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

SHARI R. MICHELS,

a Judge of the New York City Civil Court,
New York County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Edward Lindner and Brenda Correa, Of Counsel)
for the Commission

Godosky & Gentile, PC (by David Godosky) for the Respondent

The respondent, Shari R. Michels, a Judge of the New York City Civil Court, New York County, was served with a Formal Written Complaint dated January 26,

2009, containing two charges. The Formal Written Complaint alleged that during her 2006 campaign for judicial office, (i) respondent's campaign literature misrepresented that she had been endorsed by the *New York Times* and used another candidate's name without her permission (Charge I) and (ii) respondent's campaign received contributions that exceeded the maximum allowed by law (Charge II).

Between June 2009 and December 2009, the Administrator, respondent's attorney and respondent entered into two Agreed Statements of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and waiving further submissions and oral argument. The Commission rejected each of the Agreed Statements.

By Order dated March 25, 2010, the Commission designated Honorable Janet A. Johnson as referee to hear and report proposed findings of fact and conclusions of law. On September 14 and 15, 2010, a hearing was held in New York City. The referee filed a report dated May 29, 2011.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of censure, and respondent's counsel recommended dismissal of the Formal Written Complaint. On August 4, 2011, 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 Judge of the Civil Court of the City of New York since January 2007.

2. Respondent ran for election to the Civil Court in the general election held on November 7, 2006, in Manhattan's Seventh Municipal Court District. There were three candidates for two vacancies: Rita Mella, the Democratic Party candidate; Kelly O'Neill Levy, running on the "Northern Manhattan" ballot line; and respondent, running on the "Equal Justice" ballot line.

3. Respondent established a campaign committee named the Northern Manhattan Committee for Shari Michels (the "Michels Committee"). The campaign manager was Michael Oliva, and the campaign treasurer was Stanley Michels, respondent's father. Mr. Michels, who died in 2008, was an attorney who had previously been involved in numerous political campaigns and had run his own campaigns for New York City Council but had never previously worked on a judicial campaign.

4. Respondent had no prior experience as a candidate for public office.

As to Charge I of the Formal Written Complaint:

5. On October 22, 2006, the *New York Times* endorsed Ruth Mella and Kelly O'Neill Levy for Civil Court in the Seventh Municipal Court District. Respondent was not endorsed by the *New York Times*.

6. Thereafter, Mr. Oliva created a palm card for respondent's campaign that included photos of both respondent and Mella.[1] The words "Endorsed by the *New*

[1] A few months earlier Mr. Oliva had created somewhat similar literature for the primary campaign of Margaret Chan, a candidate for Civil Court in a different district. *See Matter of Margaret Chan*, 2010 Annual Report 124.

York Times" appeared on both sides of the palm card and were placed in such a manner that it could be interpreted to mean that both respondent and Mella had been endorsed by the *Times*.

7. The palm card was authorized by three political clubs which are referenced on the card, Frederick E. Samuel Democratic Club, Audubon Democratic Club and West Harlem Independent Democrats, in order to support the two candidates endorsed by the clubs, respondent and Mella. Respondent's campaign paid for the production of the palm card.

8. Ms. Mella had not given permission for her name or likeness to be used by respondent or the Michels Committee.

9. Respondent reviewed the palm card prior to its distribution.

10. At the hearing, respondent testified that the purpose of the palm card was to make clear to potential voters that they could vote for two candidates in the race. As the only candidate on the Democratic Party line, Mella was expected to, and did, finish first by a wide margin; thus, it was important to underscore that both she and Mella had the support of the political clubs.

11. The palm card was widely disseminated prior to the election, and respondent herself handed out the card.

12. On or about November 5, 2006, two days before the election, Ms. Mella told respondent that she objected to the palm card and that she had not given permission for the literature. Ms. Mella gave respondent a copy of a letter dated

November 5, 2006, that Mella had written to the three Democratic clubs stating her objections and further stating that the clubs and respondent should cease distributing the literature. In the letter, Ms. Mella stated, in pertinent part, that the use of the *New York Times* endorsement gave the impression that both respondent and she were endorsed by the *Times*.

13. Respondent reviewed Ms. Mella's letter and discussed Mella's concerns with her father and her campaign manager. They advised her not to be concerned about the issues raised in the letter particularly because the three political clubs had authorized the literature for their endorsed candidates and that Ms. Mella's permission was not required.

14. Relying on this advice, respondent continued to distribute the literature up to and on Election Day.

15. Respondent acknowledges that she is responsible for the material produced by her campaign and that it is the candidate's obligation pursuant to the Rules to insure that his or her campaign committee adheres to relevant laws and rules. In hindsight, respondent acknowledges that she should have withdrawn the literature promptly and ceased distributing it after Ms. Mella objected to it. She regrets that she did not do so and testified that the literature did not uphold her own standards for "the integrity that I would like to carry...as a judicial candidate, as a judge." She commits that in any future judicial campaign, she would carefully review the campaign literature, would not use the likeness of another candidate without the candidate's specific

authorization or consent, and, if any issues arose requiring guidance, would consult the Advisory Committee on Judicial Ethics.

16. The State Board of Elections certified the results of the foregoing election as follows: Mella received 37,859 votes; respondent received 9,808 votes; and Levy received 7,814 votes. As the two highest vote recipients, Mella and respondent were elected.

As to Charge II of the Formal Written Complaint:

17. The charge is not sustained and therefore is dismissed.

Additional Finding:

18. The affirmative defense of laches is rejected.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(4)(a) and 100.5(A)(4)(d)(iii) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established. Charge II is not sustained and therefore is dismissed.

Judicial candidates are held to higher standards of conduct than candidates for non-judicial office, and the campaign activities of judicial candidates are significantly circumscribed in order to maintain public confidence in the integrity and impartiality of the judicial system. Among other requirements, a judicial candidate may not "knowingly ... misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent" (Rules, §100.5[A][4][d][iii]). This requirement not only helps ensure that judicial campaigns comport with fundamental standards of honesty and fairness, but enables voters to choose judges based upon information that is fairly and accurately presented.

Respondent's campaign literature, which was widely disseminated and which respondent herself had reviewed prior to its distribution, was inconsistent with the ethical standards. Viewed in its totality, the literature was misleading in that it juxtaposed respondent's photograph with that of another candidate, Rita Mella – who had not given permission for her likeness to be used by respondent's campaign – and positioned the language "Endorsed by the *New York Times*" in such a way that it could be construed as referring to both candidates, when in fact respondent did not have the *Times*' endorsement. In *Matter of Chan*, 2010 Annual Report 124 (Comm on Judicial Conduct), we found that a similar palm card was inconsistent with the ethical rules. Such deceptive practices have no place in campaigns for judicial office.

We reach this conclusion based on our own careful examination of the palm card in its entirety. We are mindful that the referee, after evaluating the evidence

presented at the hearing, concluded that the palm card was not misleading (Referee's report, pp. 10-11, 16-17). By law, the Commission has the authority to accept or reject a referee's proposed findings as well as to determine the appropriate sanction (22 NYCRR §§7000.6[f][1][iii], 7000.6[l]; Jud. Law §44[7]). While due deference should be accorded to a referee's findings and analysis, neither the Commission nor the Court of Appeals is bound to accept a referee's findings (*Matter of Marshall*, 8 NY3d 741, 743 [2007]).

In this case, it is particularly troubling that the other candidate depicted in the literature (Mella) did not consent to the use of her likeness and that even after Mella objected to it, pointed out to respondent that it was misleading and asked respondent to cease distributing it, respondent continued to distribute the literature until the election. This behavior exacerbates respondent's misconduct, further conveying the appearance that her campaign traded on Mella's status by knowingly and intentionally making misleading use of the *Times*' endorsement.

We note that in a race in which three candidates were vying for two seats, respondent finished a distant second to Mella and defeated the third candidate by a small margin. Although it cannot be ascertained whether this literature played a significant role in respondent's successful campaign, a judge's election is tarnished by campaign practices that violate the ethical rules. *See Matter of Watson*, 100 NY2d 290 (2003); *Matter of Hafner*, 2001 Annual Report 113 (Comm on Judicial Conduct).

Every candidate for judicial office has an obligation to be familiar with the relevant ethical rules and to ensure that his or her campaign literature and practices are

consistent with these standards. A judicial candidate's reliance on the advice of campaign officials does not excuse misconduct during a campaign (*Matter of Shanley*, 2002 Annual Report 157, *accepted*, 98 NY2d 310 [2002]) – especially where, as in the circumstances presented here, the impropriety is clear and was brought to respondent's attention. Respondent's behavior in using such literature in her campaign, and continuing to distribute it over Mella's objection, represents a departure from the high standards of conduct required of judicial candidates.

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

Judge Klonick, Judge Ruderman, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur except that, as to Charge II, Judge Klonick, Judge Ruderman and Ms. Moore dissent and vote to sustain the charge.

Judge Acosta, Mr. Belluck and Mr. Emery, in an opinion, dissent as to Charge I and vote to dismiss the charge, concur as to Charge II, and, accordingly, vote to dismiss the Formal Written Complaint.

Mr. Cohen did not participate.

CERTIFICATION

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

Dated: November 17, 2011

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

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

SHARI R. MICHELS,

a Judge of the New York City Civil Court,
New York County.

OPINION BY JUDGE ACOSTA, MR. BELLUCK AND MR. EMERY, DISSENTING IN PART

This Commission has long recognized the complexities of judicial elections among three-quarters of the over 1,143 full-time New York State judges, as well as the majority of almost 2,200 town and village justices. It thus referred this matter to an independent referee with extensive knowledge and expertise of the judicial election process.[1] After an extensive hearing, including fact and expert witnesses, and examination of documentary evidence, the referee issued a report evincing thorough and sophisticated findings and recommended dismissal of both charges. The majority, without much analysis, rejects the referee's report as to Charge I and perplexingly reaches a conclusion that ignores the realities of the New York judicial selection process, as well as the evidence presented at the hearing. We therefore dissent and vote to dismiss Charge I.

Since the United States Supreme Court decision in *Republican Party of*

[1]The referee, Janet A. Johnson, is a former Pace Law School Dean and former appellate judge.

Minnesota v. White, 536 US 765 (2002), states have had to modify their notions of what restrictions on judicial campaign activity are consistent with the First Amendment to the U.S. Constitution. New York in particular has had to balance its clearly compelling interest in maintaining the dignity of judicial elections and the integrity, impartiality, and independence of the bench against judicial candidates' constitutionally protected activity. In that light, the Chief Administrator's Rules protect the state's interest while recognizing that the current system of selecting judges by popular election, while distasteful and undignified to some, is the system we chose.[2]

The conduct for which the majority sanctions respondent today is core First Amendment protected conduct which is part and parcel of a complex and nuanced relationship between political clubs and the candidates they endorsed as well as the relationship between the candidates themselves. The referee's report strikes a proper balance between the conduct rules and respondent's conduct, and we should adopt it.

Of course, we all would prefer judicial campaigns to be elevated, substantive and non-political. However, we cannot characterize as prohibited political activity any conduct which is part and parcel of the very democratic process by which we elect most of our judges. The Supreme Court in *White* said it this way: "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must

[2]"The change to judicial selection by popular election was born of discontent over the appointive system. Tension between New York's landed aristocracy and tenant farmers in the early 1800s fostered a violent anti-rent movement. By the middle of the century, the 'Jacksonian Democracy' movement was sweeping the nation, and the two movements together provided the catalyst for the Constitutional Convention of 1846. The resulting constitution provided that the judicial appointment system would be replaced with an elective system." Report to the Chief Judge of the State of New York, Commission to Promote Public Confidence in Judicial Elections, p. 4 (June 29, 2004).

accord the participants in that process... the First Amendment rights that attach to their role" (*White* at 788).

One of us, brother Emery, has been crying in the wilderness for some time about what he considers hypocritical and unconstitutional application of conduct rules to restrict political activity and the unseemly scheme it creates. *See*, *Matter of Young*, 2012 Annual Report ___ (Concurrence); *Matter of Herrmann,* 2010 Annual Report 172 (Dissent); *Matter of Yacknin*, 2009 Annual Report 176 (Dissent); *Matter of King*, 2008 Annual Report 145 (Concurrence); *Matter of Spargo*, 2007 Annual Report 127 (Concurring in Part and Dissenting in Part); *Matter of Farrell*, 2005 Annual Report 159 (Concurrence); *Matter of Campbell*, 2005 Annual Report 133 (Concurrence).

The *Michels* matter is a case in point. As found by the Commission's appointed referee:

> Judicial candidates are encouraged, even required, to obtain the political "support" of the clubs and organizations that decide who will be elected as judges in the State of New York. Part of this "bargain" is that the candidates will contribute funds to publish materials supported by these clubs – and to do so accurately. Interpreting this participation as a "prohibited political activity" that is inconsistent with the dignity of the office is not only "folly" but inappropriate. The [Commission] charge, if it is to be considered at all, essentially asserts that the regular and necessary contact with the political organizations by judicial candidates is not "consistent" with the dignity of the judicial office. While it might be easy to say that the system that requires judicial candidates to seek the "backing" of political leaders and clubs is less than dignified, Respondent (and her opponents) did not engage in misconduct in producing campaign literature that accurately reflected the full endorsements of these groups. (Report, p. 16)

In this context, the Commission majority faults respondent for distributing a "palm card" that reflects that three clubs endorsed her as well as the Democratic Party nominee, Rita Mella. These palm cards were reflections of the symbiotic relationship of the clubs and the candidates: both fed off the advertisement of their political relationships. The clubs garner support and sustenance from the candidate's campaigns, and the candidates can rely on the clubs for votes and legitimacy. As our referee found:

> The testimony at the Hearing demonstrated that the palm card accurately portrayed the likeness of the two candidates endorsed by the three political clubs and that the card was produced under the authority of these clubs (290). Judge Mella conceded that she and the third judicial candidate, Kelly O'Neill Levy, had also distributed a palm card authorized by another political club where both candidates are pictured (144-147).[3] The Commission does not dispute that the endorsing political clubs authorized the palm card. (Report, p. 15)
>
> Respondent's campaign committee funded a palm card that was authorized by three clubs and accurately noted the endorsement of these clubs for two of the three candidates for the office. (Report, p. 16)

Without accounting for the realistic role of the political clubs' approval of the palm card and its distribution in the hurly-burly of a New York City judicial campaign, the Commission majority votes to admonish respondent for "literature [that] was misleading in that it juxtaposed respondent's photograph with that of another candidate, Rita Mella--who had not given permission for her likeness to be used by respondent's campaign--and positioned the language 'Endorsed by the *New York Times*'

[3] "(Now) Judge Mella and (now) Judge O'Neill Levy produced a functionally similar political palm card that was 'put out' by the 'Dems in the Heights' political club (144-46). Mella testified that she remembered paying for the card –'my campaign paid for whatever my part of the cost was' (146)." (Report, p. 15)

in such a way that it *could be* construed as referring to both candidates, when in fact respondent did not have the *Times'* endorsement" (Determination, p. 7) (Emphasis added). The majority sanction, therefore, appears to be based on two components: a palm card that "could" appear to display an erroneous *New York Times* endorsement, *and* inclusion of Mella's "likeness" without her permission. As to the first basis, referee Johnson found, and we agree:

> It is possible that an ordinary, reasonable voter could look at the front side layout design of the palm card and conclude that it created the impression that Respondent had been endorsed by the *New York Times* when she had not been so endorsed. (Emphasis in original.) Judge Mella testified that "the fact that it said, 'endorsed by the *New York Times'* and it—you know, it could—I guess if you look at this piece, it could—it could be that someone could think that, perhaps, both of us were endorsed by the *New York Times* and I knew that that was not accurate" (81).
>
> The palm card, however, must be viewed in its entirety. The second side of the palm card, no less important in the information it contained than the first, clearly limited the scope of the *New York Times* endorsement to candidate Mella. Respondent's testimony at the hearing that she "could see now" that "an average reasonable person" could look just at the front of the palm card "and interpret this to mean that the card indicates that we are both endorsed by the *Times,*" (300) does not change this conclusion. *The evidence, therefore, does not establish that Respondent and/or her campaign committee produced and distributed campaign literature that represented and/or appeared to represent that Respondent was endorsed by The New York Times when in fact she had not been so endorsed.* (Emphasis added.) (Report, pp. 10-11)

The referee further concluded that "*the evidence failed to establish any knowing or other misrepresentation of fact by Respondent* about herself as to the

endorsement by the *New York Times* when the palm card is viewed in its entirety" (Report, p. 14) (Emphasis added). Nonetheless, the Commission majority rejects these findings, substituting its opinion for that of the referee who heard the testimony and reviewed the evidence in the context of a full hearing. Instead, the majority evaluates the palm card in isolation and concludes that misconduct occurred on the basis that the palm card's message "*could be*" confused (Emphasis added). The majority's conclusion that respondent "knowingly misrepresent[ed]" a fact about herself contrary to section 100.5(A)(4)(d)(iii) of the Rules not only ignores the referee's persuasive analysis and findings, but is totally inconsistent with the uncontradicted testimony.[4]

With respect to the second asserted ground for discipline, the referee determined that respondent conceded that on November 5, 2006, Mella personally gave her an envelope containing a letter objecting to the use of Mella's likeness (295-96, 337; Ex. 2):

> [Respondent] testified that she reviewed the letter and "very briefly" discussed Mella's concerns with her father and Oliva (296-297). They told her "everything was fine, not to be concerned about the issues raised in the letter" (297), *particularly because the three political clubs listed on the palm card had authorized the piece and that Mella was not required to give her permission* (289-290).
>
> Respondent testified "my understanding from Mr. Olivo [sic] and my father, Stan Michels, was that my campaign had been authorized to produce this palm card on their [the three political clubs'] behalf, showing that each of these three clubs was endorsing each of us for--for the two out of the three

[4] The majority also cites Section 100.5(A)(4)(a) of the Rules, which requires a candidate to "maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary...." It is difficult to see how this rule would give notice that the conduct here was prohibited.

> running for the two seats in the Democratic election--I'm sorry--in the general election on November 7th" (290). (Report, p. 12) (Emphasis added).

And,

> Respondent's campaign committee funded a palm card that was authorized by three clubs and accurately noted the endorsement of these clubs for two of the three candidates for the office. When Mella handed the letter (Ex. 2) to Respondent and indicated that now "she's going to have to hire a lawyer" (296), Respondent stated that she told Ms. Mella that "I was really sorry that she felt that- -that that was required and that I--felt for her because I was pretty much under the impression that her campaign didn't have a lot or resources... . So, I felt sorry because I thought, you know, the palm card is helping get her face out there and it was good for her, so I felt sorry that she looked at it that way"... . (296). She also believed that Mella's concern about "authorization" was misplaced because the piece had been produced under the color and authority of the clubs (297).
>
> Respondent's campaign committee assured her that the literature was appropriate and, "in the frenzy of the campaign" (298), the decision was made to continue to distribute what was, essentially, the only literature the campaign had in hand for the final days before the general election. (Report, p. 16)

Why and how the majority chooses to reject the referee's plainly accurate and reasoned finding that Michels acted upon expert advice, in good faith, is troubling. It ignores conditions on the ground of judicial campaign battles and blames a candidate for her considered judgment in good faith. We agree that inexperience or reliance on the advice of campaign advisers does not excuse ethical violations that are clear on their face and that every judicial candidate has a duty to "ensure that his or her campaign literature and practices are consistent with [the relevant] standards" (Determination, p. 8-9). However, under the circumstances presented here, we cannot endorse a finding of

misconduct and the imposition of public discipline for a piece of literature that even our own referee viewed as unobjectionable.

As a Commission, our duty is to respect both the First Amendment and the quandary this system imposes upon judicial candidates. It ain't pretty and we should not pretend that it is. Therefore, we should give every judicial candidate the benefit of the doubt when there is any margin to do so. That's the least the First Amendment demands and the least we can do to be fair to the judges who face this unenviable process which is necessary to ply their idealistic, supremely difficult trade.

In this case, the referee has ably documented the reasons why Judge Michels should not be disciplined for participating in the process we all require her to endure. Though she and we may wish that the palm card had been handled differently in retrospect, her hindsight and our aspirations are not a basis to find that she has violated the rules. She has not, and therefore we respectfully dissent.

Dated: November 17, 2011

Honorable Rolando T. Acosta, Member
New York State
Commission on Judicial Conduct

Joseph W. Belluck, Esq., Member
New York State
Commission on Judicial Conduct

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