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

NOREEN VALCICH,

a Justice of the Tannersville Village Court,
Greene County.

DETERMINATION

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
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the Commission

Kevin H. Harren for the Respondent

The respondent, Noreen Valcich, a Justice of the Tannersville Village Court, Greene County, was served with a Formal Written Complaint dated December 6, 2006, containing one charge. The Formal Written Complaint alleged that respondent

presided over a case notwithstanding that respondent had a professional and social relationship with the defendant and had discussed the underlying facts *ex parte* with her; that respondent granted an adjournment in contemplation of dismissal without notice to the District Attorney as required by law; and that respondent extended an order of protection after discussing the matter *ex parte* with the complaining witness. Respondent filed an answer on January 31, 2007.

On May 31, 2007, the Administrator of the Commission, respondent's counsel 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 censured and waiving further submissions and oral argument.

On July 12, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Tannersville Village Court, Greene County, since 1991. She is not an attorney.

2. As set forth more fully herein, from on or about September 29, 2004, to on or about March 23, 2005, respondent: (i) presided over *People v. Marlene Rice,* notwithstanding that she had a professional and social relationship with the defendant, and notwithstanding that the defendant had discussed with her *ex parte* some of the underlying facts of the case, (ii) failed to disclose to the prosecution her relationship with the defendant, and (iii) engaged in an improper *ex parte* communication with the

complaining witness and extended an order of protection in favor of the complaining witness without notice to the District Attorney.

3. Respondent had worked for a time as a school bus driver for a local school district. She and her husband also run a local bed-and-breakfast.

4. Marlene Rice worked at a local convenience store, where her supervisor was the store manager, Patience Ragan.

5. Prior to August 2004, Ms. Rice had been a guest one time for a few days at the bed-and-breakfast run out of respondent's home by respondent and respondent's husband.

6. In or around August 2004, Ms. Rice's employment at the convenience store was ended, and respondent participated in training Ms. Rice as a school bus driver.

7. In and around August and early September 2004, Ms. Rice visited respondent's home socially on several occasions and respondent visited Ms. Rice's home on two occasions. During these visits, Ms. Rice spoke to respondent about conflicts she had with her boss, Ms. Ragan.

8. On or about September 29, 2004, respondent arraigned Ms. Rice on a Harassment charge resulting from a complaint filed by Ms. Ragan. No representative of the District Attorney's office was present. Ms. Rice was without counsel. Respondent issued an order of protection against the defendant for the benefit of Ms. Ragan and Ms. Ragan's daughter, which was to remain in effect until March 31, 2005.

9. Thereafter, respondent failed to disclose to the District Attorney that she had a social and professional relationship with the defendant.

10. On or about October 20, 2004, the defendant again appeared before respondent without counsel. No representative of the District Attorney's office was present. Respondent granted to the defendant an adjournment in contemplation of dismissal without having obtained the unequivocal consent of the District Attorney (*see* Crim Proc Law §170.55[1]).

11. On or about March 23, 2005, respondent had an *ex parte* conversation with Ms. Ragan, who requested an extension of the order of protection previously granted for her benefit. Ms. Ragan told respondent that she suspected Ms. Rice had placed anonymous phone calls to the school Ms. Ragan's daughter attended. Respondent, on the basis of this information only, thereafter issued another order of protection dated March 23, 2005, effective for six months, without complying with Section 530.13 of the Criminal Procedure Law, which solely provides for the *ex parte* extension of a temporary order of protection simultaneous with the issuance of a warrant for the defendant's arrest.

12. By Letter of Dismissal and Caution dated April 7, 2000, respondent was cautioned by the Commission for delay in determining a motion and returning bail. By Letter of Dismissal and Caution dated December 19, 2000, respondent was cautioned by the Commission for conveying the appearance that she was not impartial when she reinstated a matter adjourned in contemplation of dismissal without consulting the district

attorney.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(4), 100.3(B)(6), 100.3(E)(1) and 100.3(F) 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 respondent's misconduct is established.

A judge's disqualification is required in matters in which the judge's disqualification "might reasonably be questioned" (Rules, §100.3[E][1]), and judges must assiduously avoid even the appearance of impropriety (Rules, §100.2[A]). Since respondent had a social relationship with Marlene Rice, including mutual visits to each other's homes in August and September 2004, and had recently participated in training Ms. Rice as a school bus driver, a reasonable person might question whether respondent could be impartial in a Harassment case in which Ms. Rice was the defendant. This is especially so since Ms. Rice had previously discussed with respondent her conflicts with her boss, who was the complaining witness in the case. *See Matter of Robert*, 89 NY2d 745 (1997); Matter *of Ross*, 1990 Annual Report 153 (Comm. on Judicial Conduct).

We recognize that in small communities, judges may know many, if not most, of the people in their community and may, in exigent circumstances, be required to

preside over arraignments in matters in which they might otherwise consider disqualification. On the facts presented, respondent should not have presided over the arraignment. Even if respondent believed she could be impartial, respondent should have disclosed the relationship, which would have afforded the District Attorney an opportunity to be heard on the issue of respondent's participation in the matter (Rules, §100.3[F]). *See*, *Matter of Merkel*, 1989 Annual Report 111 (although the judge's disqualification was not required in a case involving her court clerk, disclosure was required; judge was admonished). Instead, after conducting the arraignment and issuing an order of protection, respondent continued to preside in the case, without disclosure, and granted the defendant an adjournment in contemplation of dismissal ("ACD"). Respondent compounded the appearance of impropriety by imposing the ACD without obtaining the "unequivocal" consent of the District Attorney. *See*, *Matter of Conti*, 70 NY2d 416 (1987). By law, such a disposition requires "the consent of both the people and the defendant" (Crim Proc Law §170.55[1]).

The record further establishes that five months later, respondent extended the order of protection in the matter, based on an *ex parte* conversation with the complaining witness. Pursuant to law (Crim Proc Law §530.13), an order of protection cannot be extended without the issuance of a warrant, in compliance with well-established statutory procedures and safeguards.

In determining that censure is appropriate, we note that respondent has previously been cautioned twice for ethical transgressions.

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

Judge Klonick, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Emery dissent and vote to reject the Agreed Statement of Facts. Mr. Emery files a dissenting opinion.

Mr. Felder and Ms. DiPirro were not present.

CERTIFICATION

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

Dated: August 21, 2007

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

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

NOREEN VALCICH,

a Justice of the Tannersville Village Court,
Greene County.

- -

DISSENTING OPINION
BY MR. EMERY

Justice Valcich is a three time offender whom the Commission is giving another chance to harm the citizens who appear before her. Before we make this rash choice in favor of clemency for a recidivist ethical violator, I believe we should know what the relevant facts are.

Instead, once again, the Commission forges ahead to make what I consider to be a precipitous decision on the basis of an inadequate Agreed Statement, granting censure instead of what might well be removal if all the facts were known. On this record, however, we cannot be sure of the appropriateness of either sanction.

There are three defects in the Agreed Statement which constitutes the entire record in this case: first, it fails to disclose the facts of, or even the allegations that led to, the underlying harassment charge that Justice Valcich resolved by granting a friend an adjournment in contemplation of dismissal ("ACD"); second, the Agreed Statement confuses rather than clarifies the facts by stating that Justice Valcich granted the ACD

"without having obtained the *unequivocal consent* of the District Attorney" (par. 10), instead of "consent" as required by the applicable statute; and third, it is unclear from the Agreed Statement whether Judge Valcich was ignorant of the requirement that a prosecutor consent to an ACD or whether, because of her bias, she intentionally disregarded it.

Deciding this case without a description of the allegations that led to the harassment charge effectively precludes assessment of the severity of the judge's deviation from proper judicial conduct. In my view, we are required to make this assessment to fulfill our responsibility to fix on an appropriate sanction. For instance, if the judge's friend were accused of threatening to murder the complainant's children and the judge granted her an ACD without the consent of the District Attorney, then she should be removed. Such misconduct would be inexcusable favoritism. If, on the other hand, the harassment charge alleged several hang-up telephone calls, and the grant of the ACD were deficient because the District Attorney was not informed, censure might be called for. The point is that the nature of the harassment alleged is probative of the judge's state of mind when she used her official judicial powers to favor a friend. It may have been a gross, crass favor, in the nature of a corrupt act. Or, it may have been a misjudgment that in fact rendered substantial justice. Thus, the specific nature of the harassment charge is critical to reaching an informed decision as to sanction. But the Agreed Statement omits this information.

Second, I have no clue as to what it means to say that the "unequivocal consent" of the District Attorney was not obtained. Either the prosecutor consented

consistent with the requirement of the statute (CPL §170.55), or s/he did not. "Equivocal consent" is an oxymoron and "unequivocal consent" is redundant in this context. Such phrases convey no meaning. They only confuse and obfuscate. Therefore, substituting "unequivocal consent" for "consent" that is required by statute has no place in an Agreed Statement that, in my view, is fully the equivalent of a plea agreement. The staff of the Commission should insist on a clear statement and not mince words. Our responsibility is to inform the judiciary, bar and public, not perplex them for the sake of streamlining the process.

The phrase "unequivocal consent" that was negotiated in this Agreed Statement begs the question of whether the prosecutor consented. There is no statutory burden on the judge to obtain "unequivocal consent." And this Commission may not impose undefined and unauthorized additional burdens on judges granting ACDs. If the judge did not obtain the requisite "consent" of the prosecutor, she should admit it; if she disputes whether the DA consented, the issue is important enough to require a hearing.

And, if in fact the DA consented in accordance with law, the judge should be cleared of the charge of favoritism and sanctioned for the less serious offenses of not disclosing her relationship with the accused and two instances of *ex parte* communications. If no prosecutorial consent was obtained and the harassment was serious, she should be removed.

Finally, if the judge did not get the DA's consent, we need to know whether she was aware of the statutory requirement (which is fundamental) and, if so, what her explanation is for why she disregarded the law in this case. If she engaged in this

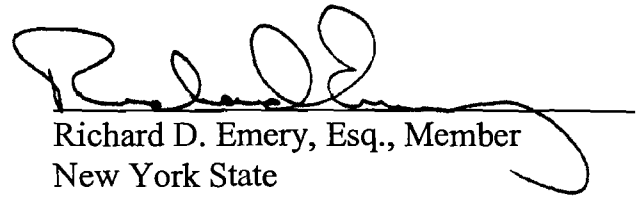
misconduct knowingly using her judicial authority to benefit a friend, she should be removed. *See, Matter of LaClair*, 2006 Annual Report 199 (Emery Dissent).

This case again demonstrates what I consider to be the facile manipulation of the Commission in the process of reaching agreed statements. *See, Matter of Carter*, 2007 Annual Report ___ (Emery Concurrence); *Matter of Clark*, 2007 Annual Report ___ (Emery Dissent); *Matter of Honorof*, 2008 Annual Report ___ (Emery Dissent). When an agreed statement is presented as a basis for imposing discipline, it should answer all relevant questions so that we can determine whether there has been misconduct and what sanction, if any, should be imposed. It is our core responsibility to determine whether a judge is fit to remain on the bench (*Matter of Reeves*, 63 NY2d 105, 111 [1984]), and we should not have to make a decision, especially on this ultimate issue, on a record with significant factual gaps, confusing characterizations of events, and critical unresolved issues.

My hope is that with the additional resources that the Legislature has provided to the Commission, staff will be more rigorous, requiring that judges who wish to enter into agreed dispositions forthrightly explain their state of mind and fully and completely describe their misconduct. This may be painful, but it surely is less wrenching than a hearing and factual findings when a judge knows s/he has engaged in misconduct. On the basis of a record that truly reveals what animated the misconduct, let alone what it was, the Commission will have much less difficulty fulfilling our responsibility to render an appropriate sanction.

In this case, the record does not meet the requisite standard of disclosure and completeness and therefore I dissent.

Dated: August 21, 2007



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