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

LAFAYETTE D. YOUNG, JR.,

a Justice of the Macomb Town Court,
St. Lawrence 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 (Thea Hoeth, Of Counsel) for the Commission

Case & Leader LLP (by Henry J. Leader) for the Respondent

The respondent, Lafayette D. Young, Jr., a Justice of the Macomb Town Court, St. Lawrence County, was served with a Formal Written Complaint dated February 25, 2010, containing seven charges. The Formal Written Complaint alleged that

respondent: (i) with respect to numerous cases involving his girlfriend's relatives, failed to disqualify himself, failed to disclose the relationship and engaged in *ex parte* communications (Charges I through VI), and (ii) engaged in improper political activity by serving as chair of local party caucus (Charge VII). Respondent filed a verified amended answer dated May 12, 2010.

By Order dated April 21, 2010, the Commission designated David M. Garber, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 16 and 17, 2010, in Canton.[1] The referee filed a report dated April 21, 2011.

Commission counsel filed a brief recommending the sanction of removal. No papers with respect to the issue of sanction were filed by respondent. Oral argument was waived. On June 16, 2011, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a Justice of the Macomb Town Court, St. Lawrence County, and has served in that capacity since January 2004, except for a brief period in 2010 in which he had resigned (*see* fn. 1). He was re-elected to that position in

[1] The hearing, originally scheduled to commence on July 13, 2010, was cancelled after the parties executed a Stipulation by which respondent resigned as Town Justice effective July 31, 2010, and represented that he would neither seek nor accept judicial office in the future. On July 26, 2010, respondent rescinded his resignation and thereafter was appointed to the position of Macomb Town Justice. Upon learning of these events, Commission counsel asked that the Stipulation, which the Commission had not yet considered, be withdrawn and that a hearing date be set. The Stipulation was tabled; the Commission granted the request of respondent's former attorney to withdraw; and a new hearing date was set (Tr. 11-12).

November 2010. Respondent is not an attorney.

2. From 2005 through approximately October 2010, Robyne Petrie-Platt was respondent's girlfriend, and they resided together. Many members of Ms. Petrie-Platt's family live in the Town of Macomb, and respondent grew up with members of her family, socialized with her relatives and attended some family gatherings. Respondent officiated at the wedding of a Petrie family member and also officiated when Ms. Petrie-Platt's parents renewed their marriage vows. Respondent's sister was formerly married to Ms. Petrie-Platt's brother.

As to Charge I of the Formal Written Complaint:

3. On or about July 8, 2007, Andrew Bowden was charged with Unlawfully Dealing with a Child in the Second Degree. The underlying complaint alleged that Mr. Bowden had provided alcohol to Kimberly Worden, who was under the age of 21. Mr. Bowden was issued an appearance ticket directing him to appear in the Macomb Town Court for arraignment on August 9, 2007.

4. Kimberly Worden, the complaining witness in the *Bowden* case, is the daughter of Robyne Petrie-Platt. In or about June 2007, Ms. Worden frequently visited the home that respondent shared with Ms. Petrie-Platt.

5. On or about July 13, 2007, after an *ex parte* request by Ms. Petrie-Platt, respondent issued an Order of Protection requiring Mr. Bowden to stay away from Ms. Worden.

6. Respondent failed to disclose in a timely fashion his relationship

with the complaining witness's mother and failed to promptly disqualify himself in the matter. Gary R. Alford, Mr. Bowden's attorney, learned from his client that Ms. Worden is Robyne Petrie-Platt's daughter and of respondent's relationship with Ms. Worden.

7. By letter dated July 13, 2007, Mr. Alford requested respondent's recusal due to respondent's relationship with Ms. Petrie-Platt and Ms. Worden.

8. In a telephone conversation with Mr. Alford, respondent initially refused to disqualify himself. Mr. Alford then told respondent that if respondent did not recuse himself, Mr. Alford would make a motion for recusal and would file a complaint with the Commission. Shortly thereafter, on or about August 7, 2007, respondent signed a certificate of disqualification in *People v. Bowden.*

As to Charge II of the Formal Written Complaint:

9. On or about June 21, 2005, Merton Petrie was arraigned in the Rossie Town Court on charges of Criminal Mischief in the Third Degree and Making a False Written Statement. The matter was transferred to the Macomb Town Court.

10. Merton Petrie is the nephew of Robyne Petrie-Platt and the son of respondent's former brother-in-law, William Petrie, who had been married to respondent's sister.

11. On or about October 20, 2005, upon the district attorney's recommendation, respondent accepted Mr. Petrie's guilty plea to Criminal Mischief in the Fourth Degree in full satisfaction of both charges and imposed a one-year conditional discharge, requiring Mr. Petrie to perform 60 hours of community service and to pay

restitution and a surcharge.

12. Respondent neither disqualified himself nor disclosed that Mr. Petrie is Ms. Petrie-Platt's nephew and the son of his former brother-in-law.

13. In 2006, after Mr. Petrie violated the terms of his conditional discharge by failing to complete the community service, respondent executed a Declaration of Delinquency to bring Mr. Petrie to court for resentencing.

14. On or about May 18, 2006, Heather Dona, Assistant St. Lawrence County Conflict Defender, appeared before respondent as Mr. Petrie's attorney for resentencing.

15. In the summer of 2006, respondent attended a Petrie family picnic. At the time, Mr. Petrie was due to be resentenced by respondent. During the weekend of the picnic, respondent discussed Mr. Petrie's violation of his conditional discharge with various members of the Petrie family, who urged respondent to send Mr. Petrie to jail and told respondent that he had been "not harsh enough" on Mr. Petrie when he initially sentenced him.

16. Sometime during that weekend, respondent told Mr. Petrie that respondent intended to resentence him to jail for violating the terms of his conditional discharge.

17. In or around July or August 2006, Sandra Petrie and Sherry Parker (respectively, Robyne Petrie-Platt's mother and sister) contacted respondent, *ex parte*, and asked him to send Mr. Petrie to jail.

18. During her representation of Merton Petrie, Heather Dona learned that Robyne Petrie-Platt is Merton Petrie's aunt, that Ms. Petrie-Platt lived with respondent and that respondent had engaged in *ex parte* conversations with Mr. Petrie and members of the Petrie family about Mr. Petrie's violation of his conditional discharge. Accordingly, on August 31, 2006, Ms. Dona wrote to respondent requesting that he recuse himself in the case. Respondent did not recuse himself.

19. On or about September 21, 2006, respondent resentenced Mr. Petrie to 45 days in jail and three years' probation for violating the terms of his conditional discharge. The St. Lawrence County Department of Probation had recommended three years' probation and no jail time.

20. Respondent failed to disclose that Merton Petrie is the nephew of Robyne Petrie-Platt and the son of his former brother-in-law and failed to disclose his relationship with Ms. Petrie-Platt and his *ex parte* conversations with Mr. Petrie and members of Mr. Petrie's family.

21. On or about April 12, 2007, respondent accepted Merton Petrie's guilty plea to charges of Unlawful Operation of an ATV on Highway and Uninsured Operation of an ATV, and sentenced Mr.Petrie to fines and surcharges totaling $210.

22. Respondent neither disqualified himself nor disclosed his relationship with Mr. Petrie's aunt or that Mr. Petrie is the son of respondent's former brother-in-law.

23. On or about July 17, 2008, respondent arraigned Merton Petrie on

charges of Harassment in the Second Degree and Attempted Grand Larceny in the Fourth Degree, and issued an Order of Protection against Mr. Petrie in favor of the alleged victim. Respondent released Mr. Petrie on his own recognizance.

24. Respondent neither disqualified himself nor disclosed his relationship with Mr. Petrie's aunt or that Mr. Petrie is the son of respondent's former brother-in-law.

25. The *Petrie* case was transferred from the Macomb Town Court to St. Lawrence County's Integrated Domestic Violence Court.

As to Charge III of the Formal Written Complaint:

26. In July 2007 Ruth Parker was charged in Macomb Town Court with Petit Larceny for allegedly using the telephone of Sandra Petrie to make long distance phone calls without Ms. Petrie's permission and consent. On or about July 12, 2007, respondent arraigned Ms. Parker on the charge.

27. Sandra Petrie, the complainant in *People v. Ruth Parker*, is the mother of Robyne Petrie-Platt. Ms. Petrie is the aunt by marriage of Ruth Parker; *i.e.*, Ms. Parker was married to Ms. Petrie's nephew.

28. On or about March 6, 2008, respondent issued a temporary order of protection in favor of Sandra Petrie against Ruth Parker. Respondent issued the order *ex parte* at the request of the district attorney, who was not aware of the family relationships among Ruth Parker, Robyne Petrie-Platt and Sandra Petrie and was not aware of respondent's relationship with Robyne Petrie-Platt.

29. On or about March 13, 2008, respondent issued a modified temporary order of protection in favor of Sandra Petrie and against Ms. Parker.

30. While the *Ruth Parker* case was pending before him, respondent discussed the case *ex parte* with Ms. Petrie-Platt and with Sherry Parker.

31. Respondent failed to disqualify himself in *People v. Ruth Parker* and failed to disclose that Sandra Petrie is the mother of Robyne Petrie-Platt; nor did respondent disclose the family relationships among Ruth Parker, Robyne Petrie-Platt and Sandra Petrie or his *ex parte* conversations with Ms. Petrie-Platt and Sherry Parker.

As to Charge IV of the Formal Written Complaint:

32. On or about January 26, 2008, James R. Petrie, Jr., was charged with Criminal Mischief in the Third Degree (a Class E felony), Criminal Mischief in the Fourth Degree, and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree. The defendant was issued an appearance ticket returnable in the Macomb Town Court on February 12, 2008.

33. James R. Petrie, Jr., is the nephew of Robyne Petrie-Platt.

34. On or about March 13, 2008, upon oral motion by Mr. Petrie's attorney, respondent dismissed the charge of Criminal Mischief in the Third Degree for facial insufficiency without notice to or the consent of the prosecution and without affording to the prosecution an opportunity to amend the accusatory instrument.

35. Respondent neither disqualified himself nor disclosed his relationship to Mr. Petrie's aunt, Robyne Petrie-Platt.

As to Charge V of the Formal Written Complaint:

36. On or about May 4, 2007, Scott M. Parker was charged with Failure to Wear a Helmet on an ATV, a violation of Section 2406(2) of the Vehicle and Traffic Law.

37. Scott M. Parker is the son of Sherry Parker and the nephew of Robyne Petrie-Platt.

38. On or about June 14, 2007, Mr. Parker appeared before respondent. Neither the arresting officer nor a representative of the district attorney's office was present. Two individuals, who were unsworn, told respondent that Mr. Parker was not operating the ATV at the time he was cited for the aforementioned violation.

39. Respondent then dismissed the charge against Mr. Petrie without notice to or the consent of the prosecution, in violation of Sections 170.40, 170.45 and 210.45 of the Criminal Procedure Law.

40. Respondent neither disqualified himself nor disclosed his relationship with Mr. Petrie's aunt, Robyne Petrie-Platt.

As to Charge VI of the Formal Written Complaint:

41. On or about March 6, 2006, Justin R. Petrie was charged with Unsafe Backing in violation of Section 1211(a) of the Vehicle and Traffic Law.

42. Justin Petrie is the nephew of Robyne Petrie-Platt.

43. Mr. Petrie entered into a negotiated plea recommendation with the

district attorney's office in which he agreed to plead guilty to a violation of Section 1101 of the Vehicle and Traffic Law.

44. On June 8, 2006, Mr. Petrie appeared before respondent. Despite the negotiated plea recommendation, respondent dismissed the charge.

45. Respondent neither disqualified himself nor disclosed his relationship with Mr. Petrie's aunt, Robyne Petrie-Platt.

As to Charge VII of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(1), 100.3(B)(6) and 100.3(E)(1) 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 through VI of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge VII is not sustained and therefore is dismissed.[2]

[2] On the specific facts elicited at the hearing, we find no misconduct as to Charge VII. However, the Commission does not endorse that a judge accept the position of chairing a political caucus as it can too easily involve the judge in prohibited political activity.

It is a fundamental precept of judicial ethics that a judge may not preside over a case in which the judge's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]). Moreover, judges must assiduously avoid even the appearance of impropriety (Rules, §100.2). In view of respondent's close relationship with Robyne Petrie-Platt, his girlfriend with whom he resided, his impartiality would reasonably be questioned – by members of the public and by the parties themselves – in cases in which her relatives were the defendants and/or the complaining witnesses. Nevertheless, over a five-year period, respondent not only presided over eight such matters without disclosing the conflict, but also engaged in *ex parte* communications with his girlfriend and her relatives concerning four of these matters and, in some instances, imposed dispositions that, at the very least, conveyed an appearance of favoritism. Such conduct, in its totality, demonstrates a blatant disregard for the ethical obligations incumbent upon every judge.

Like the referee, we reject respondent's affirmative defense that he was not prohibited from presiding over cases involving Ms. Petrie-Platt's relatives because they are not his own family members. In addition to the prohibition against presiding over matters involving persons within the sixth degree of relationship to the judge or the judge's spouse (*see* Rules, §100.3[E][1][d]), a provision that is inapplicable here, the ethical rules set forth a broad range of additional circumstances requiring disqualification, including any matters in which the judge's impartiality "might reasonably be questioned" (§100.3[E][1]). While it would be impossible for an ethical code to enumerate in specific detail all the situations that would require a judge's recusal, that general language

certainly encompasses the circumstances presented here. *See Matter of LaBombard,* 11 NY3d 294, 297-98 (2008), involving a judge who presided over cases in which his step-grandchildren were the defendants, in which the Court of Appeals emphasized that the misconduct finding was based on a violation of Rule 100.3(E)(1) and "does not depend on whether the children of the spouse of a judge's child are relatives within the sixth degree of consanguinity or affinity"; *see also, e.g., Matter of Robert*, 89 NY2d 745 (1997) (judge presided over multiple cases involving his friends); *Matter of O'Donnell*, 2010 Annual Report 201 (judge arraigned a defendant without disclosing that his daughter was the defendant's friend); *Matter of Valcich*, 2008 Annual Report 221 (judge arraigned a defendant with whom he had a social and business relationship, issued an order of protection and granted an adjournment in contemplation of dismissal).

Under the circumstances shown in this record, respondent should have recognized that his disqualification was required in these cases. Notwithstanding respondent's investigative testimony that his contacts with Ms. Petrie-Platt's relatives were minimal, the record establishes not only that respondent had significant social interactions with his girlfriend's family members at family gatherings and on other occasions, but that on several such occasions, he discussed the pending charges against her relatives with his girlfriend and/or her family members. As to Charge II, for example, while Merton Petrie (Ms. Petrie-Platt's nephew) was facing resentencing for violating the terms of his conditional discharge, which respondent had imposed earlier, respondent attended a picnic with Petrie family members, several of whom urged the judge to send

Mr. Petrie to jail and told respondent that he had not been "harsh enough" on Mr. Petrie when he initially sentenced him. That same weekend, respondent told Mr. Petrie himself that respondent intended to impose a jail sentence. These *ex parte* communications with his girlfriend's relatives, standing alone, were highly improper (Rules, §100.3[B][6]; *see, e.g., Matter of Racicot*, 1982 Annual Report 99). Even if these out-of-court communications were brief and unsolicited, respondent was obligated to give both sides notice of them and an opportunity to respond. *See Matter of Marshall*, 2008 Annual Report 161; *removal accepted*, 8 NY3d 741 (2007). Further compounding the appearance of impropriety, respondent later resentenced the defendant to 45 days in jail notwithstanding that the Probation Department had recommended no jail time. Because of his relationship with the defendant's aunt and his *ex parte* communications with the defendant's relatives, respondent's handling of the case was unavoidably tinged with an appearance of partiality and prejudgment.

As we have previously stated: "We recognize that, in small communities, local justices may frequently be presented with matters in which they have some personal relationship with the parties. Although disqualification may occasion some inconvenience and delay, every judge must be mindful of the importance of adhering to the ethical standards so that public confidence in the impartiality of the judiciary may be preserved" (*Matter of Thwaits*, 2003 Annual Report 171, 174).

At the very least, even if he believed he could be impartial in these cases, respondent should have disclosed the relationships and his *ex parte* communications,

which would have afforded both sides an appropriate opportunity to be heard on the issue of his participation in the matters (Rules, §100.3[F]). *See, e.g., Matter of Valcich, supra*; *Matter of Merrill*, 2008 Annual Report 181; *Matter of Merkel*, 1989 Annual Report 111. 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. Instead, in seven of the eight cases here, respondent made no disclosure of his close relationship to a relative of the defendant or complaining witness; in one case (*Parker*), respondent left a telephone message for the defendant's attorney that might be construed as an attempt at disclosure, but gave no notice to the prosecution. Incredibly, even after the conflict was brought to his attention in two cases by attorneys who requested his recusal after learning of the relationship from their clients, respondent failed to recognize that his disqualification was required, insisted that he could be impartial, and, thereafter, made no disclosure in subsequent cases when his girlfriend's relatives appeared before him. In *Bowden*, respondent disqualified himself only after the attorney stated that if he did not do so, the attorney would make a formal motion and report the conduct to the Commission. By taking judicial action in these cases without disclosing his relationship to the defendant or complaining witness, respondent did not act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Rules, §100.1).

While handling the cases of his girlfriend's relatives would be improper regardless of the dispositions imposed, in several cases the results here were plainly

favorable ones, which compounds the appearance of impropriety. In *Bowden*, a case in which his girlfriend's daughter was the complaining witness, respondent issued an order of protection at his girlfriend's request on behalf of her daughter. In the *Merton Petrie* case, respondent sentenced the defendant to jail after his girlfriend's relatives had urged him, *ex parte*, to do so. The dispositions afforded to other Petrie family members were not only very lenient, but in some cases contrary to statutorily mandated procedures, further conveying the appearance of favoritism. *See*, *Matter of Marshall*, *supra*; *Matter of Schurr*, 2010 Annual Report 221 (without notice to or consent of the prosecutor, judge allowed five defendants in traffic cases to plead to reduced charges); *Matter of More*, 1996 Annual Report 99 (judge dismissed three cases without notice to the prosecutor and disposed of three other cases based upon *ex parte* communications). In *James Petrie, Jr.* (Charge IV), respondent dismissed a felony charge against his girlfriend's nephew with no notice to the prosecutor, and in *Scott Parker* (Charge V), he dismissed a charge against his girlfriend's nephew without notice to or the consent of the prosecution, in violation of statutory requirements. In *Justin Petrie* (Charge VI), he inexplicably dismissed a charge against his girlfriend's nephew that could have resulted in two points on the defendant's driver's license, notwithstanding that the defendant had accepted a plea offer by which he would have pled to a lesser charge. In light of respondent's relationship to the defendants' relative, the appearance of favoritism is unavoidable.

We thus conclude after a full review of the record that Charges I through VI

are established.[3] By presiding over numerous cases involving his girlfriend's relatives, respondent showed insensitivity to his ethical obligations, even after the conflict was brought to his attention. The fact that the misconduct continued even after respondent was on notice of the potential impropriety is a significant exacerbating factor (*see Matter of Robert, supra*). Compounding this misconduct, respondent took judicial action in four cases after entertaining *ex parte* communications from his girlfriend and/or her relatives, ignored statutorily mandated procedures and rendered dispositions in several instances that conveyed the appearance of favoritism. Such misconduct undermines public confidence in the integrity and impartiality of the judiciary.

As the Court of Appeals has stated, removal is "a drastic sanction which should only be employed in the most egregious circumstances" (*Matter of Cohen,* 74 NY2d 272, 278 [1989]) and "'where necessary to safeguard the Bench from unfit incumbents'" (*Matter of Reeves,* 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [lll] [Ct on the Judiciary 1979]). In its totality, respondent's misconduct demonstrates conclusively that he lacks fitness for judicial office.

---

[3] As the referee noted, respondent admitted "nearly all" of the factual allegations contained in the Formal Written Complaint (Rep. 2). While respondent's failure to testify at the hearing or to offer any evidence in relation to the charges permits us to draw negative inferences to support the finding of misconduct (*Matter of Reedy*, 64 NY2d 299, 302 [1985]), we find it unnecessary to do so in view of the overwhelming evidence presented at the hearing establishing respondent's misconduct.

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

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

Mr. Emery concurs in an opinion in which Mr. Belluck joins.

CERTIFICATION

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

Dated: October 7, 2011

Jean M Savanyu

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

LAFAYETTE D. YOUNG, JR.,

a Justice of the Macomb Town Court,
St. Lawrence County.

CONCURRING OPINION
BY MR. EMERY, IN WHICH
MR. BELLUCK JOINS

I agree with the result in this case. But the footnote on page 10 of the Determination directing itself to the dismissal of Count VII, in my view, does a disservice to the judiciary by *advising* judges not to participate in the First Amendment protected activity of chairing an open caucus because "it can too easily involve a judge in prohibited political activity."

Judge Young's role as a chair of an open party caucus was core First Amendment activity. He was indisputably engaged in associational functions enabling a political party to select candidates. What is missing from, and crucial to, any analysis of the propriety of such conduct is an evaluation of the specific activities in the context of First Amendment protections. Such an analysis is critical in order to determine whether the conduct is constitutionally protected or permissibly prohibited under rules intended to curb political influence in the state's judiciary. *Republican Party of Minnesota v. White*, 536 US 765 (2002).

Even if that analysis were unclear (and it is not), the fear that particular political activities of a judge might be prohibited should not give rise to official advice to avoid the activity on the basis that "it can too easily involve a judge in prohibited political activity." If anything, the reverse should be true: a judge should get the benefit of the doubt if his/her conduct is arguably protected by the First Amendment, especially in our elective system which requires judges to be political.

Assuming, as I do, for purpose of this analysis that the Rules are facially constitutional (*see Matter of Raab*, 100 NY2d 305 [2003]), any proscription of a judge's conduct must still pass muster by a demonstration that the specific application of the Rule to what appears to be constitutionally protected activity nonetheless supports a sanction. Here, it is clear that a Rule that would apply to punish the judge for merely acting in the ministerial function of chair of an open caucus, and no more, violates the judge's First Amendment rights because the application of the Rule to this situation is not supported by a state interest sufficient to overcome the judge's constitutional right to participate in the caucus.

The problem is that this Commission and the Advisory Committee, which frequently opines on the application of these rules, regularly and erroneously evaluate cases such as this one under what appears to be a standard far less rigorous than that which is constitutionally required. (In over 300 Advisory Opinions issued concerning

political activity by judges, I find no First Amendment analysis whatsoever.[1])

This judge was clearly not a "political leader." His caucus activities were purely ministerial. Therefore, the question is whether there is a sufficiently compelling state interest to support application of the rules prohibiting judges from engaging in political activity to infringe on what otherwise would be the judge's clear right to associate and participate in the caucus. This question can only be answered in the context of an analysis of the entire scheme of what judges are permitted and prohibited from doing under the Rules. "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process...the First

---

[1] *See e.g.* Adv Ops 88-32 (judge may not speak at a political club about the legal system), 88-136 (Family Court judge may not speak at a political club about the function of Family Court), 89-26 (judge may not participate in the activities of a political club, even if the activities are non-political [re: participation in an essay contest sponsored by the club]), 89-55 (judge may not contribute to a political action committee established by the judge's employer), 90-77 (judge's spouse may not hold a political fundraiser at their joint residence even if the judge does not appear or participate), 91-67 (recently elected judge may not attend a dinner sponsored by a political party at any time after the six-month period following election--even one day after the end of the period), 92-129 (judge whose spouse is a candidate for political office cannot accompany the spouse to political functions or contribute to the spouse's campaign), 94-66 (judge may not contribute to the campaign of a candidate for political office in another state), 99-18 (judge may not attend or purchase a ticket to a fundraiser on behalf of a candidate seeking election to a local school board), 99-118 (judge who is not currently a candidate for judicial office should advise his/her spouse not to place signs endorsing political candidates on the property where the judge and his/her spouse reside, even if the spouse is the sole owner of the property), 00-113 (judge may not attend a post-election victory party celebrating a neighbor's election as a town board member, even if the event is not sponsored by a political organization), 04-91 (judge may not attend a candlelight vigil for crime victims in the judge's county), 05-117 (judicial candidate cannot express support for the desirability of joining the incumbent on the bench, since that would constitute an endorsement of the incumbent), 06-183 (judge may not attend or be present for any fund-raising activity hosted by the judge's child, who is a candidate for office, in their joint residence), 09-176 (two judicial candidates may display lawn signs with both candidates' names, but may not send voters a letter bearing both candidates' signatures and conveying both candidates' qualifications that is printed on letterhead with both candidates' names).

Amendment rights that attach to their roles" (*White*, *supra*, 536 US at 788). "Applying strict scrutiny, *White* made unmistakably plain that in order to be constitutional, rules regulating judicial campaign activity can be neither overinclusive nor underinclusive – that is, they can neither burden more speech than is necessary, nor leave unregulated those activities that directly undermine the State's supposedly compelling interest in restricting speech" (*Matter of Spargo*, 2007 Annual Report 127 [Emery Opinion Concurring in Part and Dissenting in Part]). Both we and the Advisory Committee regularly skip this crucial imperative by simply evaluating constitutionally protected conduct under what appears to be a mere rational basis test.

The First Amendment defect in applying a prohibition of political conduct to this judge is clear. This is a plainly fatal overinclusive application of the Rules that were charged here. *See Matter of Campbell*, 2005 Annual Report 133, and *Matter of Farrell*, 2005 Annual Report 159 (Emery Concurrences). It is not disputed that the Rules allow a judge to attend and vote publicly at a political caucus (Rules, §100.5[A][1][ii]; Adv Op 09-180). Also, it is not disputed that under the Rules a judge can (and virtually must) be a publicly identified member of a political party and actively involved in obtaining the support of political parties to secure a nomination and win an election. S/he can and, as a practical matter, must campaign on a slate, directly associating with other judicial and non-judicial candidates. The notion that a judge who directly participates in political activity in the variety of ways necessary to run for office does *not* violate the Rules, while a judge who simply calls a political meeting to order and rules on motions does, is patently hypocritical, untenable and, at the very least, a constitutional violation as

an overinclusive application of the Rules.

Thus, application of the Rules to prohibit this judge's relatively innocuous conduct would conflict with legitimate prohibitions on judicial political activities. And our advice in the footnote to avoid such activities because they "can too easily involve a judge in prohibited political activity" is just bad advice that stands First Amendment protection on its head. If anything, requiring a judge to defend against such charges and be subject to the chill of the accusations and the advice proffered in the footnote is a profound disservice except in a system which is designed to suppress constitutionally protected political activity. The footnote is a symptom of a system which does just that.

More generally, insofar as they purport to regulate the First Amendment political activity of judges, the conduct Rules are a hornet's nest of inconsistencies and are rife with questionable assumptions about what measures are appropriate and effective to control political activity within an elected judiciary which is authorized by the same Rules to associate with parties and raise money from the lawyers who appear before them. *See Matter of Yacknin*, 2009 Annual Report 176 (Emery Dissent); *Matter of King*, 2008 Annual Report 145 (Emery Concurrence); *Matter of Spargo*, *supra* (Emery Opinion Concurring in Part and Dissenting in Part); *Matter of Farrell*, *supra* (Emery Concurrence); *Matter of Campbell*, *supra* (Emery Concurrence). As such, constitutionally commanded strict scrutiny of any proposed sanction under a Rule, as applied, is the minimum we must assure to protect judicial candidates who inevitably are ensnared in a baroque tangle of contradictory and confusing rules, prohibitions and exceptions. As I have previously stated, "The entire system of regulating judicial

campaigns is riddled with hypocrisy" (*Matter of Yacknin, supra* [Emery Dissent]):

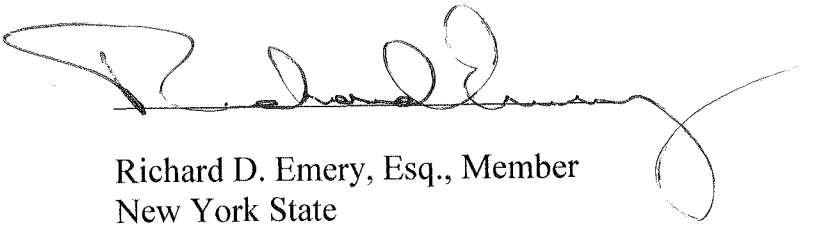
> I understand and sympathize with the [Court of Appeals'] pragmatic impulse to muddle through this mire, attempting to maintain the integrity and stature of the judiciary by separating it from unseemly political party activity and, at the same time, allowing judges to participate in the politics that are an inescapable part of our state constitutionally mandated elective selection system. But the result of this conundrum is that the Court of Appeals has upheld an entirely unworkable and untenable system of judicial candidate regulation in which the conduct rules are unrealistic, unclear and contradictory.

Id. We must guard against wooden application of the Rules, including those interpreted by the Advisory Committee, which regularly fails, as does this Commission, to analyze application of the Rules in the First Amendment context. It serves neither the judges nor the public if we fall into the trap of treating judicial campaigns and political activity under the same standards as other judicial misconduct.

This case, and others where we evaluate alleged misconduct in the judicial campaign process, beg the larger question of whether this is our appropriate role and whether it is the best use of our resources. I believe this Commission and the Advisory Committee are unsuited to this task because judicial misconduct does not ordinarily arise in the First Amendment context and the Commission and Advisory Committee appear to be committed to ignoring the overarching constitutional concerns. I think that regulating judicial campaigns should be the function of some other administrative body more experienced and sensitive to the fundamental rights at stake. My two terms on this Commission certainly document the need for this reform. Until that day comes, if ever, in my view the Commission's role should be "hands off" except in the clearest cases.

This is a case of a misconduct charge that cannot be supported on the facts or the law and, accordingly, is properly dismissed.

Dated: October 7, 2011



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