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

DETERMINATION

DAVID A. SHULTS,

a Judge of the Hornell City Court,
Steuben County.

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 (David M. Duguay, Of Counsel) for the Commission

Honorable David A. Shults, *pro se*

The respondent, David A. Shults, a Judge of the Hornell City Court, Steuben County, was served with a Formal Written Complaint dated February 16, 2011, containing one charge. The Formal Written Complaint alleged that respondent presided

over nine cases in which a client of his law firm represented a party. Respondent filed an undated answer on or about March 9, 2011.

On June 7, 2011, the Administrator and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On June 16, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Hornell City Court, Steuben County, since 1997. His current term expires on October 26, 2015. Respondent was admitted to the practice of law in New York in 1969.

2. Respondent is a partner in the law firm of Shults and Shults, which maintains an office in Hornell, New York.

3. Joseph G. Pelych, Esq., is the City Attorney of Hornell, New York and maintains a solo private law practice.

4. From about May 2006 to about February 2009, Mr. Pelych was a client of respondent's law firm. Respondent's firm brought 16 actions on behalf of Mr. Pelych to recover unpaid legal fees, and obtained judgments for Mr. Pelych totaling $10,226.57 in 13 of those actions, as set forth in Schedule A to the Agreed Statement of Facts.

5. Respondent acknowledges that Section 100.3(E) of the Rules

Governing Judicial Conduct ("Rules") obligates him to disqualify himself in a proceeding in which his impartiality might reasonably be questioned. Respondent further acknowledges that Opinions 01-71 and 89-13 of the Advisory Committee on Judicial Ethics direct that a judge must recuse when an attorney appears as counsel within two years of being a client of the judge's law firm. Where an attorney appearing before a judge was a client of the judge's law firm more than two years prior to the appearance, the judge may preside after full disclosure on the record, and in the absence of a meritorious objection.

6. As set forth below, respondent presided over and/or took other judicial action in nine cases in which Mr. Pelych represented a party, notwithstanding that Mr. Pelych was at the time a client of respondent's law firm.

The 2008 Proceedings

7. On May 15, 2008, respondent presided over eight cases in which the defendants were represented by Mr. Pelych. Respondent knew that Mr. Pelych represented the defendants in these cases and that Mr. Pelych was a client of respondent's law firm. Respondent took judicial action by accepting guilty pleas to reduced charges in four cases, granting an Adjournment in Contemplation of Dismissal in one case, and adjourning three cases, as set forth in Schedule B to the Agreed Statement of Facts.

8. Respondent did not disclose his relationship to Mr. Pelych or offer to disqualify himself in any of the eight cases set forth in Schedule B.

The 2009 Proceeding

9. On or about January 29, 2009, respondent was assigned to preside over *Patricia Scouten v. Terry & Patricia Mann,* a summary eviction proceeding in which Mr. Pelych represented the landlord/petitioner. A trial in the matter was scheduled for February 6, 2009.

10. By letter dated January 30, 2009, the tenants' attorney, William W. Pulos, Esq., requested that respondent recuse himself from the case. Mr. Pulos argued, among other things, that "Mr. Pelych has brought cases to [respondent] and/or his law firm and/or the collection agency owned by [respondent] for either the personal representation of Mr. Pelych and/or other of Mr. Pelych's clients resulting in referrals of clients and payment of fees between them."

11. On or about February 2, 2009, respondent issued a Decision and Order denying Mr. Pulos' recusal request.

12. On February 3, 2009, Mr. Pulos filed a CPLR Article 78 petition seeking a Writ of Prohibition prohibiting Mr. Pelych from representing private clients in the Hornell City Court because of his position as City Attorney and prohibiting respondent from presiding over *Scouten v. Mann.*

13. On February 3, 2009, Acting Steuben County Supreme Court Justice Peter C. Bradstreet signed a Temporary Restraining Order staying the jury trial, but not other proceedings, in *Scouten v. Mann.*

14. On February 4, 2009, respondent presided over a pre-trial conference

attended by Mr. Pulos and Mr. Pelych.

15. On February 5, 2009, Judge Bradstreet issued an oral order from the bench, disqualifying Mr. Pelych from serving as counsel in *Scouten v. Mann.*

16. On February 6, 2009, Brian C. Schu, Esq., became the substituted attorney of record for the landlord/petitioner in *Scouten v. Mann.*

17. On February 6, 2009, prior to the commencement of trial in *Scouten v. Mann*, respondent approved a settlement proposed by the parties. The settlement was reduced to an Order which respondent executed on February 11, 2009. On March 9, 2009, Judge Bradstreet dismissed the Article 78, finding, *inter alia*, that the settlement of the case rendered the petitioners' remaining claims moot.

Mitigating Factors

18. On May 15, 2008, respondent was substituting for his colleague, Hornell City Court Judge Joseph E. Damrath. All defendants on the court calendar had been previously arraigned by Judge Damrath, who was the assigned judge on each matter scheduled. All of the judicial determinations made by respondent on that occasion were in accordance with dispositional recommendations made by the Steuben County District Attorney's Office, as formulated or negotiated while the matters were pending before Judge Damrath and as would have been presented to Judge Damrath had he been available to preside that day. There is no indication that respondent's judicial actions were affected by his relationship with Mr. Pelych.

19. Respondent has been cooperative with the Commission throughout

its inquiry.

20. Respondent has served as a Hornell City Court Judge for 14 years and has never been disciplined for judicial misconduct. He regrets his failure to abide by the Rules in this instance and pledges to accord himself with the Rules.

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(E)(1) and 100.4(D)(1)(c) of the 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, and respondent's misconduct is established.

A judge's disqualification is required in any matter in which the judge's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]). Since respondent's law firm had represented attorney Joseph Pelych in numerous matters between May 2006 and February 2009, his disqualification was required in the cases at issue, in which Mr. Pelych represented the parties.

In order to maintain public confidence in the integrity and impartiality of the judiciary, judges who practice law must scrupulously observe the relevant ethical standards designed to eliminate conflict and the appearance of any conflict between the exercise of judicial duties and the private practice of law. *See*, *Matter of Miller*, 2003 Annual Report 140 (Comm on Judicial Conduct). Of particular relevance here, well-

established law requires disqualification in matters involving clients of the judge's law firm.

In a 1976 disciplinary proceeding, the Appellate Division, Second Department, stated that handling matters involving *former* clients "cannot [be] countenance[d]" and might in some cases result in removal:

> While we realize that in small communities, part-time judges or justices, many of whom are principally engaged in the practice of the law, know many, if not most, of the people in their community, and may, in exigent circumstances, be required to preside over arraignments and bail applications, we cannot countenance the apparently prevailing practice in which such judicial officers sit in judgment in cases in which they formerly had an attorney-client relationship with the litigant. Hereafter any such conduct by a judicial officer, whether full or part-time, may well be met with removal of the offender from office.

Matter of Filipowicz, 54 AD2d 348, 350 (2d Dept 1976). Since 1988, the Advisory Committee on Judicial Ethics has issued numerous opinions reminding judges who practice law of the impropriety of handling matters involving their clients and providing specific guidelines for judges in such situations. Under these standards, a judge's disqualification in matters involving a client of the judge's law firm is required during the representation and for two years thereafter, subject to remittal; after that time, a judge may preside in such matters after full disclosure on the record and in the absence of a meritorious objection (*see, e.g.*, Adv Op 01-71, 97-85, 94-71, 92-14, 92-01, 89-13). The Committee has also stated that "the same standards and guidelines [for disqualification] should apply" in matters in which the *attorney* in a case is a client or former client as in

matters in which a party is a client (Op 01-71; *see also*, Op 89-13). The Commission has disciplined judges for failing to disqualify in cases involving such conflicts (*see, e.g.*, *Matter of Aison*, 2010 Annual Report 62; *Matter of Bruhn*, 1988 Annual Report 133; *Matter of Feeney*, 1988 Annual Report 159; *Matter of Darrigo*, 2 Commission Determinations 353 [1981]).

As stipulated here, respondent violated these standards by presiding over and/or taking other judicial action in eight criminal cases and one civil case in which Mr. Pelych represented a party, notwithstanding that at the time Mr. Pelych was a client of respondent's firm. Respondent did not disclose the conflict or offer to disqualify himself. In *Scouten v. Mann*, respondent denied a request for his recusal when an attorney objected to respondent's participation in the case, forcing the attorney to commence litigation that resulted in Mr. Pelych's disqualification. It is inexplicable why the attorney's request for respondent's recusal failed to bring to his attention that he should not be presiding, or even to create a doubt in his mind sufficient to check the Advisory Opinions or other relevant law. In view of respondent's attorney-client relationship with Mr. Pelych, respondent's handling of these matters was unavoidably tinged with an appearance of impropriety.

Even if respondent believed he could be impartial in these cases, at the very least disclosing the relationship was required under the ethical guidelines. As we have previously stated, "There can be no substitute for making full disclosure on the record in order to ensure that the parties are fully aware of the pertinent facts and have an

opportunity to consider whether to seek the judge's recusal" (*Matter of Merrill*, 2008 Annual Report 181 [Comm on Judicial Conduct]). By failing to disclose his attorney-client relationship with the attorney appearing before him, respondent did not act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules, §100.2[A]).

In mitigation, we note that the eight criminal cases occurred on the same date, when respondent was substituting for a colleague who was the assigned judge in those cases, and that there is no indication that respondent's judicial actions were influenced by his relationship with Mr. Pelych. We also note that respondent was cooperative with the Commission and has pledged to adhere to the Rules.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Harding, Ms. Moore and Mr. Stoloff concur.

Mr. Emery and Judge Peters dissent in an opinion and vote to reject the Agreed Statement on the basis that the proposed disposition is too lenient.

Mr. Belluck was not present.

CERTIFICATION

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

Dated: July 7, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
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,
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a Judge of the Hornell City Court,
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DISSENTING OPINION
BY MR. EMERY AND
JUDGE PETERS

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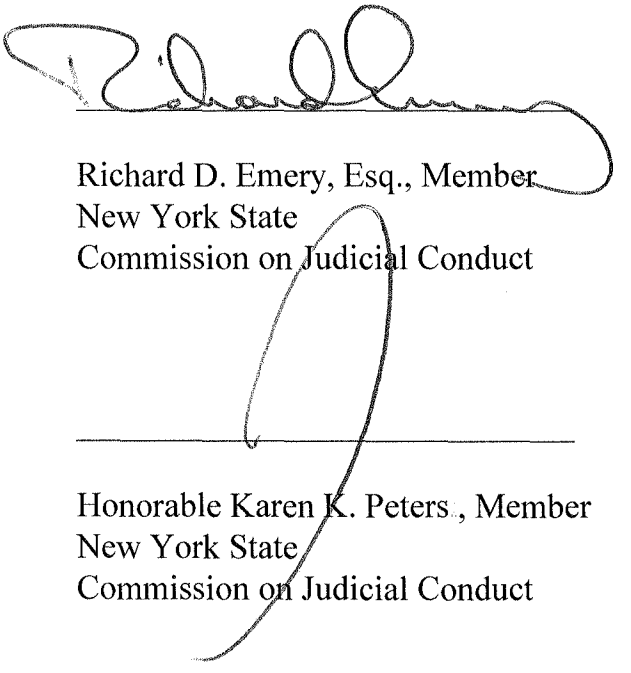
Put simply, respondent, a part-time judge for over a decade, had a private practice which included debt collection. The Town Attorney had cases in front of the judge. At the same time the Town Attorney hired the judge to collect debts for his own law practice. The Rules could not be clearer that a judge cannot sit on a current client's case. In fact, as the Determination points out, this violation can be grounds for removal. In this case the judge not only violated the Rules but refused to acknowledge the violation when a litigant's attorney appearing before him pointed it out and asked him to do what was required – get off the case. Respondent's intransigence forced the litigant to go to a higher judge to order respondent to step aside. We do not believe that this conduct, in the face of a glaring and knowing violation, should be rewarded with a mere admonition. More severe discipline is mandated no matter how conveniently remorseful the judge is when the Commission institutes proceedings. Thus, he should be censured.

Accordingly, we vote to reject the Agreed Statement of Facts.

Dated: July 7, 2011



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

Honorable Karen K. Peters, Member
New York State
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