Monty requesting an adjournment of the December 29, 2003, appearance date to mid-January. Respondent never responded to Ms. Blasdell's request for an adjournment.

5. In *Town of Cuyler v. Donald A. Marshall*, Mr. Staley filed an Order to Remedy dated July 25, 2003, alleging that Mr. Marshall had in excess of 30 unlicensed/unregistered vehicles on his property and giving him 30 days to comply with the town code. Thereafter, Mr. Staley filed an Accusatory Instrument dated September 25, 2003.

6. Respondent sent Mr. Marshall a notice to appear in the Cuyler Town Court on November 17, 2003. Mr. Marshall appeared on that date, and Ms. Monty appeared on behalf of the Town of Cuyler. Mr. Marshall admitted that he was in violation of the town code but said he was working toward compliance and asked for more time. Respondent adjourned the case to December 29, 2003.

7. In *Town of Cuyler v. Robert Gosselin*, Mr. Staley issued an Order to Remedy on August 11, 2003, alleging that Mr. Gosselin had unlicensed/unregistered vehicles on his property and giving him 30 days to comply with the town code.

Thereafter, Mr. Staley filed an Accusatory Instrument dated September 25, 2003.

8. Respondent sent Mr. Gosselin a notice to appear in the Cuyler Town Court on November 17, 2003. Mr. Gosselin appeared on that date, and Ms. Monty appeared on behalf of the Town of Cuyler. Mr. Gosselin admitted that he was in violation of the town code but said he was working toward compliance. Respondent adjourned the case to December 29, 2003.

9. In *Town of Cuyler v. Tab and Bonita Beckwith*, Mr. Staley issued an Order to Remedy dated August 11, 2003, alleging that Mr. Beckwith had erected a structure without a proper permit and had unlicensed/unregistered vehicles and vehicle parts on his property. The Order to Remedy gave Mr. Beckwith 30 days to comply with the town code. Thereafter, Mr. Staley filed an Accusatory Instrument dated September 25, 2003.

10. Respondent sent Mr. Beckwith a notice to appear in the Cuyler Town Court on November 17, 2003. Mr. Beckwith appeared on that date, and Ms. Monty appeared on behalf of the Town of Cuyler. Mr. Beckwith admitted that he was in violation of the town code and told the court that he was in the process of removing one unregistered vehicle and would apply for a building permit. Respondent adjourned the case to December 29, 2003.

11. On December 29, 2003, Mr. Marshall, Mr. Gosselin and Mr. Beckwith each telephoned respondent concerning their cases, which were scheduled for that night. Respondent spoke with each of them and agreed to adjourn their cases.

12. During those telephone conversations, respondent had an *ex parte* discussion with each of the three defendants concerning the merits of their cases.

13. That night, Ms. Monty and Mr. Staley appeared before respondent in connection with the *Covney, Marshall, Gosselin* and *Beckwith* cases. Respondent told Ms. Monty and Mr. Staley that their appearance was a "wasted trip" since she had adjourned the cases after the defendants had contacted her and indicated they could not appear.

14. Prior to their appearance, neither Ms. Monty nor Mr. Staley had received any notice that the cases had been adjourned.

15. Ms. Monty pressed respondent for an adjourned date. Respondent looked at her court calendar and selected January 26, 2004. Ms. Monty observed respondent write something down when she set that date, and Mr. Staley observed respondent write in her court calendar.

16. On January 13, 2004, respondent issued a "Letter Decision and Order" dismissing the *Covney*, *Marshall*, *Gosselin* and *Beckwith* cases.

17. Although respondent testified at the hearing that she dismissed the cases because Mr. Staley had not gotten back to her after re-inspecting the properties as she had directed on December 29th, the decision provides no indication that the cases were dismissed for that reason. The decision states that "after thinking about" the four cases respondent was dismissing the cases based on "precedent." The decision also states: "Another problem I have with these so called violations is the fact that it seems to

be pick and choose. When everybody is treated the same in this town, I may reconsider."

18. Prior to issuing her decision, respondent had an *ex parte* discussion with a town board member concerning the merits of the *Covney* case. As noted above, respondent also had an *ex parte* discussion with the defendants in *Marshall*, *Gosselin* and *Beckwith* concerning the merits of their respective cases.

19. Respondent dismissed the four cases because of her personal belief, based on her *ex parte* discussions, that the defendants' properties were in compliance with the town code.

20. Prior to issuing her decision, respondent provided no notice to the prosecution that she had received *ex parte* information and no opportunity to respond to the *ex parte* statements.

21. Neither the Covneys nor their attorney ever made an actual appearance in court or entered a plea. The only record of an appearance in that case was the attorney's written request for an adjournment.

22. Respondent dismissed the charges in the four cases without having received a motion, oral or written, from the defendants.

23. Respondent dismissed the charges in the four cases without providing an opportunity to Mr. Staley to testify concerning the allegations and without providing Ms. Monty an opportunity to offer proof or to address the charges in court.

24. After receiving respondent's decision, Ms. Monty sent respondent a letter dated January 22, 2004, stating that the Town had not been provided with an

opportunity to be heard and asking that the cases be restored to the calendar. Respondent did not respond, and the cases were not restored to the calendar. No appeal was taken as to respondent's decision.

As to Charge II of the Formal Written Complaint:

25. On October 12, 2004, respondent testified under oath during the Commission investigation concerning her actions in the *Covney, Marshall, Gosselin* and *Beckwith* cases. Respondent testified falsely that on December 29, 2003, she did not adjourn the four cases to January 26, 2004, or any other date certain.

26. After respondent testified on October 12, 2004, a Commission investigator went to respondent's home and reviewed respondent's 2003 court calendar (Comm. Ex. 22), which respondent provided to the Commission.

27. On respondent's calendar, the entry for December 29, 2003, contains respondent's handwritten entries, "Donald Marshall", "Tab Beckwith", "Ken Coveney" and "Robert Gosselin", listed in a column. On that page, after setting an adjourned date at Ms. Monty's request, respondent had originally written next to each defendant's name an arrow and the numbers "1/26", to indicate that she had adjourned the cases to January 26, 2004. Respondent also wrote next to the names: "letters if Doug doesn't call."

28. Sometime after testifying before the Commission that she had not adjourned the four cases to January 26, 2004 or any other date certain, respondent used multiple "white-out" strips on the calendar page to obliterate her original entries next to the four names and to conceal her previously written adjourned dates. Over the

obliteration, respondent wrote: "Doug is ✓ing on these properties to see if everything is cleaned up and getting back to me Coveney? Call Gina".

29. Respondent's usual practice to indicate an adjourned date in her calendar was to write an arrow next to the defendant's name followed by the date to which the case had been adjourned. Respondent uniformly wrote adjourned dates in a numeric fashion indicating the month and the day, *e.g.*, "1/26."

30. In no other instance in her 2003 calendar did respondent use "white-out" to alter or to reflect a change in an entry. There are numerous other obliterations in the calendar, all of which respondent made by scribbled cross-outs.

31. Respondent made the white-out obliteration in her calendar on the page for December 29, 2003, in an attempt to conceal from the Commission that she had adjourned the cases to January 26, 2004.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(6) 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. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The record establishes that after dismissing four code violation cases on the basis of unsubstantiated *ex parte* communications, without providing notice to the

prosecution or an opportunity to be heard, respondent seriously exacerbated her misconduct by testifying falsely about her actions and by altering her court calendar in order to conform her records to her false testimony. Her conduct violated well-established ethical standards and demonstrates convincingly that she is unfit to serve as a judge.

A judge is required to accord to all interested parties a full right to be heard under the law (Rules, Section 100.3[B][6]). Respondent has acknowledged violating that standard by having *ex parte* conversations concerning the merits of each of the four cases -- three discussions with defendants and one discussion with another individual -- and then dismissing the cases based on the unsubstantiated information she had received. Such conduct violates fundamental legal principles and, standing alone, warrants public discipline. *See, Matter of Gori*, 2002 Annual Report 101 (Comm. on Judicial Conduct) (after engaging in *ex parte* communications, judge held a hearing after telling the other party he did not have to appear); *Matter of Kressly*, 2005 Annual Report 173 (Comm. on Judicial Conduct) (judge held a trial in a code violation case without providing notice to the prosecuting authorities); *Matter of More*, 1996 Annual Report 99 (Comm. on Judicial Conduct) (judge dismissed charges in three traffic cases without notice to the prosecutor and disposed of three other cases based on *ex parte* communications).

Even if the *ex parte* communications were, as respondent testified, brief and unsolicited, respondent was obligated to give the prosecuting authorities notice of the unauthorized information she had received and an opportunity to rebut the information in

court. It is clear from the record that she failed to do so. Instead, after telling the prosecutors that she had adjourned the cases to January 26th, she relied on the *ex parte* information in dismissing the cases prior to the adjourned date, without any sworn testimony or motions and, in the case of one defendant, without any plea or court appearance. The mishandling of these cases by respondent, who has been a judge since 1999, reveals a fundamental misunderstanding of basic legal procedures.

Thereafter, respondent seriously exacerbated her misconduct by testifying falsely during the Commission investigation that she had not adjourned the cases to January 26th and by altering her court calendar in order to conceal the adjournments. These actions, designed to obstruct the Commission's investigation into her misconduct, are especially subject to condemnation. *See*, *Matter of Jones*, 47 NY2d (mmm) (Ct on the Judiciary 1979); *Matter of Kadur*, 2004 Annual Report 119 (Comm. on Judicial Conduct). "Such deception is antithetical to the role of a judge, who is sworn to uphold the law and seek the truth." *Matter of Kadur*, *supra*; *Matter of Myers*, 67 NY2d 550, 554 (1986).

We are mindful that the referee, after evaluating the evidence and weighing the witnesses' credibility, concluded that the charge of false testimony was not proved (Referee's report, pp. 6-7, 19). While the findings of the trier of fact normally are accorded due deference, they are "proposed" findings which the Commission is empowered to accept or reject (22 NYCRR §§7000.6[f][1][iii], 7000.6[l]). Based on our own careful examination of the entire record, we reject the referee's conclusion that the charge of false testimony was unproved. In doing so, we note that the referee's views are

somewhat unclear. In particular, his analysis and his conclusion exonerating respondent appear to be inconsistent in significant respects with his enumerated findings of fact, which include a finding that respondent testified falsely as to the adjournments (Referee's report, p. 18, Finding 75).

As respondent has acknowledged, she originally wrote "1/26" on her court calendar page for December 29, 2003, next to the names of the four cases. The format of this entry is consistent with respondent's usual method for noting adjournments on her calendar (*see*, *e.g.*, her notations on the calendar page for November 17th, noting the adjournments of the four cases to December 29th). This notation, supported by the testimony of both the town attorney and the code enforcement officer, convincingly establishes that respondent adjourned the four cases to that date. This is clearly contrary to her testimony during the investigation, in which she repeatedly denied adjourning the cases to January 26th or any other date certain (Comm. Ex. 23). Respondent's false testimony was material to the Commission's investigation of her conduct since it was an effort to conceal that she had disposed of the four cases prior to the next scheduled court date.

We are unpersuaded by the argument that respondent's investigative testimony was truthful because, in her mind, the adjournment was "tentative," rather than an actual adjournment. Even if this strained rationale were accepted, her testimony would be highly misleading and therefore improper. Words must be understood according to their plain meanings, and when respondent was asked under oath if she had adjourned the

cases and, in response, denied that she had done so, there was no reason to conclude that those words had any qualified or contrary meaning.

We are also unconvinced by respondent's explanation that she did not dismiss the cases prematurely but dismissed them because Mr. Staley, the code enforcement officer, never reported back to her on whether the violations had been corrected, as she claims she directed him to do. Significantly, the decision itself (Comm. Ex. 20), which discusses several reasons for the dismissal, gives no indication that the cases were dismissed for that reason. Providing a possible motivation for respondent's actions, the decision indicates that a key factor in the dismissal was respondent's belief that the Town was selectively targeting certain defendants, a view respondent reiterated in her Answer and during the oral argument (Oral argument, p. 35).

We further conclude that in a clumsy effort to conceal that she had, in fact, adjourned the cases to January 26th, respondent used "white-out" to obliterate the original entry on her court calendar and then wrote a notation over it. Respondent's explanation that this was a routine alteration, intended only to update the status of the cases, is most unconvincing. Even the referee, who found respondent's explanation to be "plausible," conceded that the alteration "appears like a covering up of wrongdoing" and that "it is possible" respondent behaved as alleged (Referee's report, p. 6). In our view, there is abundant evidence that this was not a routine alteration and that respondent's purpose in altering her calendar was to obstruct the investigation.

Significantly, although there are dozens of scribbled cross-outs throughout

respondent's 2003 calendar, this was the only occasion where "white-out" was used to make a change. In order to obliterate all traces of the original entry, respondent had to apply multiple "white-out" strips to the calendar page. The laborious effort required to change this single entry stands in sharp contrast to the many loosely-scribbled cross-outs throughout the rest of the calendar. Moreover, if respondent simply wanted to update the status of the cases, as she testified, there was ample room on the page to record additional information (two-thirds of the page is blank), and it was obviously unnecessary to obliterate what she had already written and then write over it. The circumstantial evidence, and respondent's inability to provide a credible explanation for her actions, establish convincingly that her conduct was a deliberate effort to conceal from the Commission that she had lied about adjourning the cases. This deception and dishonesty are exponentially worse than the original misconduct she attempted to conceal.

Respondent's actions are clearly inconsistent with the standards of integrity and propriety required of all members of the judiciary. A judge who engages in such deceitful behavior cannot be entrusted to administer oaths or to sit in judgment on others whose credibility she must assess. Such conduct "impedes the efficacy of the disciplinary process and is destructive of a judge's usefulness on the bench" (*Matter of Kadur*, *supra*, 2004 Annual Report at 123).

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

Mr. Felder, Judge Klonick, Mr. Emery, Mr. Harding, Judge Peters and

Judge Ruderman concur as to the sanction. Mr. Coffey and Mr. Jacob dissent as to sanction and vote that respondent be censured.

As to Charge I, Mr. Felder, Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Peters and Judge Ruderman concur.

As to Charge II, Mr. Felder, Judge Klonick, Mr. Harding, Judge Peters and Judge Ruderman concur. Mr. Coffey, Mr. Emery and Mr. Jacob dissent and vote to dismiss the charge.

Ms. DiPirro was not present.

CERTIFICATION

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

Dated: February 7, 2007

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

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

JEAN MARSHALL,

a Justice of the Cuyler Town Court,
Cortland County.

CONCURRING OPINION
BY MR. FELDER

- -

I concur that the record convincingly establishes respondent's egregious misbehavior, as alleged in Charges I and II. Indeed, although the prescribed standard of proof in Commission cases is a preponderance of the evidence (22 NYCRR §7000.6[i]), in my view the proof in this case far exceeds that standard.

The most compelling evidence against respondent, as I see it, comes from her own words. Both at the hearing before the referee and at the oral argument before the Commission, respondent's statements were evasive, riddled with inconsistencies, and singularly unpersuasive. In attempting to explain her actions, she repeatedly showed a troubling misapprehension of the relevant issues, and her explanations only raised more questions about whether she understands the proper role of a judge.

For example, at the oral argument, respondent acknowledged that prior to these proceedings it had been her practice to grant adjournments upon the request of an attorney without notifying the other side (Oral argument, p. 40). When I asked her

whether she still followed that practice, her responses revealed that, notwithstanding these proceedings, she has learned little about appropriate legal procedures:

> MR. FELDER: Since all of this happened with what we're concerned here with today, do you still follow that same practice?
>
> RESPONDENT: I do with attorneys and public defenders, DAs, but not with citizens, defendants.
>
> MR. FELDER: But if –
>
> RESPONDENT: If a defendant calls me I tell them they have to come to court.
>
> MR. FELDER: Yes, but if a DA, if you grant the DA an adjournment, how does the defendant know then, if you're doing it *ex parte*?
>
> RESPONDENT: They wouldn't know until they came to court.
>
> JUDGE PETERS: If you grant the DA an adjournment, do you send a letter to the defendant or do you make the defendant show up anyway?
>
> RESPONDENT: I make the defendant show up anyway.
>
> JUDGE PETERS: Why not just send him a letter and say, "The DA asked for an adjournment, I granted it"? Why inconvenience them?
>
> RESPONDENT: Well, since all this has started, and it's been going on three years now, I've been a lot more careful with talking to defendants on the phone.
>
> JUDGE PETERS: Well, you can send them a letter, can't you?
>
> RESPONDENT: Yes, I could send them one.
>
> JUDGE PETERS: And then they don't have to drive all the way to court?
>
> RESPONDENT: Right, but if it's an attorney, you would assume

that the attorney would notify the client.

MR. FELDER: Well, if the attorney requested on behalf of the defendant, do you notify the prosecutor?

RESPONDENT: No, not until he shows up in court.

MR. FELDER: He has to show also?

RESPONDENT: Yes.

(Oral argument, pp. 40-42)

Respondent's words reveal, even at this late date, a shaky grasp of the rules pertaining to *ex parte* communications. She clearly fails to understand that before granting any application for an adjournment, she generally should hear from the other side. Section 100.3(B)(6)(a) of the Rules provides that, with respect to *ex parte* communications as to scheduling, a judge should, "insofar as practical and appropriate, make[ ] provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allow[ ] an opportunity to respond."

Also telling was respondent's statement in her Decision dismissing the code violation cases (Comm. Ex. 20) indicating that one factor in the dismissal was her belief that the Town was selectively targeting certain defendants. Respondent reiterated that view both in her Answer ("[I]t has been only poor people who have received summonses") and at the oral argument (Oral argument, pp. 35-36). Asked why that view was relevant, respondent provided no clear response (*Id.*). The words in respondent's Decision speak for themselves: "Another problem I have with these so called violations is the fact that it seems to be pick and choose. When everybody is treated the same in

this town, I may reconsider" (Comm. Ex. 20). Motivated by her personal disagreement with the enforcement of the law, she simply chose to dismiss the charges.

Respondent could offer no persuasive explanation for why the arrows and notations on her calendar for December 29th – in the identical format she used throughout the calendar to indicate adjournments – did not, as she insisted, actually signify an adjournment. Nor could she provide any convincing explanation for her use of white-out, on that page alone, to make a substantial alteration, or for why she did not simply write the new entry she wished to make below those dates, on the bottom on that page, two-thirds of which was blank. Cumulatively, respondent's hollow explanations convey a powerful statement about her lack of credibility.

In concluding that respondent was not credible, I am constrained to disregard the referee's report, which I find unreliable and inexplicable in this regard. While appearing to exonerate respondent from the charge of false testimony, he makes a factual finding that she testified falsely as to the adjournments (Referee's report, Finding 75). He finds that the charge of false testimony (in which she denied adjourning the cases) was not proved (Referee's report, pp. 6, 19), yet also finds that she did set adjourned dates (Referee's report, Findings 8, 21, 35, 49). In light of these inconsistencies, I have examined the entire record of this case with particular care.

Additionally, I note that Chief Judge Judith S. Kaye has focused on the local justice courts and has proposed certain reforms, including more training and supervision and other measures to improve the functioning of these courts. Respondent's conduct underscores the need for greater training and other reforms. As Judge Kaye has

stated: "These courts must provide the same high standard of justice the public expects and deserves from any court in New York" ("Sweeping Reforms of New York's Local Justice Courts Unveiled," Press Release, New York State Unified Court System, 11/21/06).

I concur with the majority that respondent's actions are inconsistent with the high standards of integrity and propriety required of all members of the judiciary.

Dated: February 7, 2007

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

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

JEAN MARSHALL,

a Justice of the Cuyler Town Court,
Cortland County.

OPINION BY MR. EMERY
CONCURRING AS TO
SANCTION AND
DISSENTING AS TO
CHARGE II

- -

This case presents a difficult question: whether to remove a judge for high-handed *ex parte* activity alone, even though in my view she has not been found responsible for covering up her activities when the Commission investigated her. As I explain below, I conclude that respondent's undisputed actions with respect to Charge I are an adequate basis for her removal notwithstanding that I find her not to have violated her obligations as alleged in Charge II.

My vote for removal is driven in part by Judge Marshall's demonstration in her testimony that she fails to grasp at a fundamental level the unique role of a judge. Her testimony and her conduct clarified for me that her removal from office is warranted, notwithstanding that I vote to dismiss the more serious of the two charges. Although it is sometimes obvious that a judge has engaged in misconduct, we are often handicapped by an incomplete record for the purpose of rendering an appropriate sanction, and in this regard the judge's testimony is especially critical. It has consistently been my view that

plenary hearings are essential to the Commission's proper dispensation of its obligation to determine an appropriate sanction, especially where removal is at issue. *See Matter of Carter* and *Matter of Clark*, 2007 Annual Report at ___. Here, like my fellow Commissioner Jacob, I defer to the specific finding of the referee: the Commission did not prove by a preponderance of evidence that Judge Marshall altered her calendar to corroborate a lie to Commission investigators. *See* Referee's Report at pp. 6-7, 19. In addition, my independent review of the record confirms this conclusion, and I, therefore, fully subscribe to the portions of Commissioner Jacob's opinion which expertly parse the evidence and demonstrate the logic and force of the referee's central finding on the only disputed facts in this case.

In addition, I believe it is important to expand on one procedural wrinkle in this case that concerns me. Our effort in this case has been made significantly more difficult because of the apparent inconsistencies in the referee's report. There appears to be a glaring contradiction between the referee's careful exposition of his conclusion that the proof was inadequate to support the charge that the judge obliterated adjourned dates in her calendar to support a lie to Commission investigators (Referee's report, pp. 6-7, 19 [Conclusion 80]) and the referee's finding that the judge did give false testimony about whether she adjourned the four cases at issue (*Id.* at p. 18 [Finding 75]). Neither side sought reconsideration to clarify this contradiction; rather, each chose to selectively argue to the Commission that its view was supported by the referee.

Although I can understand that attorneys may choose not to seek clarification for strategic or other reasons, as Commission members we require a complete, clear record on which to base our determination. The Court of Appeals would likewise be greatly hampered in its review of a determination if the record contains glaring inconsistencies or is otherwise deficient. Thus, I see a critical need for establishing a procedure that either we or Commission staff, on notice to the respondent, should seek clarification from the referee before we engage in the complex task of considering the arguments and the referee's report, and before we write opinions based on a record that is unclear, as in this case.

Nonetheless, I agree with Commission counsel and my fellow commissioners that Judge Marshall should be removed. The undisputed findings in this case, wholly aside from whether she covered up any misdeeds, betray a jurist with such a fundamental misunderstanding of what it means to be a judge that she should not remain on the bench. Unlike other judges whom we have disciplined for engaging in *ex parte* communications central to the merits of the cases before them, Judge Marshall did so repeatedly and unabashedly, even righteously proclaiming that her behavior was justified because "It has been only poor people who have received summonses" (Judge's Answer) and "When everybody is treated the same in this town, I may reconsider" (Judge's Letter Decision and Order [Comm. Ex. 20]). Her Joan of Arc indignation and her reckless actions may serve her well with some unknown constituency, but they have no place in

the mind and actions of a judge who must be fair to individual litigants. To make matters worse, she high-handedly dismissed cases based on the uncorroborated information that she received *ex parte* and she never informed the prosecutors to give them a chance to protest. And, as Chairperson Felder demonstrates in his concurring opinion, we can have no confidence that she has learned any lessons, let alone the ones that this case should have taught her.

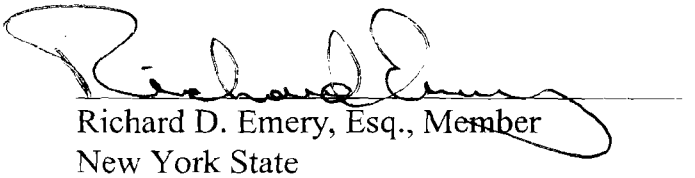
It is unimaginable that we would even consider a sanction less serious than removal if Judge Marshall were sitting in Supreme Court when she engaged in these undisputed infractions and displayed the unvarnished bias that her statements reveal. *See, Matter of Blackburne*, 7 NY3d 213 (2006). It is true, however, that some of our cases have resulted in discipline less serious than removal for similar infractions.[1] But none of

[1] *See, e.g., Matter of Kressly*, 2005 Annual Report 173 (judge held a trial and dismissed the charge in a code violation case without notice to the prosecution) (admonition); *Matter of Cook*, 2006 Annual Report 119 (judge reduced or dismissed charges in over 40 cases without notice to the prosecutor, some of which were based on *ex parte* communications and one of which was based on a request for special consideration) (censure); *Matter of Gori*, 2002 Annual Report 101 (judge solicited *ex parte* information concerning the merits of a small claims case, held a hearing in the defendant's absence after telling him he did not have to appear, and dismissed the claim prior to the deadline for submission of additional information) (admonition); *Matter of Hooper*, 1999 Annual Report 105 (judge reduced charges in two traffic cases, one pending before another judge, based on *ex parte* requests of defendants, without notice to the prosecution) (admonition); *Matter of More*, 1996 Annual Report 99 (judge dismissed charges in three traffic cases without notice to the prosecution and disposed of three other cases after initiating *ex parte* discussions with, respectively, a prosecutor, a social worker and a witness) (admonition); *Matter of LaMountain*, 1989 Annual Report 99 (judge ruled in favor of the plaintiff after an *ex parte* meeting with the plaintiff, before the case was commenced, in which he reviewed the claim and helped the party marshal his proof; after the case, he told the defendant he could not appeal until the judgment was paid, wrote a letter referring to extra-judicial complaints against the defendant, and admitted his hostility in a conversation with the defendant's secretary) (admonition); *Matter of Wilkins*, 1986 Annual Report 173 (judge dismissed a civil claim after a "preliminary hearing,"

these cases combine the disregard for fundamental due process rights with the raw display of self-justifying prejudice that animates these violations. Even if some of our other sanctions in similar cases seem lenient by comparison, we need to consider each case on its own merits, especially with respect to our obligation to predict future compliance. The fact that Judge Marshall is not a lawyer does not excuse her and certainly does nothing for those whose rights she tramples. Although she is not a Supreme Court Justice, the public deserves no less protection from her and we should certainly not tolerate standards that excuse her abuse of power.

Because Judge Marshall's undisputed misconduct is far beyond tolerable levels of judicial lawlessness and because I believe that she has not learned that her role as a judge requires her to set aside her prejudices, I concur in the decision to remove her.

Dated: February 7, 2007



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

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in the absence of the plaintiff's attorney and after advising the defendant's attorney *ex parte* that he would entertain a motion to dismiss) (censure); *Matter of Loper*, 1985 Annual Report 172 (judge refused to hear a plaintiff's claim after initiating and engaging in an *ex parte* discussion with the prospective defendant) (censure); *Matter of Racicot*, 1982 Annual Report 99 (judge, *inter alia*, engaged in numerous *ex parte* discussions concerning disputed evidentiary matters with the neighbors and co-workers of a defendant prior to the defendant's guilty plea) (censure). *See also Matter of VonderHeide*, 72 NY2d 658 (1988) (judge removed for routinely initiating *ex parte* discussions to solicit information concerning pending cases, abuse of authority and intemperate behavior).

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

JEAN MARSHALL,

a Justice of the Cuyler Town Court,
Cortland County.

OPINION BY MR. JACOB, IN WHICH MR. COFFEY JOINS, DISSENTING AS TO CHARGE II AND AS TO SANCTION

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While I concur that respondent should be disciplined for her *ex parte* communications as established in Charge I, I respectfully dissent from the finding of misconduct as to Charge II and vote to dismiss the charge. In my view, there is no basis to overrule the referee's conclusion that Commission counsel failed to prove by a preponderance of the evidence that respondent "lied under oath and then altered court records to conceal the truth" (Referee's report, p. 6).

Charge II alleges that respondent engaged in misconduct by testifying falsely during the investigation that she had adjourned the *Covney*, *Marshall*, *Gosselin* and *Beckwith* cases and by altering her court calendar to obliterate the adjourned dates. As the majority opinion makes clear, false testimony by a judge is extremely serious, and respondent's removal from office hinges on whether she lied under oath about her conduct. Respondent denied that she testified falsely and insists that she did not adjourn the cases to a "date certain" and did not alter her calendar for the purpose of concealing

the adjournments. The referee found that the charge was unproved and that respondent's explanation for the alteration was "plausible" and was not "contradicted by the evidence" (Referee's report, pp. 6-7).

As the trier of facts designated by the Commission, the referee was empowered to evaluate the quality and weight of the evidence presented and, especially, to weigh the credibility of the witnesses. In doing so, he considered not only respondent's testimony, but the testimony of all the witnesses as it bears upon the charges. The credibility findings of a trier of fact are normally accorded considerable weight and should not be disturbed if they are substantiated by the record.[1] Certainly, the referee was in the best position to make crucial findings as to respondent's credibility. There is no indication that he misapprehended the facts or overlooked important evidence. Accordingly, there is simply no basis for the Commission to overturn such findings, especially in a matter as serious as this where, as Commission counsel has conceded, the remaining misconduct does not warrant the sanction of removal.

I recognize that the Commission may accept or reject a referee's

[1] *See, e.g.*, *Poster v Poster*, 4 AD3d 145 (1st Dept 2004) ("It is the function of a referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility. Generally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record. The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor... To the extent that the referee clearly defined the issues, resolved matters of credibility and made findings that were substantially supported by the record, the court properly credited those findings; to the extent that the referee's findings were not substantiated by the record, they were properly rejected"); S*later v Links at North Hills*, 262 AD2d 299 (2d Dept 1999) ("The determination of a Referee appointed to hear and report is entitled to great weight, particularly where conflicting testimony and matters of credibility are at issue, since the Referee, as the trier of fact, had the opportunity to see and hear the witnesses and to observe them on the stand. The findings of such a Referee will not be disturbed if supported by the evidence in the record" [citations omitted]).

"proposed" findings of fact and conclusions of law (*see* 22 NYCRR §§7000.6[f][iii], 7000.6[l]). However, it would be highly unusual for the Commission to substitute its own judgment for that of its referee on the key issue of a judge's credibility. In nearly every case which has turned on such credibility determinations, the Commission has accepted the referee's findings, and the Court of Appeals has repeatedly cited such findings in reviewing Commission determinations (*see, e.g., Matter of Going*, 97 NY2d 121, 124 [2001]; *Matter of Collazo*, 91 NY2d 251, 253 [1998]; *Matter of Mogil*, 88 NY2d 749, 753 [1996]; *Matter of Gelfand*, 70 NY2d 211, 214-15 [1987]).

I am constrained to disagree with the majority's observation that the referee's views on this critical issue are unclear. In three pages of detailed analysis (Referee's report, pp. 4-7), the referee's views are set forth unambiguously, and he concludes, in unequivocal language: "I do not believe that it has been established by a preponderance of the evidence that Judge Marshall testified falsely" (Referee's report, p. 6). Those views are later incorporated and restated in his enumerated conclusion as to Charge II, a single sentence declaring unequivocally that the charge was not proved by a preponderance of the evidence (Referee's report, p. 19).[2] These findings as to respondent's credibility go to the heart of Charge II. From any reading of the report in its entirety, there is no doubt whatever that the referee concluded that the charge was unproved.

[2] "The Commission did not prove by a preponderance of the evidence that respondent failed to avoid impropriety and the appearance of impropriety in that she failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of the Rules; nor were any other violations based on the allegations in Charge II proved" (Referee's report, p. 19).

In my view, Commission counsel places undue reliance on a single finding by the referee that the judge gave false testimony when she testified that she had not adjourned the cases (Referee's report, p. 18, Finding 75). That aberrational finding is completely inconsistent not only with the entire thrust of the referee's detailed analysis but with (i) his explicit statement in his analysis that the allegation of false testimony concerning the adjourned dates was not proved (p. 6)[3] and (ii) his specific, enumerated conclusion of law as to Charge II (p. 19). Since neither side chose to clarify the apparent inconsistency, choosing instead to emphasize the findings in its favor, the question cannot be resolved with certainty, but I believe the only reasonable conclusion from a fair reading of the entire record is that the finding is an aberration. It appears likely that the inclusion of Finding 75 may have been an editing error, since the referee adopted verbatim proposed findings of fact 1 through 79 contained in Commission counsel's post-hearing brief, omitting only the last proposed finding and changing the proposed conclusions. Most significantly, the referee *did not adopt* proposed finding of fact 80, requested by Commission counsel, that respondent obliterated the entry in her calendar for the purpose of concealing her adjournment and conforming her records to her investigative testimony.[4] Without that proposed finding, which the referee rejected, Charge II is eviscerated.

On the key issues regarding the alleged adjournments and alteration of the

[3] The referee states: "The Commission argues that Judge Marshall testified falsely about the adjourned dates at an earlier Commission hearing. I do not believe that it has been established by a preponderance of the evidence that Judge Marshall testified falsely" (Referee's report, p. 6).
[4] *See* "Post-Hearing Memorandum by Counsel to the Commission," p. A-17.

court calendar, the referee provided a penetrating analysis of respondent's testimony. He found that respondent's account of her actions was "plausible" and "not 'contradicted by the evidence'" (Referee's report, p. 6), and I see no reason to overrule that conclusion. As to the purported adjournments, I note, in particular, that neither Ms. Monty nor Mr. Staley produced any contemporaneous notes regarding their court appearance on December 29th. The only written records concerning that appearance – respondent's entries on her calendar – are inconclusive, as the referee noted. Essentially, the evidence consists of conflicting recollections by the witnesses as to exactly what respondent had said at a proceeding that occurred more than two years earlier. From this purported battle of recollections, the record appears to support respondent. Significantly, respondent testified that she told Mr. Staley to re-inspect the properties and get back to her in a couple of weeks (Tr. 251, 257-58); Mr. Staley does not recall whether that statement was made (Tr. 134); and Ms. Monty was never asked about it. Accordingly, on this key issue Judge Marshall's testimony stands uncontroverted, which leaves no basis for concluding that her testimony was false.

Further, I am constrained to reject the suggestion that respondent's testimony regarding the adjournments has been inconsistent. Both in her investigative testimony and at the hearing, respondent consistently denied adjourning the cases to January 26th or any other date (Comm. Ex. 23, pp. 37, 44, 48, 62-63; Tr. 252, 302, 307-08). At the hearing, Commission counsel conceded as much (Tr. 306). Although respondent stated at the hearing that her calendar entry "1/26" referred to a "tentative" adjournment (Tr. 307), I do not find that statement to be inconsistent with her other

testimony; nor does it establish that her testimony was false. Lying under oath is a very serious charge which should not be based on testimony that can be read as being literally true.

In my view, the altered entry in respondent's calendar – which the majority regards as the linchpin of respondent's misconduct – actually demonstrates most graphically the weakness of Commission counsel's argument. It is readily apparent, even on a photocopy, that the entry was altered by the use of white-out. This eviscerates Commission counsel's theory that respondent intentionally used white-out, rather than her usual scribbled cross-outs, to obliterate the adjourned dates on her calendar because she was attempting to conceal that the entry had been altered, believing that she would only have to provide a photocopy of the page to the Commission. Moreover, although Commission counsel characterizes the use of white-out as an "obliteration," it is nothing of the sort. The writing beneath the white-out is visible, literally, to the naked eye. It can scarcely be doubted that – as respondent noted at the oral argument (pp. 34, 39) – had she actually intended to "obliterate" and conceal the original entry, it could have been done far more effectively. Commission counsel's argument – that respondent was calculating enough to use white-out for the alteration, but foolish enough to do so in a sloppy manner – is most unconvincing. Counsel's explanation citing "a record of ham-handed attempts" by judges to cover up misconduct (Oral argument, p. 55) does not address the underlying weakness of his entire theory, which the referee rejected.

Essentially, this case consists of several brief, unsolicited *ex parte* communications by respondent: three defendants telephoned her shortly before their

scheduled appearance and blurted out that the violations had been remedied, and there was an *ex parte* discussion with a town official. It is undisputed that respondent did not initiate these discussions and that the communications were very brief. It is also undisputed that respondent was told that the violations had been corrected, and that Mr. Staley never got back to respondent, after December 29th, to advise her to the contrary.

Simply stated, Commission counsel presented an elaborate theory of what might have happened subsequently, in the course of the Commission's investigation, but failed to prove those allegations at a hearing before a referee. A judge should not be removed based on theories and conjecture, especially when the Commission's own referee has concluded that the most serious allegations were unproved. I cannot substitute my judgment for that of the Commission referee where I am constrained to agree that respondent's testimony concerning the purported adjournments was plausible, nor can I plausibly make the inferences that the majority makes regarding the "obliteration" on her calendar.

At the oral argument, respondent expressed contrition for her *ex parte* contacts and pledged against recurrences of such conduct (Oral argument, pp. 34, 43). Contrary to the majority's conclusion that respondent's testimony was strained and evasive, I found respondent to be responsive, candid, contrite and, most important perhaps, emphatic in her denials as to any false testimony. While Mr. Felder appears to criticize respondent for distinguishing between *ex parte* requests for adjournments from lawyers and requests from litigants, such conduct goes beyond the charges in this proceeding, and, in any event, staff has conceded that respondent's *ex parte* conduct does

not warrant removal. I believe we are dealing here with a systemic problem, as evidenced by Ms. Monty's *ex parte* letter to respondent following the dismissals, and it would be inequitable to visit the consequences of this system solely upon respondent, as appears to be suggested by Mr. Felder.

Under our rules, Commission counsel bears the burden of proof by a preponderance of the evidence (22 NYCRR §7000.6[i][1]). Giving due deference to the referee's findings, I find that that burden has not been met in this case. Accordingly, I vote to dismiss Charge II. Since Commission counsel concedes that Charge I, standing alone, would not warrant the sanction of removal, I respectfully dissent from the determined sanction and vote to censure respondent.

Dated: February 7, 2007

Marvin E. Jacob, Esq., Member
New York State
Commission on Judicial Conduct