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

EDWARD D. BURKE, SR.,

a Justice of the Southampton Town Court,
Suffolk 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Pamela Tishman, Of Counsel) for the Commission

Zuckerman Spaeder LLP (by Paul Shechtman) for the Respondent

The respondent, Edward D. Burke, Sr., a Justice of the Southampton Town Court, Suffolk County, was served with a Formal Written Complaint dated January 22,

2013, containing four charges. The Formal Written Complaint alleged that respondent: (i) rode in a police car with a defendant after arraigning him, recommended that he hire an attorney who was the judge's business partner, gave the defendant legal advice and thereafter presided over his case (Charge I); (ii) used his judicial title to promote his law firm and business (Charge II); (iii) imposed fines that exceeded the maximum authorized by law (Charge III); and (iv) made improper political contributions (Charge IV). Respondent filed an answer dated February 27, 2013.

By Order dated March 5, 2013, the Commission designated Peter Bienstock, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 18 and 19, 2013, in New York City. The referee filed a report dated December 3, 2013.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of removal, and respondent argued that a sanction greater than censure was unwarranted.

On March 6, 2014, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Southampton Town Court, Suffolk County, since 2008, and previously served in that position from 1994 until July 2000. His current term expires on December 31, 2015. From 2000 to 2007 he was a Judge of the Court of Claims and an Acting Supreme Court Justice. He was admitted to practice law in the State of New York in 1970.

As to Charge I of the Formal Written Complaint:

2. On Saturday, March 14, 2009, at 2:07 AM Michael Matus was charged with Driving While Intoxicated in Sag Harbor. At 9:00 AM on that date, respondent arraigned Mr. Matus in the Southampton Town Court, suspended his driver's license and released him on his own recognizance. During the arraignment, respondent told Mr. Matus on the record that he could apply to the court for a hardship driver's license.

3. Following the arraignment, respondent, who had left his vehicle at a service station, asked the police for a ride home and was driven to his home in the police car transporting Mr. Matus back to Sag Harbor. Respondent sat in the front seat with a police officer, and Mr. Matus was in the back seat. During the ride, respondent told Mr. Matus that he could no longer hear Mr. Matus' case because he was riding in the police car with him. Mr. Matus told respondent that the suspension of his driver's license would cause extreme hardship since he had to drive his wife to New York City for cancer treatments. Respondent again told Mr. Matus that he could apply for a hardship license.

4. Mr. Matus, who lived in Amagansett, told respondent that he did not know any attorneys. Respondent suggested at least one Amagansett attorney, Tina K. Piette. At that time, respondent and Ms. Piette were co-owners of two investment real estate properties.

5. Mr. Matus met with and retained Ms. Piette the next day. At the hearing, Mr. Matus testified that respondent's recommendation influenced his decision to hire Ms. Piette "to a minor extent" and that he discussed the subject with friends before

deciding to hire Ms. Piette.

6. Upon learning that respondent was sitting on March 17th in the part that would hear Mr. Matus' application for a hardship license, Ms. Piette told Mr. Matus that she could not appear before respondent but could assist Mr. Matus in preparing the application. Ms. Piette authored a letter, signed by Mr. Matus, asking that the application be heard on March 17th and filled in a portion of the application, which requested a hardship license so that Mr. Matus could drive his wife to and from a medical facility in New York City. The papers were filed in the Southampton Town Court on March 16, 2009.

7. On March 17, 2009, Ms. Piette drove Mr. Matus to the Southampton courthouse and waited outside of the court while Mr. Matus appeared before respondent. Respondent granted the application for a hardship license so that Mr. Matus could drive his wife to and from medical appointments and could also drive to appointments for alcohol evaluation and therapy. Respondent did not preside over any subsequent proceedings in the *Matus* case.

8. At the hearing before the referee, respondent testified that he did not disqualify himself from Mr. Matus' application for a hardship license since he considered it to be "administrative," but respondent conceded that granting the application was an exercise of discretion. Respondent acknowledged that it was improper to ride in the police car with Mr. Matus, to speak *ex parte* with him during the ride, and to recommend Ms. Piette as a lawyer.

As to Charge II of the Formal Written Complaint:

9. Respondent is a partner in the law firm of Burke & Sullivan, PLLC, and has held a majority ownership interest in the firm since January 1, 2008. In March 2010 the law firm's website contained the following statement in the section that provided information about the firm's attorneys:

> "The Hon. Edward D. Burke, Sr., is an outstanding and respected jurist, serving as a Southampton Town Justice (1994-2000 & 2008 to present)... having been elected in 1993, 1995, 1999 and 2007. In August of 2000, he was appointed as New York State Court of Claims Judge and assigned to the Supreme Court Bench in Riverhead, where he earned the respect and trust of his colleagues and the public through his fair and wise administration of justice."

10. Respondent testified that he had nothing to do with the contents of the website, did not review the website and did not know how to access it. He acknowledged that he did not instruct his law office staff regarding the limitations on using his judicial position to promote his law practice.

11. The language describing respondent as "an outstanding and respected jurist" was deleted on the website after the Commission questioned respondent about it during its investigation.

As to Charge III of the Formal Written Complaint:

12. On more than 200 occasions between late 2008 and January 2011, respondent imposed fines in excess of the maximum amount authorized by law, most often $200 instead of $150, in cases involving defendants who pled guilty to violations of section 1202(a) of the Vehicle and Traffic Law ("VTL") (stopping, standing or parking in

prohibited places), reduced from a charge of Speeding or other moving violation.[1]

13. In the fall of 2008, the chief clerk of the Southampton Town Court attended a State Magistrates Association training conference, where she learned that the maximum fine for a violation of VTL §1202(a) was $150. In late 2008 or early 2009, the clerk told the judges of the Southampton Town Court that she had learned that the maximum fine for such violations was $150.

14. Despite such notice from the clerk, respondent took no action to determine whether the clerk's information was correct and continued until approximately January 2011 to impose fines greater than $150 for violations of VTL §1202(a).

15. At the hearing before the referee, respondent testified that after the clerk spoke to him about the fine amount, he began to ask defendants to waive the maximum fine amount in exchange for the plea bargain (a reduction of the original charge and no "points" on their driver's license), to which the defendants consented.

16. Respondent testified that it had been the court's practice to impose a $200 fine in such matters and that after the clerk spoke to him, he still believed that a $200 fine was permissible, in part because the district attorney recommended that amount on occasion. He also testified that while some judges imposed a $150 fine plus community service, he did not believe that community service was an appropriate or authorized sentence in such matters, and he believed that a higher fine amount was

[1] There is evidence that some of the 285 cases listed on Schedule A of the Formal Written Complaint involved multiple tickets, for which the cumulative fine might exceed $150, and in a few instances the district attorney recommended a $200 fine. The maximum fine for a first offense for VTL §1202(a) is $150; the maximum for a second offense is $300; and the maximum for a third offense is $450 (V&T §1800[b][1]).

appropriate, especially in cases where the alleged speed was very high. He testified that he stopped imposing fines higher than $150 for such violations when the court clerk continued to object.

As to Charge IV of the Formal Written Complaint:

17. Respondent is a name partner in the law firm of Burke & Sullivan, PLLC, and has held a majority ownership interest in the firm since 2008. From May 2008 through June 2010, respondent's law firm made approximately 30 contributions to political organizations or candidates in amounts ranging from $75 to $500, totaling approximately $6,500. One check was signed by respondent, and most of the others were signed by a secretary and authorized by respondent's daughter, Denise Burke O'Brien, an attorney with the firm who was politically active. Most of the contributions were for tickets to attend politically sponsored events.

18. Respondent is the owner of Edward D. Burke Realty Co., Inc. ("Burke Realty") and was the owner from 2004 through 2009. In 2004 and 2006, while respondent was a Judge of the Court of Claims, and in 2009, while he was a town justice, Burke Realty made a total of five contributions, totaling $1,000, to political organizations or candidates. Respondent signed one check, a $500 contribution in 2004, which he testified was for a golf outing sponsored by a political organization. Four checks were signed by the company's property manager.

19. All of the above contributions were made when respondent was not a candidate for judicial office and were outside of the window period for judicial

candidates as defined by Section 100.0(Q) of the Rules Governing Judicial Conduct.[2]

20. Respondent testified that, except for the checks he signed, he was unaware of the political contributions by his law firm and business. He acknowledged that the contributions were improper and that he failed to take appropriate steps to ensure that his law firm and his business adhered to the limitations on making political contributions while he was a judge.

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(C), 100.3(B)(1), 100.3(B)(6), 100.3(E)(1) and 100.5(A)(1)(h) 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 IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

The record before us demonstrates that respondent engaged in behavior, both on and off the bench, that was inconsistent with well-established ethical standards prohibiting judges from lending the prestige of judicial office to advance private interests and requiring every judge, *inter alia*, to maintain professional competence in the law and to avoid even the appearance of impropriety (Rules, §§100.2, 100.2[C], 100.3[B][1]).

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[2] During a window period (from nine months before the selection of candidates to six months after the primary, convention, caucus or general election), a judicial candidate may purchase two tickets to attend politically sponsored dinners or other functions (22 NYCRR §§100.0[Q], 100.5[A][2][v]).

Respondent's misconduct, which is essentially undisputed, showed poor judgment in several respects and insensitivity to his ethical obligations.

In the *Matus* matter, the most serious of the charges, it is undisputed that respondent rode in a police car with the defendant after arraigning him on a charge of Driving While Intoxicated, had *ex parte* communications with him in the police car, and recommended that he hire an attorney who was respondent's business associate. Getting into the police car with the defendant, in itself, showed poor judgment since it created an appearance of impropriety that would necessarily require his recusal in the defendant's case. Compounding the impropriety, respondent violated the prohibition against *ex parte* communications (Rules, §100.3[B][6]) by engaging the defendant in discussion about his case, not only encouraging him to apply for a hardship driver's license but also recommending that he hire a particular attorney. Regardless of whether respondent recommended three local attorneys (as he testified) or only Ms. Piette (as Mr. Matus recalled), it was highly improper for respondent even to suggest that the defendant hire an attorney with whom respondent had a business relationship. Such a recommendation, cloaked with the prestige of judicial office, advanced the private interests of Ms. Piette (whom the defendant retained shortly thereafter), in violation of Section 100.2(C) of the Rules. Notwithstanding Mr. Matus' testimony that he did not rely on respondent's recommendation but only hired Ms. Piette after discussing the matter with friends, the appearance created by such a recommendation was improper and implicitly coercive.

Finally, two days after respondent had informed the defendant in the police car that he could no longer handle his case because of their ride together, respondent

failed to disqualify himself from Mr. Matus' hardship license application – the very subject they had discussed *ex parte* in the police car – and granted the application when Mr. Matus appeared before him. Since his impartiality could reasonably be questioned in the matter, respondent's disqualification (or, at least, disclosure of the *ex parte* conversation that had taken place) was required by the ethical rules (Rules, §100.3[E][1]), even if the application seemed routine or ministerial. Respondent's assertion that he viewed the application as an "administrative" matter that did not require his recusal is unpersuasive since, as he ultimately conceded, granting such an application necessarily involves the exercise of judicial discretion (VTL §1193[2][e][7][e]). As the Court of Appeals recently stated, "A judge's perception of the nature or seriousness of the subject matter of the litigation has no bearing on the duty to recuse..." (*Matter of George*, 22 NY3d 323, 328 [2013]).

In sum, respondent's handling of the *Matus* case was inconsistent with numerous fundamental ethical principles. Viewed objectively, the totality of his conduct – chatting with a defendant about his case during a ride in a police car, recommending that the defendant retain a lawyer with whom the judge had a business relationship, and granting the relief requested by the defendant even after respondent had indicated he could not handle the case – breached the appropriate boundaries between a judge and a litigant and thereby created "a very public appearance of impropriety" (Referee's report 13), which adversely affects public confidence in the judiciary as a whole.

In addition, in more than 200 cases involving plea reductions from moving violations to a parking offense (VTL §1202[a]), respondent imposed a fine that exceeded

the $150 maximum amount authorized by statute for a first-time conviction for the parking offense. Significantly, he continued to impose such excessive fines for many months even after the chief court clerk advised him that, as she had learned at a training conference, the maximum fine was $150. Even if respondent was not required to accept the clerk's advice at face value, her comments put him on notice of an important issue and should have prompted him to make sure he was acting in compliance with the law. Instead, as he has acknowledged, he took no action to determine whether the clerk's information was correct, but simply began to ask defendants to waive the maximum fine amount in exchange for the plea bargain (a reduction of the original charge and no "points" on their driver's license).

Respondent testified that at the time, notwithstanding his clerk's advice, he still believed that a $200 fine was permissible and appropriate, especially in cases where the alleged speed was very high. Every judge is required to maintain professional competence in the law (Rules, §100.3[B][1]), and it is inconsistent with the Rules that, having been put on notice that he was regularly imposing fines that were contrary to law, respondent took no action to ensure that the fines he imposed were in accordance with the statute. Nor is it any excuse that the district attorney recommended that fine amount on occasion, or that other judges may have been imposing similar, unlawful sentences. *See Matter of Sardino*, 58 NY2d 286, 291 (1983) (holding that it was irrelevant to the charged misconduct that other judges may have engaged in similar practices). To be sure, not every mistake of law, or even repeated errors, will rise to the level of judicial misconduct. *Compare*, *Matter of Bauer*, 3 NY3d 158 (2004) (judge was removed for

systematic disregard of legal requirements, including persistent violation of defendants' constitutional rights resulting in illegal incarcerations); *Matter of Tyler*, 75 NY2d 525 (1990) (town justice's legal error in failing to recognize her lack of authority to order child support was insufficient to sustain a charge of misconduct). However, where, as here, respondent persisted in the conduct for many months even after he was on notice that he was transgressing the limits of the law, such error constitutes misconduct.

It is also undisputed that over a six-year period respondent's law firm and realty business made more than 30 contributions, totaling approximately $7,500, to political organizations and candidates. Section 100.5(A)(i)(h) of the Rules prohibits a judge from making such contributions, and since judges "cannot do indirectly that which is forbidden explicitly," contributions by a judge's law firm are also improper (Advisory Op 96-29; *see* Rules, §100.5[A]; *Matter of DeVaul*, 1986 NYSCJC Annual Report 83). Although respondent testified that these contributions were made without his knowledge, except for the two checks he signed, and it appears that most of the law firm's contributions were authorized by his daughter, an attorney with the firm who was politically active, this does not excuse the impropriety. At the very least, there was an appearance that respondent, who owned the realty business that bore his name and who was a name partner and held a majority interest in his law firm, was responsible for or endorsed the contributions by those entities. As the referee stated, such "blatant and direct" political contributions, which are prohibited by clear ethical rules, "must not be countenanced" (Referee's report 28). Respondent, with years of experience as a judge, was familiar with the relevant rules and clearly should have been more sensitive to his

obligation to ensure that his law firm and business adhered to the strict limitations on political contributions. The onus was on respondent to ensure that his law firm and business were in compliance with the ethical rules (*see Matter of Kelly*, 2012 NYSCJC Annual Report 113).

Finally, we find that the descriptive language on respondent's law firm website as to both his current and former judicial positions was improper. While the website of a judge's law firm may contain a "simple, direct statement" of his or her judicial position (*see* Advisory Ops 09-59/09-86), it was inconsistent with the prescribed standards for the firm's website to refer to respondent as "an outstanding and respected jurist" who, in his former judicial position, "earned the respect and trust of his colleagues and the public through his fair and wise administration of justice." We reject respondent's suggestion that laudatory references to his prior judicial position are permissible because similar language is used by some former judges in connection with post-judicial activities. The Rules Governing Judicial Conduct apply to judges of the state unified court system, not former judges (unless, like judicial hearing officers, they perform judicial functions within the judicial system [*see* Rules, §100.6[A]). By promoting his law firm through laudatory descriptions of his ability and reputation as a judge, respondent lent the prestige of judicial office to advance his private interests, in violation of section 100.2(C) of the Rules.

In considering the appropriate sanction, we have considered the totality of the circumstances presented here. In particular, as to the *Matus* case, while respondent showed extremely poor judgment by getting into the police car with the defendant,

recommending an attorney and presiding over the defendant's hardship license application, it appears that he was motivated by a sincere desire to help the defendant find an attorney near his home and obtain a hardship license so that he could drive his wife to medical treatments, and it was the defendant's perception that the judge was "compassionate." Nor do we find any improper motive in respondent's imposition of excessive fines; as he indicated, he could properly have imposed the same or higher amount had the charge been reduced to another section of the same statute. We further note that several factors, including the fact that the district attorney had recommended the improper fine amount, appear to have bolstered respondent's belief that the fine was permissible, and that he eventually stopped the practice after his clerk continued to raise the issue. Finally, we are mindful that respondent has acknowledged his misconduct as to each of the charges and has an otherwise unblemished record in 20 years of service as a judge. In view of these factors, we believe that the sanction of censure is appropriate.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

Mr. Belluck did not participate.

CERTIFICATION

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

Dated: April 21, 2014

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