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

MICHAEL R. CLARK,

a Justice of the Hastings Town Court,
Oswego County.

DETERMINATION

- -

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian, (David M. Duguay and John J. Postel, Of Counsel)
for the Commission

Michael A. Santo for the Respondent

The respondent, Michael R. Clark, a Justice of the Hastings Town Court, Oswego County, was served with a Formal Written Complaint dated July 2, 2014,

containing six charges. The Formal Written Complaint alleged that respondent engaged in ex parte communications with defendants and dismissed or reduced charges without notice to or the consent of the prosecution; failed to provide a defendant the opportunity to be heard regarding bail; increased bail in an improper manner; imposed conditions of release on a defendant that were without basis in law; made improper comments about a defendant's physical appearance; and, at an arraignment, failed to advise a defendant of the right to counsel, asked incriminatory questions and imposed improper conditions for permitting the defendant to negotiate a plea. Respondent filed a verified Answer dated August 5, 2014.

By Order dated August 20, 2014, the Commission designated William T. Easton, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The parties entered into a stipulation dated February 24, 2015, closing the matter in view of respondent's resignation from judicial office by letter dated February 3, 2015, effective May 31, 2015. After respondent withdrew his resignation and requested a hearing, the Commission again designated Mr. Easton as referee by Order dated May 20, 2015, and a hearing was held on September 17 and 18, 2015, in Syracuse. The referee filed a report dated August 23, 2016.

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's counsel recommended a sanction no greater than censure. On December 8, 2016, 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 Hastings Town Court, Oswego County, since January 2000. His current term of office expires on December 31, 2019. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. In the Hastings Town Court, the prosecutor was often not present for the disposition of charges. The last Wednesday of each month was designated a "district attorney day" when a prosecutor would attend, although during court proceedings on that day the prosecutor would often be in a separate room conferencing cases.

People v. B. B.

3. On April 27, 2011 respondent presided over *People v. B. B.,* involving a defendant charged with Speeding and Operating a Motor Vehicle with a Suspended or Revoked Registration, a misdemeanor.

4. After reviewing the signed plea recommendation form from the district attorney's office, respondent accepted Mr. B.'s guilty plea to the reduced offenses of Operating an Unregistered Vehicle and Standing on the Pavement.

5. While explaining the surcharge, respondent asked the defendant about his military service in Iraq. Then, without notice to the prosecution, respondent vacated the defendant's plea to the reduced offense of Operating an Unregistered Vehicle and dismissed the original misdemeanor charge in the interest of justice, stating, "I don't like the resolution of this. So I'm going to dismiss the 401(1)(a) in the interest of justice and the other one's a parking ticket, and you don't owe us nothing on it anyway."

People v. Joseph Scafidi

6. On June 1, 2011, Joseph Scafidi appeared before respondent for disposition and/or sentencing on a charge of Petit Larceny and several traffic offenses including Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree ("AUO"), a misdemeanor.

7. Mr. Scafidi's attorney, Charles E. Pettit, confirmed to respondent that there was an agreed-upon disposition with the district attorney's office reducing the Petit Larceny charge to Disorderly Conduct contingent upon restitution and community service and that Mr. Scafidi had paid restitution and performed 45 hours of community service at a local cemetery.

8. In response to respondent's inquiry, Mr. Scafidi stated that he had worked for Theresa Green at the cemetery, and respondent remarked that "she does a great job." At the hearing, Mr. Pettit testified that Theresa Green was a friend of respondent's wife.

9. Respondent accepted Mr. Scafidi's guilty plea to Disorderly Conduct and sentenced him to a conditional discharge, waiving the surcharge. The waiver of the surcharge resided within respondent's discretion since the defendant had paid restitution prior to sentencing.

10. Without notice to or the consent of the prosecution, respondent reduced the misdemeanor AUO offense to a traffic violation and dismissed another violation of Improper Turn, stating that he was doing so "on [his] own volition."

11. The district attorney's policy was not to agree to a reduction of a

misdemeanor AUO offense if a defendant, like this defendant, had outstanding fines in another court.

People v. C. T.

12. On July 13, 2011, respondent arraigned Mr. T. on a charge of Disobeying a Traffic Control Device. After the defendant said he wanted to explain what had occurred, respondent advised him that he could seek a reduction of the charge from the district attorney's office. Respondent then asked him where he worked, and Mr. T. stated that he worked as an intern at the Calvary Baptist Church in Brewerton and was pursuing a master's degree. He also told respondent that he had not received a ticket within the previous 18 months.

13. Without notice to the prosecution, respondent dismissed the traffic infraction, stating, "Okay, I'm going to dismiss this case in the interest of justice, *sua sponte.*"

14. At the hearing before the referee, respondent testified that he believed he had authority to reduce an AUO charge in certain circumstances and to dismiss a traffic infraction in the furtherance of justice without notice to the prosecution, but that he now recognizes that such conduct is improper.

Additional Finding

15. As the referee found, respondent's exchanges with the defendants in the *B.*, *Scafidi* and *T.* cases were either innocuous or permissible in the context of sentencing and were not ex parte communications. However, respondent had a responsibility to afford the prosecution notice of the information that he elicited and the

action that he was about to take in dismissing or reducing charges on his own motion.

As to Charge II of the Formal Written Complaint:

16. On July 13, 2011, respondent arraigned Timothy B. Fuller on a charge of Menacing in the Third Degree, a misdemeanor, and Harassment in the Second Degree, a violation. Mr. Fuller was appearing pursuant to an appearance ticket. Respondent ascertained that Mr. Fuller qualified for assigned counsel, directed that he be taken into custody and set bail at $1,500 cash. Respondent then inquired whether any attorney in attendance in the courtroom wished to represent Mr. Fuller, and Mara J. Holst, Esq., agreed to represent him.

17. After Ms. Holst was appointed, the following exchange occurred:

> "JUDGE CLARK: Okay. Come on up counselor. This is your new attorney. Give her your paperwork, Mr. Fuller. He's charged with Menacing 3rd, a B misdemeanor and the Harassment 2nd violation. Here, Mel, you'll need to make this out. You're going to probably make a motion for ROR or pre-trial, or something of that sort.
>
> MS. HOLST: Yes, judge.
>
> JUDGE CLARK: Okay, motion denied. Bail. You sure you haven't been drinking?
>
> MR. FULLER: Positive. I am not lying to you.
>
> JUDGE CLARK: Let's stay with the 1,500 cash, 3,000 bond ..."

Ms. Holst never made a bail application.

18. At the hearing before the referee, Ms. Holst (Wegerski) testified that she did not make an argument for her client's release because she believed the bail respondent had set was fair ("if I believed that the bail...was not fair, I would have pushed the issue") and because she did not think that making an argument would "make a

difference" in light of respondent's statements and his bail decisions in earlier cases that day. She also testified that she believed respondent's handling of the proceeding did not violate her client's rights and was "within the parameters of the law."

19. After the proceeding, respondent sent the paperwork in the matter to the County's pre-trial release program, and Mr. Fuller was released the next day.

As to Charge III of the Formal Written Complaint:

20. On July 13, 2011, respondent arraigned Matthew J. Stuper and Justin Cote, who were charged with Harassment in the Second Degree, a violation.

21. Mr. Stuper was a town resident who had appeared before respondent for nearly two years on two cases which were still pending. He had not had a bench warrant issued against him in these cases.

22. In preparation for his court appearance, Mr. Stuper had borrowed money from his fiancée's mother in anticipation of needing cash to post bail.

23. At the arraignment, respondent asked attorney Charles E. Pettit, who was representing Mr. Stuper on the pending matters, if he wanted to represent him on the new charge. Mr. Pettit agreed to accept the appointment solely for the purposes of arraignment.

24. Respondent addressed Mr. Stuper about the other charges pending against him. According to the transcript, after Mr. Stuper reported that he was in the pre-trial release program, the following exchange occurred:

> "JUDGE CLARK: Okay, your bail is set at 3,500 cash.
> MR. STUPER: I'll post it now.

JUDGE CLARK: Get it out.
MR. STUPER: I want to post Mr. Cote's bail as well.
JUDGE CLARK: Well, maybe I'm not going take it from you, sir. How much you got in there?
MR. STUPER: Well, Mr. Pettit told me to bring a little more than necessary.
JUDGE CLARK: Mr. Pettit? 3,500, by the way, will [sic], no, I can't do that.
MR. STUPER: I don't have much more than that.
JUDGE CLARK: No. Well, it doesn't really matter how much you have. What matters is that you're in more trouble while you have charges pending. Well, let's make sure I'm correct about a couple things here."

25. Mr. Pettit informed respondent that Mr. Stuper's plea to a reduced charge of Attempted Endangering the Welfare of a Child had been vacated after an investigation found the complaint to be unfounded. Mr. Stuper confirmed that he was reporting to pre-trial release every week and told respondent that his fiancée needed his help in caring for their four children as she had a fractured tibia. After Mr. Stuper said he had attended an anger management program, respondent stated, "I find it hard to believe that someone who just attends anger management winds up in another similar situation where there appears to be anger involved." The transcript indicates that the following colloquy then occurred:

"JUDGE CLARK: We now have three criminal files for you.
MR. STUPER: Understand, sir.
JUDGE CLARK: Do you have 5,000 there?
MR. STUPER: Maybe, maybe, close. I'm –
JUDGE CLARK: Start counting. Because you need 5,000 cash. Do you want to step aside a second while you're counting?
MR. STUPER: Yes, sir. …
JUDGE CLARK: ... Count it out. Make sure what you have.
* * *
JUDGE CLARK: What are we up to there, counselor?
MR. PETTIT: 5,000.

JUDGE CLARK: Good. Here, Mel. Mr. Stuper is going to post $5,000 cash bail."

26. Mr. Stuper posted his bail as well as Mr. Cote's $500 bail.

27. At the hearing before the referee, respondent testified that he was still reviewing the file when he set bail at $3,500 and that he changed the bail amount after reviewing the prior and pending charges against the defendant and determining that he was "a flight risk."

28. In September 2011 respondent granted an adjournment in contemplation of dismissal in the matter and issued an order of protection. The allegation in the Formal Written Complaint pertaining to the order of protection is not sustained and therefore is dismissed.

As to Charge IV of the Formal Written Complaint:

29. On September 8, 2010, respondent arraigned Thor E. Lentz pursuant to an appearance ticket on charges of Criminal Mischief in the Fourth Degree, Harassment in the Second Degree and Unlawful Possession of Marijuana. Respondent assigned Charles E. Pettit, Esq., to represent Mr. Lentz.

30. Prior to releasing the defendant, respondent directed him with respect to his attorney, "[Y]ou're going to have to make an appointment with his office, and you're going to have to go there"; "You have to make each and every appointment with him"; and "If I'm going to release you in your own custody today, you're going to report to your attorney when he says to, you're going to do what he says, how he says. Understand?"

31. Respondent also told the 21-year old defendant, "Any of the people that you usually hang around with, you're not going to hang around with them anymore"; "stay out of trouble" and "when you're not working, go home, watch TV, do something different, right?"; and "There will not be any drinking of alcohol until this case is closed, and God forbid you go out there and do any illegal drugs." Mr. Lentz had no co-defendants on the pending charges, and there was no indication in the papers that alcohol was involved in the matters.

32. In addition, respondent told Mr. Lentz, who had not pled to any offense, "Start a little community service or something, maybe. Is that going to hurt you?"; "you need to start some community service, get yourself a few hours going, 20, 25 hours ... you're going to start doing some community service, right?" He also asked Mr. Lentz, "Do you go to church? ... Well maybe you need to start ... So, you can, you know, check out the churches...."

33. On November 3, 2010, Mr. Pettit faxed a letter to the court asking to be relieved as Mr. Lentz's attorney and stating that Mr. Lentz had missed his first appointment and had indicated he would not appear for his next appointment because of a lack of transportation. Respondent signed a bench warrant for Mr. Lentz bearing a notation, "Failed to meet conditions of ROR." Respondent testified that the warrant was a draft that was placed in the court file and was never given to a law enforcement agency or executed.

34. At the hearing, Mr. Pettit testified that he did not object to respondent's instructions to Mr. Lentz because he regarded them as "unenforceable."

Respondent testified that while there is "no excuse" for his instructions to the defendant, he made those statements "because I care about this kid"; his "intent was to take this young man and get him set on the right course," and at the time he thought he "was doing the right thing." He recognizes that by engaging in such behavior, he improperly "bridge[d] social work with being a judge" and testified that he will not repeat such conduct.

As to Charge V of the Formal Written Complaint:

35. On February 9, 2011, respondent presided over a status conference in *People v. Adam J. Colbert*, involving a 21-year old defendant charged with two counts of Driving While Intoxicated, Inadequate Lights, and Unlawful Possession of Marijuana. Mr. Colbert was represented by Richard H. Jarvis, Esq.

36. Mr. Colbert has a nose piercing and ear gauges.

37. Respondent began the proceeding by saying to Mr. Colbert, "What's that thing in your nose, Adam?" and "When I was a kid we used to do that to all the bulls on the farm." Respondent's comments provoked laughter in the courtroom. A few moments later, respondent continued, "I was mentioning what we used to do. That's all, rings in their noses, made them behave better." Respondent then commented on Mr. Colbert's ear gauges, saying, "What is going on with your earlobes?"

38. At the hearing, Mr. Colbert testified that he felt respondent "was poking a little fun at" his physical appearance and that he was nervous because he did not know if his ear gauges would affect "what was going on in court."

39. Five months later, on July 13, 2011, Mr. Colbert appeared before respondent to enter a plea. In reference to the ear gauges, respondent asked Mr. Colbert, "Aren't those bigger than the last time I saw you?" When Mr. Colbert acknowledged that that they were, respondent replied, "Well, why would you do that?" and said, "You afraid I'm not seeing you up here or something?" Respondent continued to speak about Mr. Colbert's physical appearance, stating:

> "Well, it's not because I don't care. I mean, I'm just concerned about his ears. Court will reflect into the record that Mr. Colbert just appeared, and I believe last time he had pierced ears with holes in them that were approximately dime size, and today he appears, and I'm not sure, but they're somewhere between quarter and half dollar, and that's what we're discussing."

40. Mr. Colbert pleaded guilty to one count of Driving While Intoxicated in satisfaction of all charges. Respondent imposed a conditional discharge with a $1,000 fine, a $400 surcharge and 40 hours of community service. After imposing the sentence, respondent told Mr. Colbert:

> "Additional [sic], there will be no more, geez, how do we say this, how about we just put it this way, you don't increase the size of your earlobes for the next twelve months. Because if I have to look at you again, I don't want to look at that.
>
> * * *
>
> Man, you got to find a new hobby – I'm letting you know.
>
> * * *
>
> I don't know why you do that, hey, you know what – maybe that's cool, maybe that's what you like, I don't know."

41. At the hearing, Mr. Colbert testified that he understood that his conditional discharge required that for a year he "was not to stretch the size of my ears anymore," that he was "not happy" because he "did not believe my ears had anything to

do with the case," and that he was embarrassed by respondent's comments and by laughter in the courtroom when respondent made them. He also testified that he believed that respondent "cared about" him.

42. Mr. Colbert's attorney testified that respondent "had clearly taken an interest" in Mr. Colbert, "was monitoring him very, very closely" and had developed "a rapport" with him over numerous court appearances. He testified that he did not object to respondent's statements because he regarded them as "good natured" and did not think the defendant "was being ridiculed or embarrassed."

43. At the argument before the Commission, respondent stated that his comments to Mr. Colbert were an "attempt which was fool-hearted to relax the atmosphere" for a young defendant whom he had a rapport with and cared about. He testified at the hearing, and reiterated at his appearance before the Commission, that he now recognizes that such comments are inappropriate and that he will not engage in such conduct in the future.

As to Charge VI of the Formal Written Complaint:

44. On November 10, 2010, D. C., who was 17 years old, appeared before respondent for arraignment on a charge of Imprudent Speed, a traffic infraction. Mr. C.'s father was present.

45. Respondent asked Mr. C. to show him the documents he was holding, and Mr. C. gave him an accident information form. Without advising Mr. C. that he had a right to be represented by counsel or asking for a plea, respondent

questioned Mr. C. about the underlying incident, asking, *inter alia*, "So, you had an accident?"; "Was it your fault?"; "Was anybody hurt?"

46. Respondent asked Mr. C. why he did not live with his parents and asked Mr. C.'s father whether he wanted D. "to move home." When Mr. C.'s father said he did, respondent asked Mr. C., "Been to the Public Safety Center? Never been to jail? ... Thinking about it? ... I am." Respondent questioned Mr. C. several times about why he was not living at home.

47. Respondent asked Mr. C. if he wanted to '"just plead guilty" and "go to the Public Safety Center" where he "could go for up to ten days just on this charge. That's a week and a half." He added, "You don't think you want to go there? ... It's jail." Respondent then engaged in the following exchange with the defendant:

> "JUDGE CLARK: Oh but that jogged you pretty well, didn't it? You don't want to go to jail?
> MR. C.: No.
> JUDGE CLARK: Me either. So, how soon can you move back home?
> MR. C.: As quick as possible.
> JUDGE CLARK: Pardon me?
> MR. C.: As quick as possible.
> JUDGE CLARK: There you go. How long is that going to take?"

48. After Mr. C. confirmed that he would move in with his parents, respondent stated, "I'll tell you what, I'll make you a deal. How's that? You want my help ... or do you want to continue down the course you are heading right now?"

49. Respondent directed Mr. C. to never again come to court without his report card so respondent could confirm that he was passing his classes, then stated,

"Then if you're doing what I think you ought to be doing, I'll line up a meeting with you and the district attorney, and you can try and negotiate your way through this. Maybe he'll offer you a lesser charge." Respondent continued:

> "But, I'm the ultimate authority that decides what happens to this. Now, if you earn your way through this by going back home to live, like you should be anyways, and forgetting all about your goombas, and you get good grades in school, and you don't get in more trouble, you never know, maybe I'll dismiss it ... do you want part of the deal or not? ... Do we have a contract between us?"

50. Respondent then told Mr. C. he would adjourn the case for 60 days "to give you a couple months to perform." Respondent summarized the terms he had set: "To achieve a C-level in school, report cards, and the promise. Promises will let you negotiate with the ADA, and then I'll do what I think is right, up to and including the possibility of 15 days of incarceration."

51. The case history report in the *C.* case contains a notation stating: "def needs to move back home...needs to imp[r]ove on his grades, bring grades to court." For the next four months Mr. C. returned to respondent's court several times to provide respondent with his report cards. The case history report indicates that the defendant met with the district attorney on March 20, 2011, four months after his arraignment.

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)(3), 100.3(B)(6) and 100.3(B)(7) 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.

The record before us demonstrates that in performing his judicial duties in several cases in 2010 and 2011, respondent overreached his judicial authority, misapprehended his role as a judge and failed to comply with well-established legal requirements. As respondent has acknowledged, he deserves to be disciplined for his behavior, which was inconsistent with ethical standards requiring every judge, *inter alia,* to be an exemplar of courtesy, to be faithful to the law and maintain professional competence in it, and to accord to every person with a legal interest in a proceeding the right to be heard according to law (Rules, §§100.3[B][3], 100.3[B][1], 100.3[B][6]). Although it appears that in many respects respondent's conduct was well-intentioned and that his errors of law were isolated and unintentional, it is not disputed that he disregarded his ethical obligations and abused the power of his office.

Most serious, we believe, was respondent's misconduct in connection with the *Colbert* and *Stuper* matters.

Respondent's remarks regarding Mr. Colbert's appearance, delivered at two separate court appearances five months apart, were improper and unfitting for a judge. At a time when the young defendant facing serious charges was appearing before the judge to report on his treatment and later for sentencing, respondent commented on Mr. Colbert's nose piercing and ear gauges, remarking, *inter alia*, "What's that thing in your

nose? ... When I was a kid we used to do that to all the bulls on the farm"; "What is going on with your earlobes?"; "Aren't those bigger than the last time I saw you? ...Why would you do that?" Further, in sentencing Mr. Colbert to a conditional discharge on a plea to Driving While Intoxicated in satisfaction of multiple serious charges, respondent advised him, "Additional [sic]... you don't increase the size of your earlobes for the next twelve months. Because if I do have to look at you again, I don't want to look at that." As the referee aptly stated, "That these comments were aimed at a twenty one year old young man struggling with a substance abuse problem only accentuates their inappropriateness."

Conceding that his comments, on their face, appear to be mocking the defendant, respondent asserts that he was only attempting to "relax the atmosphere" for a young defendant whom he cared about and had developed a rapport with over numerous court appearances. Mr. Colbert, testifying about the incident four years later, said that while he had felt embarrassed by respondent's remarks, he believed that respondent "cared about" him, and his attorney concurred that the judge "had clearly taken an interest in this young man" and spoke to him in a manner that was "good-natured," not mean-spirited. Even if dispensed with good intentions, such comments to a vulnerable young defendant, delivered in a courtroom full of spectators, were inconsistent with Section 100.3(B)(3) of the Rules, which requires a judge to be "patient, dignified and courteous" to litigants; at the very least, they could be perceived as demeaning and belittling and thus were detrimental to the public's confidence in this particular judge to perform his judicial duties in an appropriate manner, as well as in the judiciary as a

whole. Even a single instance of denigrating, disrespectful statements to a litigant, standing alone, may warrant public discipline. *See, e.g., Matter of Hannigan*, 1998 NYSCJC Annual Report 131 (during plea discussions, judge referred to a young defendant as "trash" and "garbage" who had used her "constitutional right ... to lay back, ... to have babies, ...to be stupid"); *Matter of Going*, 1998 NYSCJC Annual Report 129 (judge told a litigant he appeared to be "more than a little nuts" and repeated the remark when the litigant objected). *See also Matter of Assini*, 2006 NYSCJC Annual Report 191.

In the arraignment of defendant Matthew Stuper on a Harassment charge, which occurred on the same date that respondent sentenced Mr. Colbert, the transcript of the proceeding indicates that respondent increased the bail from $3,500 to $5,000 with no explanation after Mr. Stuper indicated that he was prepared to post the initial amount, suggesting that respondent increased the amount simply because the defendant could post it. While respondent maintains that he spoke too quickly in setting the initial bail amount since he was still reviewing the file and that he subsequently determined that a higher amount was appropriate because of the defendant's prior convictions and pending charges, respondent failed to ensure that the record reflected the statutorily mandated criteria he considered in changing his bail determination (*see* CPL §510.30[2]). In the absence of such a record, respondent's increase of the bail amount appeared to be arbitrary and punitive, which demeaned the critical importance of procedural regularity and fairness in determining bail. *See Matter of Hopkins*, 1987 NYSCJC Annual Report 93 (judge revoked recognizance, set bail and jailed a defendant charged with a traffic

violation after he requested an adjournment). This was contrary to respondent's ethical obligation to be faithful to the law and to avoid impropriety and the appearance of impropriety in performing his judicial duties (Rules §§100.3[B][1], 100.2[A]).

On the same date, in *Matter of Fuller*, respondent made a pre-emptive, peremptory denial of a motion for the defendant's release by announcing "Motion denied" before any application had been made. Before making that comment, respondent, who had just assigned counsel to represent the defendant, remarked that the attorney was "probably" going to move for the defendant's release. The defendant's attorney never made a bail application, testifying at the hearing that she chose not to "push the issue" because she believed that the bail respondent had set was fair and because she felt it would be futile to do so in view of respondent's comments and prior bail decisions. Respondent's comment, at the very least, discouraged the attorney from making an application and therefore constituted a failure to accord to every person who has a legal interest in a proceeding the right to be heard in violation of Section 100.3(B)(6) of the Rules. Procedural due process, which includes allowing a defendant an opportunity to be heard regarding his or her liberty interests, is of fundamental importance not only to the defendant, but to the public's confidence in the fairness, integrity and competence of the judiciary. *See Matter of Jung*, 11 NY3d 365 (2008). Whether the application would have been futile or not, the defendant was denied the right to be heard regarding his release.

In two other arraignments, both involving young defendants, respondent overstepped his judicial authority by appearing to impose improper and far-ranging

conditions that had no basis in law and no relation to the charges against the defendants. In *Matter of Lentz*, he released on his own recognizance a 21-year old defendant charged with various offenses after directing the defendant, *inter alia*, to "make each and every appointment" with his assigned counsel and "do what he asks you to do ... how he says, what he says"; he further advised the defendant that "when you're not working, go home, watch TV, do something different, right?"; "the people you usually hang around with, you're not going to hang around with them anymore"; and no "drinking of alcohol until this case is closed." He even told the defendant, who had not been convicted of any offense, to "start a little community service or something, maybe. Is that going to hurt you? ... get yourself a few hours going, 20, 25 hours"; and after asking the defendant if he went to church, respondent told him, "Well maybe you need to start ... check out the churches." In *Matter of C.*, involving an unrepresented 17-year old charged with a traffic infraction, respondent coerced the defendant to agree to move back home by underscoring his authority to send the young man to jail and pressing him for an explanation of why he did not live with his parents before asking, "So, how soon can you move back home?" Respondent also directed the defendant to bring his report cards to subsequent court appearances as a condition for "lin[ing] up a meeting between you and the DA" to discuss a possible plea. Despite respondent's professed motive to help the young defendants whom he "cared about" to get "set on the right course," such actions were an abuse of his judicial authority and, as he has acknowledged, wrongfully "bridge[d] social work with being a judge." Respect for the law is better fostered by strict compliance with the requirements of due process than by *ad hoc*, informal

procedures that, even if well-intentioned, abrogate those requirements.

Finally, it was improper for respondent to dismiss traffic charges in three cases and to reduce a charge (from the misdemeanor of Aggravated Unlicensed Operation to a traffic infraction in *Scafidi*) without according the prosecution an opportunity to be heard. While a judge has discretion to dismiss a charge *sua sponte* in the furtherance of justice "even though there may be no basis for dismissal as a matter of law" (CPL §170.40), such dispositions require notice to the prosecutor (CPL §§170. 45, 210.45), and reducing a charge requires the prosecutor's consent (CPL §220.10[3]). In each instance, respondent appears to have acted based on information he acquired, in the prosecutor's absence, during colloquy with the defendants concerning their military or community service. By his actions, respondent failed to be faithful to the law and maintain professional competence in it and failed to accord every person who has a legal interest in a proceeding the right to be heard according to law in violation of Sections 100.3(B)(1) and 100.3(B)(6) of the Rules. *See Matter of Cook*, 2006 NYSCJC Annual Report 119 (censuring a judge, *inter alia*, for reducing or dismissing charges in 40 cases without notice to or the consent of the prosecution, in many instances based on ex parte communications). Admitting that these dispositions were inconsistent with statutorily required procedures, respondent testified that he had mistakenly believed that he could dismiss a traffic infraction in the interest of justice and had authority from the district attorney to reduce an AUO charge in certain circumstances. We note that there is no indication in the record before us that the district attorney, who appeared in respondent's court only once a month although respondent presided twice each week, ever objected to

or appealed these dispositions. Further, though the dispositions were improper, it appears that respondent's leniency was prompted by what he had ascertained about the defendants' character and conduct, not by favoritism or other improper purpose.

In considering the sanction, we note that the Court of Appeals has stated that "the extreme sanction of removal" should be imposed only in the event of "truly egregious circumstances" (*Matter of Steinberg,* 51 NY2d 74, 83 [1980]). While serious in several respects, the misconduct described herein does not rise to the level of "truly egregious" misbehavior that has been held to warrant the sanction of removal (*compare, e.g., Matter of Restaino*, 10 NY3d 577 [2008]; *Matter of Bauer*, 3 NY3d 158 [2004]; *Matter of Sardino*, 58 NY2d 286 [1983]). Based on the totality of the record before us, we therefore conclude that the sanction of censure is appropriate and consistent with Commission precedents, especially in view of the mitigating circumstances presented here. It appears that respondent's comments and directions to defendants, while improper, were well-intentioned, that he believed he was acting in the interests of justice, and that his errors of law were isolated and unintentional (*compare, e.g., Matter of Duckman*, 92 NY2d 141 [1998] [removing a judge for knowingly ignoring the law and demonstrating bias and intemperate conduct on repeated occasions]). We are also mindful that respondent appears to be a caring, hard-working judge in a busy court and that, at the hearing and oral argument, he readily acknowledged that his actions were improper and has vowed not to repeat them. Finally, we note that all of respondent's misconduct occurred more than five years ago, with no indication in the record before us of any prior or subsequent complaints regarding his judicial service (*see Matter of*

Skinner, 91 NY2d 142, 144 [1997]). Based on the totality of the record presented, we are persuaded that respondent is committed to ensuring that his conduct in the future is consistent with the ethical standards required of every judge.

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

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

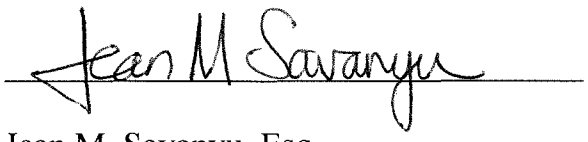
Mr. Emery files a concurring opinion.

Ms. Yeboah did not participate.

CERTIFICATION

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

Dated: March 13, 2017



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

MICHAEL R. CLARK,

a Justice of the Hastings Town Court,
Oswego County.

- -

CONCURRING OPINION
BY MR. EMERY

I concur in the sanction of censure despite my first reaction to Judge Clark's inexcusable comments to a vulnerable young defendant. At a time when the young man, facing serious charges and struggling with substance abuse issues, was appearing before the judge to report on his treatment and later for sentencing, Judge Clark's gratuitous statements about the youth's nose piercing and ear gauges mocked and denigrated his appearance. Without question, such comments are "improper and unfitting for a judge," as the Commission's determination states. *See, e.g., Matter of Duckman*, 92 NY2d 141 (1998) (judge who engaged in intemperate, bullying tirades towards prosecutors, *inter alia*, appeared to mock a blind attorney by waving papers in his face and saying, "Do you see me?"); *Matter of Hannigan*, 1998 NYSCJC Annual Report 131 (during plea discussions, judge referred to a young defendant and her witnesses as "trash" and "garbage" and referred to her constitutional rights "to relax, to lay back,...to have

babies,...to be stupid"). In my view, Judge Clark's comments to this defendant, standing alone, might warrant the ultimate sanction of removal, as recommended by Commission counsel, since such behavior so seriously damages public confidence in this particular judge to perform his judicial duties in an appropriate manner, as well as, in the judiciary as a whole.

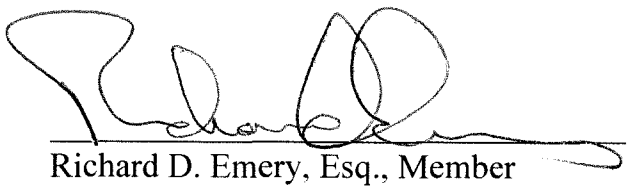
The Commission's Determination fairly describes the mitigating factors which support the result we reach. One of them, however, deserves a bit more elucidation, in my view. The chronology of this case, though long delayed for reasons not in the record, has ironically aided this judge in his quest to remain on the bench. The events took place more than five years ago and the record before us does not reveal any similar misconduct before or, more importantly, since. Because we took so long to bring this case to conclusion, the judge plainly benefited from his, apparently, blemishless record. Ironically, the delay in this case supports the conclusion that Judge Clark has demonstrated that he can perform his duties properly and effectively and, therefore, is not a threat to the public.

By noting this factor in this case, I do not want to imply that we should suspend our process so that a judge can demonstrate her fitness after misconduct has occurred. I do not think there was any intent to allow this case to meander for so long. It is indisputable that delays of this length are bad for the judge, the Commission and the public. It just so happens that in this case, notwithstanding that the charges pending against the judge must have weighed heavily on his mind, the lengthy delay and the

judge's ability to function effectively during the pendency of his case worked to his benefit. Hopefully, we can make fair decisions without inordinate delay.

For these reasons, I respectfully concur with the determined sanction of censure.

Dated: March 13, 2017



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