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November 4, 2021

By: E-mail and Federal Express

New York State Commission on Judicial Conduct
61 Broadway Suite 1200
New York, NY 10006

Attn: Celia Zahner, Esq.
Clerk of the Commission
[redacted]@cjc.ny.gov

Re: Matter of Hon. Linda S. Jamieson

Dear Ms. Zahner:

I have sent an original hardcopy of Justice Linda S. Jamieson's brief for the Commission. It should arrive today. In accordance with your email, I have also emailed it to the above email address. In addition, I have served the brief only by email on Ms. DiPalo, with her consent.

I will be arguing the case before the Commission and I presume this is a sufficient Notice of Appearance. If you need a stand-alone Notice of Appearance letter please let me know.

Please note, we briefly discussed what part of the record would be provided Commission Members, and, in accordance with Policy Manual 3.9(A) I would request, at minimum, that my e-mail/memo, dated January 17, 2021, to Referee Hugh H. Mo, regarding character testimony be submitted. It is, in essence, a brief memo that is relevant to a disputed issue. I have attached the email for your convenience.

Very truly yours,

RICHARD M. MALTZ/electronically signed

Richard M. Maltz

cc: Melissa DiPalo, Esq.
Special Counsel

From: Maltz, Richard M. <[redacted]@fkks.com>
Sent: Sunday, January 17, 2021 8:10 AM
To: Hugh H. Mo ([redacted]@hhmolaw.com)
Cc: Melissa DiPalo; Mark H. Levine
Subject: Character Evidence
Attachments: Adams.pdf; Berger.pdf; Blackburnecase.pdf; Gorry.pdf; Shaw.pdf; Shillling.pdf; Wong.pdf

Mr. Mo: I know it is Sunday, but I wanted to get you this information asap. I hope it is acceptable to submit my response to Mr. Levine's letter, dated January 15, 2021, regarding character testimony, in the form of this email and attached cases. I will be ready to argue this point at the hearing but these are my basic points.

1. Commission Counsel ("counsel") has referred only to criminal cases, which has little applicability to a professional discipline case. If you review these criminal cases you will see the purpose and scope of character evidence in a criminal case is different than a professional discipline case. A professional discipline case considers character evidence as "mitigation" and credibility. The criminal cases cited by counsel are not applied for mitigation.

2. In contrast to the criminal cases cited by counsel, I have provided three *Judicial Conduct Commission c*ases that either directly or indirectly support the proposition that character evidence is not limited to reputation in such cases. In *Matter of Blackburne* on page 8 of Richard Emery's dissent, he indicates that character witnesses "vouch[ed]" for the respondent. This is not reputation evidence but personal opinion. In *Matter of Shaw*, the Court of Appeals indicated that character witnesses testified as to "petitioner's strong moral character **and** excellent reputation in the court system." In other words, both opinion and reputation were considered. I have marked the pertinent section for your convenience. In *Matter of Shilling*, the Court of Appeals references the "respect" he earned, this is not reputation but opinion. I have marked the pertinent section.

3. I have also attached Appellate Division decisions regarding attorney grievance matters and have marked the pertinent sections. These are similar to Commission cases in that they are professional discipline cases. Their focus is very similar to Commission cases versus criminal cases. They are *Wong, Adams, Gorry and Berger*. They all reference opinion evidence and in Adams it references character and reputation.

4. Finally, this tribunal should err on the side of admission to provide every opportunity to respondent in such an important proceeding. The Commission is not prejudiced by admission of opinion evidence but respondent would be prejudiced if precluded. This tribunal certainly

has the discretion to admit this evidence and may give it whatever weight it deems appropriate. Similarly, there is no reason to deny the Commission the discretion to consider the evidence to the degree they deem appropriate. Maybe most telling is the fact that no Commission or Court of Appeals case precludes such testimony.

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42 A.D.3d 1, 833 N.Y.S.2d 645, 2007 N.Y. Slip Op. 03298

****1** In the Matter of Jeffrey M. Adams (Admitted as Jeffrey Mark Adams), an Attorney, Respondent. Grievance Committee for the Ninth Judicial District, Petitioner

Supreme Court, Appellate Division, Second Department, New York
2005-04246
April 17, 2007

CITE TITLE AS: Matter of Adams

SUMMARY

Disciplinary proceedings instituted by the Grievance Committee for the Ninth Judicial District. Respondent was admitted to the bar on January 15, 1986 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department as Jeffrey Mark Adams. By decision and order on motion of this Court dated May 9, 2005, as amended by decision and order on motion of this Court dated June 17, 2005, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against the respondent and the issues raised were referred to the Honorable Fred L. Shapiro, as Special Referee, to hear and report.

HEADNOTE

Attorney and Client
Disciplinary Proceedings

Respondent attorney, who commingled personal funds with funds being held on behalf of a client, failed to safeguard client funds, failed to maintain required bookkeeping records of an attorney escrow account, failed to promptly ***2** pay to or on behalf of a client all the funds the client was entitled to receive, and shared legal fees with a suspended attorney without making application to the court, was guilty of professional misconduct (Code of Professional Responsibility DR 9-102 [22 NYCRR 1200.46]; 22 NYCRR 691.10 [b]). Under the totality of circumstances, including respondent's disciplinary history which consisted of a letter of caution and four letters of admonition, the corrective measures he took to properly safeguard funds entrusted to him, the absence of venality and loss to any client, his health related issues and his expression of remorse, respondent was suspended from the practice of law for a period of one year.

RESEARCH REFERENCES

Am Jur 2d, Attorneys at Law §§ 38, 61, 65, 66, 114.

Carmody-Wait 2d, Officers of Court §§ 3:256, 3:258, 3:259, 3:277, 3:279, 3:286, 3:287, 3:437.

22 NYCRR 691.10 (b); 1200.46.

NY Jur 2d, Attorneys at Law §§ 351, 354, 355, 363, 400, 401, 403, 410.

ANNOTATION REFERENCE

Attorney's commingling of client's funds with his own as ground for disciplinary action—modern status. 94 ALR3d 846.

APPEARANCES OF COUNSEL

Gary L. Casella, White Plains (*Gloria J. Anderson* of counsel), for petitioner.
Jones Garneau, LLP, Scarsdale (*Deborah A. Scalise* of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

The Grievance Committee served the respondent with a petition dated July 5, 2005, containing eight charges of professional misconduct against him. The respondent answered the petition, and following a hearing held on October 18, 2005, November 16, 2005, November 18, 2005, and November 21, 2005, the Special Referee sustained all eight charges. The Grievance Committee now moves to confirm the Special Referee's report and ***3** to impose such discipline as the Court deems appropriate. In his responsive papers, the respondent concedes that Charges One through Seven were properly sustained by the Special Referee, but he requests that Charge Eight be disaffirmed and that this Court limit the discipline imposed to no greater than public censure. ****2**

Charge One alleges that the respondent is guilty of commingling personal funds with funds being held on behalf of his client in violation of Code of Professional Responsibility DR 9-102 (a) (22 NYCRR 1200.46 [a]).

The respondent maintained an account entitled "Adams Law Firm P.C. IOLA Trust Account" at Union State Bank. Between April 30, 1999, and September 30, 2003, he deposited and/or retained earned legal fees and reimbursed expenses totaling approximately $230,278 in the IOLA account.

Charge Two alleges that the respondent is guilty of breaching his fiduciary duty and/or engaging in conduct adversely reflecting on his fitness as a lawyer by failing to safeguard client funds and/or failing to maintain adequate client funds in his firm's IOLA account in violation of Code of Professional Responsibility DR 9-102 (a) (22 NYCRR 1200.46 [a]) and/or DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

The respondent "adjusted" the IOLA account by making periodic disbursements of the earned fees to the Adams Law Firm twice on August 10, 1999, in the sums of $2,897.29 and $17,696.89, once on June 14, 2001, in the sum of $56,304.34, and twice on January 17, 2003, in the respective sums of $10,119.19 and $91,134.88. He made disbursements to Charles Schwab & Co. on November 21, 2001, and November 23, 2001, in the sums of $30,635.36 and $4,718.38, and to Eugene Adams on August 18, 1999, in the sum of $2,385.98.

The respondent was not able to explain how he determined the specific amounts of the disbursements and/or the names of the clients to whom they related. With respect to four disbursements made to the Adams Law Firm and one to Eugene Adams, on the dates these were made, there were insufficient earned fees and reimbursed expenses on deposit in the IOLA account to cover the "adjustments." With respect to the two disbursements made to Charles Schwab & Co. and the January 17, 2003, disbursement to the Adams Law Firm in the sum of $10,119.19, insufficient earned fees and reimbursed expenses were on deposit in the IOLA account on the dates that these were made to cover the "adjustments." ***4** Consequently, the disbursements were drawn in whole and/or in part against funds being held for the benefit of clients. The January 17, 2003, disbursement in the sum of $91,134.88 made to the Adams Law Firm created a negative balance of earned fees and reimbursed expenses on deposit in the account, which remained negative through

September 30, 2003, the end of the period audited by the Grievance Committee. On September 30, 2003, the balance of earned fees and reimbursed expenses on deposit in the IOLA account was minus $34,313.82.

Charge Three alleges that the respondent is guilty of breaching his fiduciary duty and/or engaging in conduct adversely reflecting on his fitness as a lawyer by failing to safeguard client funds in violation of Code of Professional Responsibility DR 9-102 (a) (22 NYCRR 1200.46 [a]) and/or DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

On June 29, 1999, the respondent mistakenly deposited into the operating account escrow funds relating to his clients Weber and Gura totaling $24,500. The respondent failed to review the operating account records and/or take corrective action, and failed to discover the mistaken deposit until it was brought to his attention by the Grievance Committee.

Charge Four alleges that the respondent is guilty of breaching his fiduciary duty and/or engaging in conduct adversely reflecting on his fitness as a lawyer by failing to safeguard client funds and/or failing to maintain adequate client funds in his firm's IOLA account in violation of Code of Professional Responsibility DR 9-102 (a) (22 NYCRR 1200.46 [a]) and/or DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

The respondent made 24 disbursements from the IOLA account in various amounts ranging from $63.53 to $14,824.76, in connection with one or more matters involving 16 different clients, between June 8, 1999, and September 19, 2003. At the time of these disbursements, there were no funds and/or insufficient funds on deposit in the IOLA account relative to the matters to **3 cover these disbursements.

Charge Five alleges that the respondent is guilty of failing to maintain required bookkeeping records of an attorney escrow account in violation of Code of Professional Responsibility DR 9-102 (d) (1), (2) and (9) (22 NYCRR 1200.46 [d] [1], [2], [9]).

The opening balance in the IOLA account on April 30, 1999, the first day of the period audited by the Grievance Committee, *5 was $150,758.30. Of that amount, the respondent provided the names of the clients for whom he was holding funds totaling $88,450.86. According to the respondent, the $62,307.44 remainder of the opening balance represented earned fees and/or reimbursed expenses belonging to his firm. However, he was not able to provide the names of the clients to whom the fees and/or reimbursed expenses related or the amount of fees and/or reimbursed expenses attributable to each client.

Charge Six alleges that the respondent is guilty of breaching his fiduciary duty and/or engaging in conduct adversely reflecting on his fitness as a lawyer by failing to safeguard client funds in his firm's IOLA account in violation of Code of Professional Responsibility DR 9-102 (a) (22 NYCRR 1200.46 [a]) and/or DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

One or more of three client disbursements made on January 11, 2001, in the sum of $8,850, on January 18, 2001, in the sum of $18,242.31, with respect to client Dionaldo, and on October 26, 1999, in the sum of $5,000, with respect to client Horowitch, were drawn by the respondent from the IOLA account and prior to the time that he made the corresponding client deposit.

Charge Seven alleges that the respondent is guilty of breaching his fiduciary duty and/or engaging in conduct adversely reflecting on his fitness as a lawyer by failing to promptly pay to or on behalf of a client all the funds the client was entitled to receive in violation of Code of Professional Responsibility DR 9-102 (c) (4) (22 NYCRR 1200.46 [c] [4] and/or DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]). The respondent failed to promptly disburse the balance of funds he was holding in the IOLA account in connection with one or more of eight client matters in amounts from $196.67 to $1,904.98. He disbursed the funds only after his failure to do so was brought to his attention by the Grievance Committee.

Charge Eight alleges that the respondent is guilty of engaging in conduct that adversely reflects on his fitness as a lawyer by sharing legal fees with a suspended attorney without making application to the Court, on notice to the client, to fix the amount and manner of payment for legal services rendered and disbursements incurred by the suspended attorney prior to the effective date of the suspension in violation of 22 NYCRR 691.10 (b) and/or Code of Professional Responsibility DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

On January 1, 1994, the respondent became partners with his father, Eugene J. Adams, in the firm of Adams & Adams *6 P.C., and they continued to practice law together until Eugene J. Adams was suspended from the practice of law in the State of New York effective September 19, 1996 (*Matter of Adams*, 224 AD2d 4 [1996]). Thereafter, the respondent continued to practice as Adams Law Firm P.C., which became the attorney of record for the firm's pending cases, the majority of which were personal injury matters. The name on the firm's escrow account was changed from "Adams & Adams P.C. Escrow Account" to "Adams Law Firm P.C. IOLA Trust Account." The account number remained the same and the respondent became the sole signatory on the account. The respondent paid a portion of the firm's earned fees and/or reimbursement in amounts ranging from $140 to $98,715.80 for expenses incurred to Eugene J. Adams on at least 44 separate occasions during the period audited by the Grievance Committee, April 30, 1999, through September 30, 2003, totaling approximately $211,000. The respondent customarily reported the fees he shared with Eugene J. Adams on closing statements that he filed with the Office of Court Administration pursuant to 22 NYCRR 691.20, as quantum meruit payments for legal services rendered. Neither **4 the respondent nor Eugene J. Adams applied to the Court to fix the amount and/or manner of these payments.

At the hearing, pursuant to stipulation I, 23 exhibits were submitted into evidence, the respondent admitted the factual allegations in Charges One through Seven, and he stated that he would offer evidence in mitigation. With respect to Charge Eight, the respondent also admitted the underlying factual allegations and further conceded that he did not make an application to the Court to fix the amount and/or manner of payments to Eugene J. Adams. He asserted that he would present evidence and legal arguments that Charge Eight should be dismissed, or in the alternative, offer evidence in mitigation. Additionally, the parties submitted stipulation II setting forth what would have been the testimony of the respondent's bookkeeper, Lois Ryan, if she had been called as a witness.

The Grievance Committee introduced no witnesses. In mitigation, the respondent testified on his own behalf and presented the testimony of his therapist, a licensed clinical social worker, and seven character witnesses. Additionally, he submitted into evidence numerous letters attesting to his character, reputation, and personal integrity, as well as various documents relating to his community service.

*7 Based upon the respondent's concession that Charges One through Seven were properly sustained by the Special Referee, and on the evidence adduced, we find that all seven charges should be sustained. We also find that the Special Referee properly rejected the respondent's arguments with respect to Charge Eight, and sustained that charge finding the respondent guilty of misconduct with respect to the payments he made to his father. The contention that court intervention is not required in order to share fees with a disbarred or suspended attorney is erroneous. We have held that compensation to a disciplined attorney is capped by the rule of quantum meruit and that fee-splitting agreements between such attorneys are not binding on the Court (*see Padilla v Sansivieri*, 31 AD3d 64, 68 [2006]; *Matter of Marett v Pegalis & Wachsman*, 176 AD2d 321, 322-323 [1991]). Accordingly, the Grievance Committee's motion to confirm the Special Referee's findings sustaining Charges One through Eight is granted.

In determining an appropriate measure of discipline to impose, the Grievance Committee advises that the respondent's prior disciplinary history includes a letter of caution issued by the Rockland County Bar Association and four letters of admonition, one personally delivered, issued by the Grievance Committee for the Ninth Judicial District.

By letter dated April 6, 1993, the Rockland County Bar Association cautioned the respondent and reminded him of an attorney's ethical obligation to advise a client of fee arrangements and to keep records which are sufficiently accurate and detailed to calculate the fee.

By letter of admonition dated November 4, 1999, the Grievance Committee expressed its concern to the respondent that he failed to withdraw from employment promptly after he was discharged by the client.

By letter of admonition dated June 29, 2001, the Grievance Committee advised the respondent that it found that he had notice of, but failed to honor, a valid chiropractor's lien.

By letter of admonition dated March 14, 2002, and personally delivered to the respondent, the Grievance Committee expressed its concern that (1) he failed to make a reasonable effort to settle a fee dispute in the best interest of the client, and (2) he contacted the client directly after receiving notice of her intent ***8** to change attorneys via a properly executed consent to change attorney form.

By letter of admonition dated March 31, 2004, the Grievance Committee advised the respondent that he had notice of a chiropractor's lien and he failed to honor the lien and/or hold the disputed funds in escrow.

Notwithstanding the corrective measures taken by the respondent to properly safeguard ****5** monies entrusted to him by his clients, the absence of venality and loss to any client, his health-related issues, his remorse, and other mitigating factors, the evidence presented demonstrates multiple breaches of his fiduciary obligation and longstanding disregard of appropriate escrow practices. Under the totality of circumstances, the respondent is suspended for a period of one year.

Prudenti, P.J., Schmidt, Crane, Mastro and Rivera, JJ., concur.

Ordered that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

Ordered that the respondent, Jeffrey M. Adams, admitted as Jeffrey Mark Adams, is suspended from the practice of law for a period of one year, commencing May 10, 2007, and continuing until the further order of this Court, with leave to the respondent to apply for reinstatement no sooner than six months before the expiration of the one-year period upon furnishing satisfactory proof that during that period he (a) refrained from practicing or attempting to practice law, (b) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), (c) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11 (c), and (d) otherwise properly conducted himself; and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent, Jeffrey M. Adams, admitted as Jeffrey Mark Adams, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

***9** Ordered that if the respondent, Jeffrey M. Adams, admitted as Jeffrey Mark Adams, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

character - op - r

1 A.D.3d 83, 767 N.Y.S.2d 19, 2003 N.Y. Slip Op. 18371
(Cite as: 1 A.D.3d 83, 767 N.Y.S.2d 19)

Supreme Court, Appellate Division, First Department, New York.
In the Matter of Marshall C. BERGER (admitted as Marshall Charles Berger), an attorney and counselor-at-law.
Departmental **Disciplinary** Committee for the First Judicial Department, Petitioner,
Marshall C. Berger, Esq., Respondent
Nov. 13, 2003.

Attorney **disciplinary** proceedings were instituted by the Departmental **Disciplinary** Committee. Following hearing, Committee sought order confirming findings of fact and conclusions of law of the Hearing Panel, and imposing sanction. The Supreme Court, Appellate Division, held that absent a finding of venal intent, and in light of significant factors in mitigation, attorney's irresponsible and unprofessional conduct in connection with spoliation of evidence, which was aggravated by his failure to cooperate with the Committee, warranted public **censure**.

Petition granted.

West Headnotes

Attorney and Client 45 ⟸59.8(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) **Discipline**
45k59.1 Punishment; Disposition
45k59.8 Public Reprimand; Public **Censure**; Public Admonition
45k59.8(1) k. In General. Most Cited Cases
(Formerly 45k58)
Public **censure** was appropriate sanction for attorney's misconduct in making erasures on documents in employment law case in which he represented plaintiff; while attorney's irresponsible and unprofessional conduct in connection with alleged spoliation of evidence was aggravated by his subsequent failure to cooperate with the **Disciplinary** Committee, there was no finding of venal intent, and there were significant factors in mitigation, including the aberrational nature of the incident, the lack of any **disciplinary** history, and attorney's prior good reputation. Code of Prof.Resp., DR 1-102, subd. A, pars. 5, 7, DR 7-106, subd. C, par. 7; McKinney's Judiciary Law App.

****20 *83** La Trisha A. Wilson, of counsel (Thomas J. Cahill, Chief Counsel) for petitioner.

***84** Philip Pierce, of counsel (Margolin & Pierce, LLP), for respondent.

EUGENE NARDELLI, Justice Presiding, ERNST H. ROSENBERGER, DAVID FRIEDMAN, GEORGE D. MARLOW, LUIS A. GONZALEZ, Justices.

PER CURIAM.

Respondent Marshall C. Berger was admitted to the practice of law in the State of New York by the First Judicial Department on December 3, 1956 and, at all times relevant herein, has maintained an office for the practice of law within the First Judicial Department.

Respondent, on or about June 27, 2002, was served with a Notice and Statement of Charges by the Departmental **Disciplinary** Committee (the "Committee") charging respondent with: two counts of violating New York Code of Professional Responsibility DR 1-102(a)(4), in that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; two counts of violating DR 1-102(a)(5), in that he engaged in conduct prejudicial to the administration of justice; one count of violating DR 1-102(a)(7), in that he engaged in con-

duct which adversely reflects on his fitness as an attorney; and one count of violating DR 7-106(c)(7), which prohibits an attorney from intentionally or habitually violating any established rule of procedure or evidence. With regard to the last charge, respondent is alleged to have engaged in the spoliation of evidence and perjury in a pre-trial proceeding before the United States District Court, Southern District of New York, in the matter of *Vincella Miller v. Time-Warner Communications, Inc., et al* ("*Miller v. Time*"). Respondent is also alleged to have intentionally made misrepresentations to the Committee regarding the status of his file in the federal action.

Respondent, by answer dated July 25, 2002, admitted most of the factual allegations, but denied knowingly making any misrepresentations to the court, or the Committee, concerning his files.

The Committee, prior to the hearing before the Referee, moved for a finding, pursuant to the doctrine of collateral estoppel, that respondent was guilty of professional misconduct under DR 1-102(a)(4) and (7). The motion was based upon certain findings made by Judge Martin in *Miller v. Time*, an employment discrimination action, in which respondent represented the plaintiff. During pre-trial proceedings in that action, issues arose concerning certain erasures on documents produced **21 by the plaintiff through respondent, although despite the erasures, much of what had been written was still legible.

***85** Defendant Time-Warner moved for summary judgment dismissing the complaint based upon spoliation of evidence and, as a result, Judge Martin held an evidentiary hearing. During the course of the hearing, both respondent and his client testified that each was responsible for the erasures. Judge Martin concluded that plaintiff had deliberately erased handwritten notes she had made during the course of her employment in order to prevent discovery of the information by Time-Warner, and that plaintiff had deliberately perjured herself as to when and why the erasures occurred. Judge Martin, as a sanction for Miller's perjury and spoliation of evidence, dismissed the complaint.

The Referee, by memorandum decision dated September 10, 2002, denied the Committee's collateral estoppel motion and found that the Committee's allegations in charges one and five went beyond Judge Martin's findings of false testimony because they charged respondent, in the alternative, with intentionally erasing notes prior to producing the documents, or falsely testifying that he had done so. The Referee also ruled that the Committee lacked evidence of venal intent on the part of respondent, being an essential element of the intentional misrepresentation charge and, as a result, concluded that respondent be permitted to contest the two counts which charged him with dishonest behavior.

The Committee and respondent thereafter stipulated that, contrary to the findings made by Judge Martin, respondent had, in fact, made the erasures on the documents in *Miller v. Time*, and that he also failed to comply with Local Civil Rule 26.2 of the United States District Courts for the Southern and Eastern Districts of New York, which requires an attorney withholding responsive material on the grounds of privilege to specify so in writing. Accordingly, the Committee's case proceeded solely on the theory that respondent had, in fact, made the erasures.

The Committee, during the course of its investigation, requested, by letter dated January 29, 2001, that respondent produce his original litigation file in *Miller v. Time*. Respondent, by letter dated February 26, 2001, suggested that the Committee obtain the file from Time-Warner's counsel because his files were in poor condition due to an office move.

The Committee, in early September 2001 and again in October 2001, requested that respondent produce

his file by October 10, 2001. Respondent failed to do so, but in a deposition*86 held on October 17, 2001, respondent acknowledged that his file "was gone" and could not be located, that the file had been mislaid during an office move in September 2000, and that he knew it was missing at that time. The Committee, during the deposition, renewed its request for certain documents from the *Miller v. Time* matter, and also requested respondent to provide any documentation regarding his attempt to locate and/or reconstruct his files. Respondent appeared again on December 6, 2001, but he did not have the requested items and admitted that he had not looked through his files to ascertain whether he had any documents from *Miller v. Time*.

The Referee, following a liability hearing held on September 24, 2002, issued a letter-report granting respondent's motion to dismiss count one, which alleged that he had violated DR 1-102(a)(4) by intentionally erasing handwritten notes prior to releasing them to opposing counsel. The Referee opined that respondent's conduct was "thoroughly unprofessional and detrimental to his client," but concluded that it **22 had not involved intentional dishonesty or venality.

The Referee also dismissed count two, which likewise alleged a violation of DR 1-102(a)(4), in that respondent failed to act in a candid and cooperative manner regarding the Committee's inquiries concerning his file in *Miller v. Time*, as there was no evidence establishing a dishonest motive.

The Referee, in a subsequent report dated December 20, 2002, sustained counts three through six and, as a sanction, recommended that respondent be publicly **censured** and required to attend 12 hours of continuing legal education ("CLE") courses on the Federal Rules of Civil Procedure, including at least six hours of instruction on discovery procedures under those rules.

The Referee opined that:

> As remarkable, an [sic] unexplainable, as it is for a veteran of more than 43 years of litigation practice in the state and federal courts to have acted and failed to act as described above, I find that none of this misconduct was motivated by venal intent on respondent's part. The Committee's evidence fails to persuade me that Respondent engaged in intentional or purposeful dishonesty in making the erasures or in testifying about them. I also find that he did not [ ] act with intentional dishonesty or venal intent during the Committee's investigation even though he failed to exhibit the candor, cooperation*87 and diligence a member of the Bar owes to the **disciplinary** process.

In mitigation, respondent averred that he: has been practicing law for 46 of his 73 years, including four years of service as a Civil Court Judge, with an unblemished **disciplinary** record; served as a lieutenant in the United States Air Force and 12 years on committees of the Association of the Bar of the City of New York; co-authored an American Bar Association model jury charge for trade secret cases; and successfully represented the League of Women Voters, pro bono, in seeking the reapportionment of the Westchester County Council. Respondent also produced **character witnesses** who testified that he consistently exercised professional judgment and conformed to high standards of practice.

A Hearing Panel heard oral argument on February 3, 2003, at which time the Committee argued that the Referee's report should be modified to sustain counts one and two, and that a six-month **suspension** be imposed in light of respondent's conduct and his failure to cooperate with the Committee. Respondent, arguing that his conduct was an aberration in an otherwise laudable career, urged a private reprimand.

In a report dated March 10, 2003, the Hearing Panel confirmed the Referee's report and recommendation

in its entirety. The Hearing Panel observed, inter alia, that respondent's conduct constituted a serious lapse in judgment, although they agreed with the Referee that the evidence did not support the conclusion that he acted with a dishonest or deceitful purpose; and that respondent's lack of candor with the Committee and persistent lack of cooperation with their requests amounted to conduct prejudicial to the administration of justice, although he appeared to be acting under the "misguided hope that the problem would go away." In rejecting both respondent's and the Committee's recommendations for sanction, the Hearing Panel opined that although "several factors weigh against the issuance of a private reprimand ..." there are, on the other hand, "significant" mitigating factors which weigh against imposing a six-month **suspension** as too severe. The Hearing **23 Panel, therefore, recommended public **censure**.

The Committee, by petition dated May 20, 2003, now seeks an order confirming the findings of fact, conclusion of law and recommendations of public **censure** set forth in the report of the Hearing Panel.

Initially, we find that in view of the stipulated facts and the evidence presented, the Hearing Panel's findings of fact and *88 conclusions of law, in which counts three through six were sustained, should be confirmed. Moreover, while respondent's irresponsible and unprofessional conduct was aggravated by his failure to cooperate with the Committee, there was no finding, by either the Referee or the Hearing Panel, of venal intent which, coupled with significant factors in mitigation, including the aberrational nature of the incident, the lack of any **disciplinary** history and respondent's prior good reputation, leads us to conclude that the recommended sanction of public **censure** is appropriate.

Accordingly, the Committee's petition should be granted to the extent of confirming the findings of fact and conclusions of law of the Hearing Panel and the recommended sanction of public **censure**.

Respondent publicly **censured**.

All concur.

N.Y.A.D. 1 Dept.,2003.
In re Berger
1 A.D.3d 83, 767 N.Y.S.2d 19, 2003 N.Y. Slip Op. 18371

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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

LAURA D. BLACKBURNE,

a Justice of the Supreme Court,
Queens County.

- -

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Alan J. Pope, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg and Jennifer Tsai, Of Counsel)
for the Commission

Richard Godosky and David M. Godosky for the Respondent

The respondent, Laura D. Blackburne, a justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated August 5, 2004,

containing one charge. Respondent filed a verified answer dated September 10, 2004.

By Order dated September 14, 2004, the Commission designated Honorable Ernst H. Rosenberger as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 30 and December 1, 2004, in New York City. The referee filed a report on August 23, 2005.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended a sanction no greater than censure. On September 30, 2005, 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 Supreme Court, Queens County, since 2000. Prior to that, from 1996 through 1999, she served as a judge of the Civil Court of the City of New York.

2. On June 10, 2004, respondent was presiding over cases in the Drug Treatment Court, Queens County, where she had served for several months. There were approximately 25 cases on the calendar that day. One of the cases involved Derek Sterling, a defendant charged with selling drugs who had been enrolled in a treatment program since early 2003.

3. Treatment Court proceedings are available as an alternative to incarceration to defendants who are charged with a non-violent felony and have a history of addiction. In such proceedings in Queens County, the defendant pleads guilty to a

felony and sentencing is deferred while the defendant is enrolled in a treatment program; upon successful completion of the program, the plea is withdrawn and the charge is dismissed. The defendant is required to appear in court on a regular basis so that the treatment can be monitored.

4. On June 10, 2004, at around 10:00 A.M., Detective Leonard Devlin arrived at the courthouse for the purpose of arresting Mr. Sterling on charges of robbery and assault, unrelated to the case on respondent's calendar.

5. Detective Devlin told a court officer, Sergeant Richard Peterson, that he was there to question Mr. Sterling in connection with a robbery. As a result, the sergeant believed that the detective was going to take Mr. Sterling into custody. Sergeant Peterson referred the detective to Jeffrey Martinez, a representative from Treatment Alternatives for a Safer Community ("TASC"). Sergeant Peterson and Mr. Martinez explained to the detective that Mr. Sterling was in a residential treatment program in Queens and provided the location of the residence, which the detective wrote down. The assistant district attorney ("ADA"), Sharon Scott Brooking, was also notified.

6. Thereafter, the detective waited outside the public entrance to respondent's courtroom in order to arrest Mr. Sterling after his case was concluded. It was the accepted protocol that the police not arrest a defendant at the court until the calendar call of the defendant's case was finished.

7. Sergeant Peterson went to see respondent in chambers and informed her that a detective was in the courtroom to question Mr. Sterling in connection with a

robbery.

8. Respondent told Sergeant Peterson that the defendant's attorney had to be notified and that the detective should not discuss anything with Mr. Sterling until the defendant's attorney was present. A short while later, respondent told Sergeant Peterson to advise the detective that the defendant's attorney was coming and that the detective should not speak to the defendant.

9. Mr. Sterling's assigned counsel, Joseph Justiz, was unavailable; a substitute was contacted but was also unavailable; ultimately, Warren M. Silverman, a court-appointed 18-B attorney, was notified to appear on behalf of Mr. Sterling.

10. After the calendar call began, Mr. Sterling left the courtroom twice for brief periods and passed Detective Devlin, who was in the hallway.

11. Respondent told Sergeant Peterson to arrange for Mr. Silverman and Detective Devlin to speak together. When Mr. Silverman arrived, he spoke to Detective Devlin in the hallway. Mr. Silverman asked the detective if he wanted to speak to Mr. Sterling "as a subject or as a witness." The detective indicated "subject." Mr. Silverman informed the detective that Mr. Sterling declined to speak to the detective, was represented by counsel and should not be questioned without counsel. Mr. Silverman gave the detective his card. The detective replied, "Then he is going to the 106th," referring to his precinct. Mr. Silverman asked the detective if he intended to arrest Mr. Sterling, and the detective said "yes." Mr. Silverman asked what the charges concerned, and the detective declined to say. Mr. Silverman spoke briefly with the defendant.

12. In the courtroom, respondent called Mr. Silverman to a sidebar and had a private conversation with him. Mr. Silverman told respondent that the detective had indicated that he was going to arrest Mr. Sterling. Respondent asked what crimes would be charged, and Mr. Silverman said that the detective did not tell him that information. Respondent then said that she was going to have Mr. Sterling taken out of the courtroom and out of the building through a side entrance.

13. Respondent called Sergeant Peterson to the bench and directed him to take Mr. Sterling "out the back stairwell" at the end of the calendar call. The back area is a secure hallway used by judges, jurors and court staff, and has a stairwell that leads from the third floor to the first floor, to the judges' parking lot. Sergeant Peterson was "stunned" by the instruction and did not reply.

14. Sergeant Peterson was concerned because he felt he could get in trouble for either following or not following respondent's instruction. He discussed the matter with another court officer and with ADA Sharon Scott Brooking. The sergeant asked the ADA whether following respondent's direction would be considered an obstruction of justice.

15. Sergeant Peterson approached respondent again, stated that he was "uneasy" about her directive and asked respondent to speak to the ADA.

16. Respondent summoned ADA Scott Brooking to the bench. The prosecutor told respondent that taking the defendant out the back would not be appropriate and that defendants should be arrested at court, not at the treatment programs,

since defendants were encouraged to feel safe at the programs. Respondent responded that she was insulted that the detective, whose actual intention was to make an arrest, had entered the courtroom under the "ruse" of questioning Mr. Sterling.

17. On the record, in open court but outside the presence of the detective, respondent accused Detective Devlin of coming to court under the "ruse" of wanting to ask questions when, in fact, he intended to arrest the defendant. Out of anger, respondent ordered that Mr. Sterling be escorted out of the court through a private exit in order to avoid arrest. The record of the proceeding states as follows:

> THE COURT: Good afternoon, Mr. Silverman, and thanks again for standing up on behalf of Mr. Justiz.
>
> MR. SILVERMAN: My pleasure.
>
> MR. MARTINEZ: Your Honor, we have a good update from the program. He also tested negative for all substances at the TASC office.
>
> THE COURT: Mr. Sterling, I don't know what else is going on. That's why I asked Mr. Silverman to be here to represent you. I understand that there is a detective on the premises who has some reason to believe that he ought to arrest you. I'm not going into that. That's not before me at this time.
>
> It is my hope that, whatever the issue is, it's not something that's going to effect your ability to continue in this program.
>
> I have directed that you be escorted out of the building by Sgt. Peterson because I -- and I'm putting this on the record -- specifically, I resent the fact that a detective came to this court under the ruse of wanting to ask questions when, in fact he had it in his head that he wanted to arrest you. If there is a basis for him arresting you, he will have to present that in the form of a warrant.

And it may occur at your program. I'm not saying it won't. But what I am saying to you is that if you go back to your program and you do everything you are supposed to do at your program, if they appear with a legitimate warrant for your arrest then you follow that. I'm not trying to keep you from being arrested. I'm trying to keep you from being arrested today in my courtroom based on obvious misrepresentation on the part of the detective.

You have your opportunity to speak to Mr. Silverman and I'm sure Mr. Silverman will convey to Mr. Justiz what's going on so that you will be appropriately represented if you are, in fact, arrested at the program.

MR. SILVERMAN: Judge, if I may, for the record, I have spoken to the detective. I gave him my card and indicated to him that Mr. Sterling is represented by Mr. Justiz. I have spoken to Mr. Sterling and he has indicated that he is following my advice to adhere to his Fifth Amendment rights and not to speak to the police. And I've instructed the police detective should there be an arrest in the future that he is not to question Mr. Sterling in the absence of his attorney.

THE COURT: And, Mr. Sterling, that advice works as long as you keep your mouth shut. Once you start talking you are basically waiving your right to be represented by counsel.

All right. The next court date on this case for Mr. Sterling will be July 15th.

18. Respondent was annoyed and angry because she believed, based on the information presented to her, that Detective Devlin had given two different versions of his intentions. Respondent never saw Detective Devlin that day or questioned him about the matter. There is no indication in the record that Detective Devlin acted improperly.

19. When the proceeding ended, Sergeant Peterson approached

respondent, again related that he felt uneasy, and expressed his concern that her direction amounted to an obstruction of justice. Respondent interrupted him and, while starting to stand up at the bench, stated that he had been given a direction and that if he did not take Mr. Sterling out through the back exit, she would do it herself. Sergeant Peterson replied that he would do it. Sergeant Peterson concluded that he, rather than respondent, should escort the defendant since he did not want to compromise respondent's safety. Sergeant Peterson then escorted Mr. Sterling out the side doorway, through the secure hallway and stairwell, and out the door to the parking lot.

20. When Detective Devlin learned that Mr. Sterling had left through a back exit, he hurriedly left through the front door to try to locate him but was unable to do so.

21. After escorting Mr. Sterling from the courthouse, Sergeant Peterson went to the security office, where he met with his captain and informed him that he was going to prepare an "unusual occurrence report." Sergeant Peterson submitted several reports memorializing the event.

22. Mr. Sterling was arrested the following day at the treatment center and was taken into custody. Bail was set at $50,000. The charges against him were ultimately 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(C) and 100.3(B)(1) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to

Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Abdicating the proper role of a judge, respondent directed a court officer to escort a defendant out of the courthouse through a non-public, back stairway in order to elude a police detective who was waiting to effect a lawful arrest. In doing so, respondent inexplicably ignored several alarms that were raised by experienced court personnel, including the prosecutor and court officer, and persisted in directing the officer to comply with her improper order. Respondent's conduct not only compromised the safety of others, but severely damaged public confidence in her impartiality and ability to administer the law she is sworn to protect.

The salient facts, as set forth in the above findings, are largely uncontested; only respondent's motivation is in dispute. Having concluded that the detective had come to the court under a "ruse" of wanting only to question the defendant, respondent determined to thwart the arrest at the courthouse by arranging for the defendant to leave through a private exit with a court officer escort. While respondent asserts that she was motivated by a desire to protect the perception of the integrity and independence of the court from being tainted by the so-called "ruse," it seems clear that her hasty conclusion that the detective acted improperly was based upon secondhand information that was at best incomplete.

Although the detective apparently told a court officer that he wanted to

question the defendant, that officer and other court personnel readily understood that "question" meant "arrest." Respondent, without seeking to question the detective himself, concluded that a subterfuge had occurred. In any event, respondent's ill-conceived actions were entirely unjustified by the perceived "ruse," as she herself has conceded.

We agree with the conclusion of the referee, a respected former jurist, that respondent's actions arose out of anger and annoyance toward the police (Rep. 12). From the moment she learned that the police wanted to question the defendant, respondent made considerable efforts to protect the defendant's interests and to keep the detective away from him. She arranged for the defendant's lawyer to come to court, and she told the court officer to advise the detective not to speak to the defendant until the attorney arrived. Even after the attorney had arrived and advised the defendant of his rights, respondent admonished the defendant not to speak to the police without his attorney ("[k]eep your mouth shut"). Respondent's actions provide a context for her decision to have the defendant escorted out the back door of the courthouse (a decision she initially confided to the defendant's attorney in a private meeting at the bench).

It is ironic that after accusing the detective in open court of a "ruse," respondent employed a devious maneuver to whisk the defendant out of the courtroom and out of the detective's grasp. Her behavior not only violated her duty as a judge to act in a manner that reflects respect for the law she is duty-bound to uphold, but set a reprehensible example for court officers and other court personnel who were aware of

what she was doing. She also created an enormous conflict for the court officer under her command, who was understandably hesitant to comply with her directive, concerned that doing so might constitute an obstruction of justice. It is striking that respondent failed to recognize the impropriety of her directive, which was readily apparent to court personnel; it is more striking that even when the court officer and prosecutor expressed their concerns to respondent, she failed to reconsider her plan.

We are unpersuaded by respondent's contention that the special nature of the Treatment Court, where trust and accountability between the court and its "clients" are of paramount importance, in any way mitigates or explains her conduct. We are mindful of the unique dynamics of Treatment Court proceedings, its laudable goals and record of success (*see* Resp. Ex. C and D), and we note respondent's testimony that the court should be viewed as a "safe haven" by defendants (Ref. Ex. 1, p. 67). Nonetheless, we fail to see how public confidence in the court is advanced when a judge actively helps a defendant to avoid arrest by sneaking him out the back door. Respondent's behavior in this case far exceeded the norm of acceptable conduct by any judge in any court.

The repercussions of respondent's conduct were considerable. A suspect facing charges of robbery and assault was permitted to walk through a highly restricted area escorted by a single court officer, and then was allowed to avoid imminent arrest and remained at liberty for another 24 hours, until arrested by police. The fact that Mr. Sterling was ultimately arrested without incident, and that the charges against him were later dismissed, should not inure to respondent's credit; despite her testimony that she

"fully expected" that Mr. Sterling would return to the treatment center (Tr. 168), she obviously had no way of knowing what would occur once he left the court. The incident itself, which understandably became widely known throughout the courthouse, brought the judiciary into disrepute.

Not until respondent learned later that day that her actions had created a "hullabaloo" throughout the courthouse did she recognize that her conduct was improper (Oral argument, p. 58). Although respondent has expressed regret and remorse for her actions, we note that the referee, after hearing her testimony, concluded that respondent lacked forthrightness at the hearing and sought to minimize her responsibility (Rep. 7). Moreover, as the Court of Appeals has stated with respect to contrition, in some instances "no amount of it will override inexcusable conduct." *Matter of Bauer*, 3 NY3d 158, 165 (2004).

As reflected by respondent's admission of wrongdoing and her request for a disciplinary sanction no greater than censure, it is apparent that the sole issue is whether respondent's misconduct was so egregious that the ultimate sanction of removal is warranted. We conclude that respondent's behavior was such a gross deviation from the proper role of a judge that it justifies the sanction of removal, notwithstanding her lengthy career of public service, her previously unblemished record on the bench, and the testimony of distinguished witnesses, including public officials and members of the judiciary, as to her character and reputation. Comparable conduct by an attorney, court staff or any officer of the court would certainly subject the individual to the severest

sanctions. For a judge, whose enormous powers and commensurate responsibilities require the judge to be held to the highest standards of behavior, it is simply intolerable.

We recognize that removal is not normally to be imposed for conduct that amounts to poor judgment, even extremely poor judgment. *Matter of Sims v. Comm. on Judicial Conduct*, 61 NY2d 349, 356 (1984); *Matter of Shilling v. Comm. on Judicial Conduct*, 51 NY2d 397, 403 (1980). This is especially so where, as in this case, the conduct was not venal or abusive but rather consists of a single episode of aberrant behavior.

We believe that respondent's conduct was not simply an egregious error in judgment, but an act that transcended the boundaries of acceptable judicial behavior. She placed herself above the law she is sworn to uphold and abused the power of her office, utilizing court personnel and court facilities to accomplish her goal of thwarting a lawful arrest. We need not determine whether her conduct was unlawful (*see* Penal Law §195.00 [Official Misconduct]; §195.05 [Obstructing Governmental Administration]; §205.50 [Hindering Prosecution]) since, manifestly, behavior that even raises such questions is inconsistent with the role of a judge and brings the judiciary into disrepute. *See, Matter of Backal v. Comm. on Judicial Conduct*, 87 NY2d 1 (1995); *Matter of Gibbons v. Comm. on Judicial Conduct*, 98 NY2d 448 (2002). Difficult as it may be to impose a sanction that marks the end of any judicial career, we conclude that the sanction of removal is appropriate.

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

Mr. Goldman, Ms. DiPirro, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Emery dissent only as to the sanction and vote that the appropriate sanction is censure.

Mr. Pope was not present.

CERTIFICATION

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

Dated: November 18, 2005

Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

LAURA D. BLACKBURNE,

a Justice of the Supreme Court,
Queens County.

CONCURRING OPINION
BY MS. HERNANDEZ,
IN WHICH JUDGE
PETERS JOINS

- -

I concur that respondent's serious misconduct warrants a severe sanction. It is a judge's responsibility to abide by proper procedures, to follow the law the judge is sworn to administer, and to respect the roles of others involved in the administration of justice in our system. Respondent clearly violated those standards.

In concluding that removal, rather than censure, is the appropriate sanction, I have considered several factors. Respondent placed herself above the law and failed to respect the roles of others within the framework of our justice system. She obstructed the detective from performing his duty, which was to make a lawful arrest at the court. She placed the court officer who was under her command in an awkward position by directing that he take the defendant out through the judges' private entrance, thus causing him to be deeply concerned that following her directive might constitute a crime. Her total lack of consideration in that regard is unacceptable.

In addition, it is incomprehensible to me that respondent ignored the concerns expressed by experienced court personnel, including the prosecutor and court officer. I find it inexplicable that when the court officer told her, in two separate conversations, that he was uneasy about her directive and even said that he was concerned about whether it would be an obstruction of justice, she did not think to reconsider her decision.

On a personal level, the decision to remove respondent is extremely difficult, especially in light of her long career of public service and her unblemished record as a judge. I take into consideration that respondent has been a role model for women of color. I also believe that respondent was genuinely trying to protect the interests of a defendant who, as she testified, she "believed at the time needed protecting" (Ref. Ex. 1, p. 67). However, it is clear to me that in doing so, she crossed over the line and became not just the defendant's advocate, but an adversary of the police. That is completely inconsistent with the role of a judge in our system of justice.

Accordingly, I respectfully concur that respondent should be removed.

Dated: November 18, 2005

Christina Hernandez

Christina Hernandez, M.S.W., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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- -

DISSENTING OPINION
BY MR. COFFEY

The decision reached by the majority in this matter is unprecedented and I believe unwarranted. The mistake made by the respondent, while wrong and while sanctionable, was in all respects a classic case of an error of judgment, which we as a Commission historically have been very cautious in criticizing. For a single error of judgment, in the absence of a breach of trust, to result in removal from office is unduly harsh.

It is indisputable that the respondent's action was based on what she in part felt was a ruse perpetrated by an arresting officer. While this does not condone her action, it should not be the basis of removal from office. Unfortunately, the majority does so even though the respondent acted in her official capacity in open court, has an absolutely unblemished judicial record, has a character so exemplary that an impressive array of witnesses testified in her defense, and acted with no malice, with no hope of personal

gain, and not out of any personal vindictiveness. While her decision was admittedly wrong, the record reflects that her motive, in large part, was essentially to protect what she perceived to be the rights of the defendant. In addition, within hours of her order, she recognized her mistake, and long before she was charged by the Commission with misconduct, freely acknowledged her culpability, a position which she has consistently and persistently adhered to throughout this entire process.

I recognize the concerns of the majority and acknowledge the gravity of the respondent's error. But our goal in establishing an appropriate punishment for an offense is to examine the entire constellation of factors and circumstances in a case while searching for a just result. Even though the majority views her act as egregious, it does not, at least in my view, pay proper deference to the actor herself. This is particularly unfortunate since, in the ten years that I have served on this Commission, I cannot recall a single instance where we have voted to remove another judge who made a basic error in judgment and who has come before us with the extensive and compelling mitigating factors that are present in this record.

I do not find the respondent unfit, unethical, or lacking in judicial temperament. Rather, under the circumstances, I find her merely human. As I result, I respectfully dissent.

Dated: November 18, 2005

Stephen R. Coffey, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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Pursuant to Section 44, subdivision 4,
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Queens County.

- -

DISSENTING OPINION
BY MR. EMERY

The removal of Justice Laura Blackburne[1] is both unprecedented and unfair. It is unprecedented because, until this case, neither this Commission nor the Court of Appeals has ever removed a judge based on a single event of misconduct, no matter how egregious, unless the misconduct was based upon breach of trust, venal conduct, moral turpitude or personal gain for the judge. It is unfair because this Commission is imposing career capital punishment upon an experienced, highly-respected and accomplished jurist, with an unblemished disciplinary history, who, indisputably, is unlikely to engage in this type of misconduct again.

[1] Justice Blackburne was a member of the board of the New York Civil Liberties Union where I was employed during the mid-1980s. I have never had any personal contact with her and my professional contact was limited to observing her as board member. When I informed the Commission, staff and respondent's counsel of these facts, there was no objection to my participation. I have independently concluded that there is no reason to recuse myself.

I

A survey of the applicable precedent makes the first point. As the Commission's majority decision accurately states:

> [R]emoval is not normally to be imposed for conduct that amounts to poor judgment, even extremely poor judgment. (Citations omitted). This is especially so where, as in this case, the conduct was not venal or abusive but rather consists of a single episode of aberrant behavior. (Majority decision, pp. 12-13)

This description of the applicable law reflects the heretofore unwavering holdings of both the Commission and the Court of Appeals. I do not see any basis in this record or in the majority decision to deviate from these principles in this case.

The Commission staff in urging respondent's removal relies virtually exclusively on *Matter of Gibbons*, 98 NY2d 448 (2002), in which a judge issued a search warrant and then immediately told his ex-boss at his ex-law firm that an ex-client was about to be searched. But for the restraint of the judge's ex-boss, this warning would have allowed the ex-client to avoid the surprise appropriate for a search pursuant to a warrant. Moreover, the judge made numerous attempts to reach his former boss, and each such occasion was an act of misconduct. Commission counsel characterizes *Gibbons* as the equivalent of Justice Blackburne's misconduct—facilitating the ability of a defendant to avoid arrest in drug court because she was angry at the arresting officer—based on the assertion, accepted in *Gibbons*, that the judge was motivated by his anger at his former client, rather than venal intent.

But it is plain that *Gibbons* is quite different. In *Gibbons*, the judge was, at a minimum, engaging in an inappropriate relationship with his former firm, no matter what his motivation. Moreover, the appearance was that he was currying favor with his ex-colleagues. The Court of Appeals aptly described Gibbons' conduct in contacting his ex-law firm as a "serious breach of trust" (*Id.* at 450). In this case, there is no contention, nor is there even an appearance, that respondent had any special relationship with anyone, or was motivated by personal gain or favoritism.

Had Justice Blackburne had a relationship with the defendant, other than as a litigant before her, I would unhesitatingly vote for her removal. Rather, her misconduct was a serious misjudgment motivated by her angry reaction to a police officer who she believed had attempted to deceive her. Additionally, Justice Blackburne had a misconceived, but good faith, view of the best way to maintain the trust between the judge and the defendant which she viewed as critical to the success of her specialized Drug Treatment Court, namely, to delay the arrest she felt was a product of the detective's ruse (*See* Majority decision, pp. 9-10). Finally, Justice Blackburne's on-the-record explanation for her actions (Majority decision, pp. 6-7) demonstrates her good faith beyond cavil. Respondent plainly acted openly and forthrightly in pursuing her misguided course of action. Thus, unlike *Gibbons*, Justice Blackburne's misconduct was a serious misjudgment that cannot fairly be characterized as a "serious breach of trust." She was, in fact, attempting to uphold the "trust" reposited in her office.

In order to support her removal, the Commission is, therefore, forced to adopt the unprecedented position that Justice Blackburne's misconduct, absent any

breach of trust, inappropriate relationship or advantage to her, is so "egregious" that neither her good faith nor mitigating circumstances will be considered. In the majority's view, her conduct "transcended the boundaries of acceptable judicial behavior" (Majority decision, p. 13). Notably, during the argument before the Commission, staff counsel refused to answer the hypothetical question of whether it would be appropriate to remove the judge if she had reasonably believed that the police officer was about to beat the defendant (Oral argument, p.12). As I view the majority decision, it relies on a similarly ostrich-like position.

While I agree in the abstract that certain extreme misconduct may be so "egregious" as to warrant removal notwithstanding a judge's good faith intent, the Commission and Court of Appeals precedents make clear that this is not such a case. The facts in *Blackburne* are undisputed: the judge's motive was a selfless attempt to uphold the "legal system [s]he was duty-bound to protect and administer" (*Matter of Gibbons, supra* at 450) even if her attempt betrayed "extremely poor judgment." Given that the Court's basic command to us is that removal "is not normally to be imposed for poor judgment, even extremely poor judgment" (*Matter of Sims v. Comm. on Judicial Conduct*, 61 NY2d 349, 356 [1984]), a review of the applicable single-incident misconduct cases plainly demonstrates that removal is not proper in this case.

The Commission and the Court of Appeals have imposed removal based on a single incident when there has been some aspect of the conduct that was, or appeared to be, venal. *Matter of Molnar*, 1989 Annual Report 115 (sexual favor solicited); *Matter of Scacchetti*, 56 NY2d 980 (1982) (bribe solicited); *Matter of Reedy*, 64 NY2d 299 (1985)

(attempt to fix son's ticket by a judge with a prior history of misconduct); *Matter of Levine*, 74 NY2d 294 (1989) (*ex parte* promise to political leader to adjourn a case and lying to the FBI); *Matter of Heburn*, 84 NY2d 168 (1994) (falsely subscribed designating petitions); *Matter of Benjamin*, 77 NY2d 296 (1991) (sexual assault); *Matter of Stiggins*, 2001 Annual Report 123 (conviction for abuse of an incompetent person); *Matter of Westcott*, 2004 Annual Report 160 (conviction for sexual relations with a mentally disabled person); *Matter of Brownell*, 2005 Annual Report 129 (issuing a court check to pay a judgment after mishandling the case). Similarly, we have not tolerated overt racism. *Matter of Bloodgood*, 1982 Annual Report 69 (reference to a Jewish defendant as "kikie" in a letter on court stationery); *Matter of Cerbone*, 61 NY2d 93 (1984) (racial epithets threatening African-Americans if they ever appeared in judge's court). Finally, in a context arguably not properly characterized as a single incident, we have found abandonment of judicial duties to be cause for removal. *Matter of Fiore*, 2006 Annual Report __ (judge left for a job in Iraq). Thus, along with *Matter of Gibbons*, this is the sum total of the single-incident removal cases that I have found.

By contrast, there are at least three cases in which we have censured, rather than removed, judges for single-incident misconduct that was more egregious than that of Justice Blackburne. In *Matter of Friess*, 1982 Annual Report 109, a highly publicized case, the judge released a murder defendant into his own custody, took her to his home overnight (although with no ulterior sexual motive) and provided her with counsel for a subsequent court appearance. The Commission stated that Judge Friess "exhibited extraordinarily poor judgment and a serious misunderstanding of the role of a judge in

our legal system...diminish[ing] public confidence [and] bring[ing] the judiciary into disrepute." In that case, the Commission concluded that the judge's "capacity to serve and regain public confidence had not been irreparably harmed."

In *Matter of Mills*, 2005 Annual Report 185, a majority of the Commission censured a judge who held an acquitted, unrepresented defendant in an isolation cell for five days, during which he doctored his contempt order to cover up the illegal basis for the punishment. In addition, in another incident before the Commission at the same time, Judge Mills jailed a litigant's father after the judge overheard him use an expletive in a courthouse parking lot. Notwithstanding the Commission's characterization of Mills' misconduct as a "travesty of justice," he remains a judge to this day.

Finally, the result in *Matter of Dusen,* 2005 Annual Report 155, is particularly instructive. In *Dusen* we censured the judge after he arranged the release of an incarcerated defendant by knowingly issuing an illegal court order and fabricating a conviction in order to facilitate his deportation. Dusen's misuse of his judicial authority to pervert the result in a particular case in order to accomplish what the judge believed was the best outcome was, in my view, a "serious breach of trust" and abuse of authority more "egregious" than that engaged in by Justice Blackburne.

Dusen raises the question of what Justice Blackburne's sanction would have been if she had facilitated an illegal arrest rather than frustrated a proper arrest. Apparently, the majority's view is that frustrating a proper arrest is more "egregious" than facilitating an illegal conviction and deportation. This stands logic on its head, for

the consequences to the deported defendant are so profound compared with the short delay of a proper arrest.

In the end, the essential point is that before this case, neither this Commission nor the Court of Appeals has ever removed a judge in a single-incident misconduct case for acts that were not venal or did not constitute a "serious breach of trust." Justice Blackburne's misconduct was neither; rather, it was a misguided attempt to protect the sanctity of her court and uphold her oath of office.

II

Removal of Justice Blackburne is also unfair for an additional reason: she has had a lengthy career of public service and a ten year career as a jurist marred only by her "aberrant" misjudgment in this case (Majority decision, p. 13).

Given that the Court of Appeals directs the Commission to mete out discipline "not [as] punishment but ... to safeguard the Bench from unfit incumbents" (*Matter of Reeves*, 63 NY2d 105, 111 [1984], citing *Matter of Waltemade*, 37 NY2d [a],[111]), it is error to remove Justice Blackburne based on this single incident of misconduct that is unlikely to be repeated.

Respondent's accomplished career as a judge and the testimony of seven eminent witnesses at respondent's hearing make it unequivocally clear that Justice Blackburne is the furthest thing from an "unfit incumbent." Not only has she served as a judge with an unblemished disciplinary record since 1995, but she has also continued to serve without incident since June 2004, when this misconduct occurred.

Particularly impressive to me is the list of those who testified on her behalf—John Carro, Basil Paterson, Milton Mollen, Seymour Boyers, Steven Fisher, David Dinkins and Charles Rangel. Each of these people has known respondent for years. Several served with her on boards; Justice Fisher is one of her supervisors and selected her for the Drug Treatment Court; Mayor Dinkins appointed her to chair the New York City Housing Authority; and Justice Mollen appointed her to the Second Department Committee on Character and Fitness. Particularly notable is the fact that Justice Fisher urges her retention even after this misconduct, when it was he who entrusted her with the Drug Treatment Court assignment.

This is no ordinary collection of character witnesses. None of these eminent and accomplished jurists and leaders would vouch for Justice Blackburne in the face of her clear misconduct unless each believed it was aberrant and that it was in the public interest for her to remain on the bench. Loyalty or personal relationship, in my view, could not distort the recommendations and predictions of any of these esteemed witnesses.

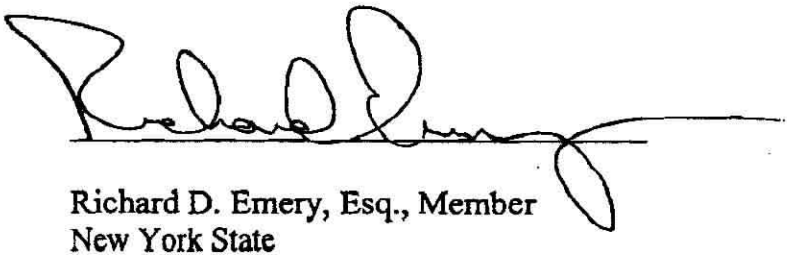
Finally, of utmost importance to the proper result in this case is the undisputed prognostication that Justice Blackburne will not engage in this type of behavior again: the majority concedes that respondent's behavior was "aberrant" (Majority decision, p. 13) and Commission counsel concedes that her behavior is unlikely to be repeated (Oral argument, p. 69). In my view, these concessions, along with the assessments of the eminent character witnesses and the evidence of Justice Blackburne's accomplishments and continuing service, render the majority's sanction a violation of our

mandate to limit removal to "unfit incumbents" (*Matter of Reeves, supra*). Plainly, Justice Blackburne's distinguished career does not have to be extinguished to protect the public or the judiciary in the future.

No doubt the majority's decision is driven by its understandable sense of outrage at the shocking nature of Justice Blackburne's aberrant action. But this is just the sort of case where, because her actions were aberrant, we are mandated to consider more factors than the misconduct alone. This is a case where all the circumstances relating to the misconduct, as well as a judge's past and likely future contributions, should bear on the sanction decision. Justice Blackburne has made significant contributions and has much more to contribute. Regrettably, the majority's choice to exclude these crucial factors in the analysis is both legally and equitably wrong.

For these reasons, I dissent and vote to censure Justice Blackburne.

Dated: November 18, 2005



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

34 A.D.3d 25, 821 N.Y.S.2d 113, 2006 N.Y. Slip Op. 06413

**1 In the Matter of Kevin R. Gorry, a Suspended Attorney, Respondent.
Grievance Committee for the Tenth Judicial District, Petitioner

Supreme Court, Appellate Division, Second Department, New York
2005-01856
September 12, 2006

CITE TITLE AS: Matter of Gorry

SUMMARY

Disciplinary proceedings instituted by the Grievance Committee for the Tenth Judicial District. Respondent was admitted to the bar on July 22, 1987 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department. By decision and order on motion dated June 3, 2005, the respondent was immediately suspended from the practice of law as a result of his conviction of a serious crime pursuant to Judiciary Law § 90 (4) (f), the Grievance Committee for the Tenth Judicial District was authorized to institute and prosecute a disciplinary proceeding against him, and the issues raised were referred to the Honorable Lawrence J. Bracken, as Special Referee, to hear and report. By decision and order on motion dated June 29, 2005, the respondent's motion to stay enforcement of the June 3, 2005, decision and order on motion was granted to the extent that the effective date of the suspension was extended up to and including July 22, 2005, and the motion was otherwise denied.

HEADNOTE

Attorney and Client
Disciplinary Proceedings

Respondent attorney, who was convicted of the misdemeanor of criminal facilitation in the fourth degree, a serious crime within the meaning of Judiciary Law § 90 (4) (d), arising from his representation of a client in real estate transactions, was guilty of professional misconduct. Notwithstanding evidence presented in mitigation, including respondent's lack of prior disciplinary history, his initial lack of knowledge of the fraudulent scheme, the absence of profit to himself, his cooperation with authorities, the severe medical issues which beset his family and character evidence presented on his behalf, respondent knowingly provided the opportunity for others to commit a felony, and he was suspended from the practice of law for a period of two years.

RESEARCH REFERENCES

Am Jur 2d, Attorneys at Law §§ 38, 88, 93, 114.

Carmody-Wait 2d, Officers of Court §§ 3:245, 3:277, 3:279, 3:280, 3:282, 3:287.

McKinney's, Judiciary Law § 90 (4) (d).

NY Jur 2d, Attorneys at Law §§ 323, 400, 401, 403, 405, 408.

*26 ANNOTATION REFERENCE

See ALR Index under Attorney or Assistance of Attorney; Discipline and Disciplinary Actions.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: suspended & criminal /2 facilitation /3 fourth & falsify! /4 record

APPEARANCES OF COUNSEL

Rita E. Adler, Hauppauge (*Michael J. Kearse* of counsel), for petitioner.

OPINION OF THE COURT

Per Curiam.

The petitioner served the respondent with a petition containing two charges of professional misconduct. After a pretrial conference on July 27, 2005, and a hearing on November 3, 2005, the Special Referee sustained both charges. The petitioner moves to confirm the Special Referee's report and to impose such discipline upon the respondent the Court may deem just and proper. The respondent has neither cross-moved nor requested additional time in which to do so.

Charge One alleges that respondent has been convicted of a serious crime within the meaning of Judiciary Law § 90 (4) (d) and 22 NYCRR 691.7 (b). **2

On or about December 12, 2000, the respondent was arrested on felony complaint No. 2000 NY 110959, filed in the Criminal Court, New York County. The complaint contained three counts of the class E felony of falsifying business records in the first degree, in violation of Penal Law § 175.10.

On or about April 20, 2004, the respondent pleaded guilty before Judge Judith Levitt to the reduced charge of criminal facilitation in the fourth degree, a class A misdemeanor, and was immediately sentenced to a conditional discharge.

Charge Two alleges that the respondent engaged in conduct adversely reflecting upon his fitness to practice law, in violation of Code of Professional Responsibility DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]), based on the allegations set forth in Charge One.

The parties entered into a stipulation agreeing that the facts are not in dispute, including the following:

> "On April 20, 2004, during his plea allocution, respondent *27 stated that in January and February 1999, on three separate occasions, he was the attorney for a not-for-profit corporation which was the putative purchaser of three separate parcels of real property in New York County.
>
> "Respondent stated further in his plea allocution that he was aware that at each of those real estate closings, checks tendered by the buyer were in fact purchased with money from the seller and that by allowing the closings to proceed respondent provided his client, and others, the means and opportunity to commit a felony, namely falsifying business records in the first degree, and that he realized that, in fact, a felony was committed by his client and other participants in those closings."

Based on the uncontroverted evidence of the respondent's conviction and his admissions of liability, the Special Referee properly sustained both charges of professional misconduct. The petitioner's motion to confirm the Special Referee's report is granted.

In determining an appropriate measure of discipline to impose, the petitioner is unaware of any prior discipline imposed upon the respondent as an attorney. In addition to his own testimony in mitigation, including his initial lack of knowledge of the fraudulent scheme, the absence of profit to himself, his total cooperation with authorities, and the severe medical issues which beset his family, the respondent presented a wealth of character evidence. The universal sentiment expressed through the testimony and letters of both personal and professional acquaintances is one of confidence in the respondent's integrity and abilities.

Notwithstanding the mitigation advanced by the respondent, he was convicted of a misdemeanor which constitutes a serious crime. It is undisputed that he knowingly provided the opportunity for others to commit a felony.

Under the totality of circumstances, the respondent is suspended from the practice of law for a period of two years, with credit for time elapsed under the period of his interim suspension, which effectively commenced on July 22, 2005.

Prudenti, P.J., Florio, Miller, Schmidt and Goldstein, JJ., concur.

Ordered that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further, **3

*28 Ordered that the respondent, Kevin R. Gorry, is suspended from the practice of law for a period of two years, commencing immediately, with credit for time elapsed under the interim suspension imposed by order of this Court dated June 3, 2005, and continuing until the further order of this Court, with leave to the respondent to apply for reinstatement no sooner than six months before the expiration of that period upon furnishing satisfactory proof that during the said period he (a) refrained from practicing or attempting to practice law, (b) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), (c) complied with the continuing legal education requirements of 22 NYCRR 691.11 (c) (2), and (d) otherwise properly conducted himself; and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent, Kevin R. Gorry, shall continue to desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that if Kevin R. Gorry has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and Kevin R. Gorry shall certify to the same in his affidavit of compliance, pursuant to 22 NYCRR 691.10 (f).

96 N.Y.2d 7
Court of Appeals of New York.

In the Matter of James H. SHAW, Jr., a Justice of the Supreme Court, Second Judicial District, Kings County, Petitioner. State Commission on Judicial Conduct, Respondent.

Feb. 20, 2001.

Synopsis

Judge petitioned for review of determination by State Commission on Judicial Conduct that he be censured. The Court of Appeals held that evidence supported finding of misconduct.

Determination accepted.

Rosenblatt, J., concurred and filed opinion.

Smith, J., dissented and filed opinion.

Attorneys and Law Firms

***673 *8 **1273 Emery Cuti Brinckerhoff & Abady, P.C., New York City (Richard D. Emery and Ilann M. Maazel of counsel), for petitioner.

Robert H. Tembeckjian, New York City, and Gerald Stern for *9 respondent.

OPINION OF THE COURT

PER CURIAM.

Petitioner, a Justice of the Supreme Court, Kings County, seeks review of a determination of the State Commission on Judicial Conduct sustaining one of two charges of misconduct against him and censuring him (N.Y. Const., art. VI, § 22; Judiciary Law § 44). The Commission determined that petitioner failed to maintain standards of conduct so as to preserve the integrity of the judiciary (22 NYCRR 100.1); failed to avoid impropriety and the appearance of impropriety and to conduct himself at all times in a manner that promotes public confidence in the integrity of the judiciary (22 NYCRR 100.2); and failed to be patient, dignified and courteous with individuals with whom he dealt in an official capacity (22 NYCRR 100.3[B] [3]).

After an evidentiary hearing, submissions by the parties and oral argument, the Commission determined that petitioner engaged in "inappropriate and demeaning" conduct toward his secretary, Jacqueline Bland. Specifically, the Commission concluded that petitioner made numerous comments to Bland of a sexual nature, repeatedly touched her without her invitation or consent and, on one occasion, pulled her onto his lap and kissed her mouth without her invitation or consent. The Commission determined that because petitioner was 76 years old and was leaving office at the end of 1999, he should be censured rather than removed from office.

Petitioner maintains that Bland, with the aid of her friend and co-worker, Caroline Rucker, fabricated the allegations against him after he reprimanded her for poor work habits. He asserts that the Commission ignored both the testimony of his law clerk and 14 character witnesses. Moreover, petitioner argues that the Referee improperly allowed Bland to testify that she had told

"many other people" about petitioner's harassment without requiring her to identify and produce those people to corroborate her story. Pursuant to our plenary review of the record, and upon our evaluation of the ***10** Commission's findings and conclusions, we hold that charge I was established by evidence in the record and petitioner's misconduct warrants censure.

Bland testified that on numerous occasions during her employment, petitioner made inappropriate remarks to her about her physical appearance, focusing on certain physical attributes and the way her clothing fit. In addition, petitioner also asked her details about her sex life with ****1274** her husband and, after her divorce, told her she "should be dating, I should be seeing other men, that I should be having sex, and I should be having sex with him."

Bland also testified that petitioner inappropriately touched her numerous times *****674** without her consent. She testified that just prior to Thanksgiving 1985, petitioner

> "told me to come into his chambers and he wanted to show me something, and to come around over his shoulder. * * * [H]e pulled me on his lap and he said that I should be * * * comfortable, that I spend a majority of my time here, and then he kissed me and he put his tongue in my mouth."

Part of Bland's testimony was corroborated by Rucker, who reported certain inappropriate comments regarding Bland's physical attributes made by petitioner when she, Bland and petitioner were looking at Bland's wedding photographs.

Petitioner, testifying on his own behalf, denied the allegations, stating that they were false and in retaliation for his having disciplined Bland. Petitioner's law clerk also testified that during the eight years he worked in petitioner's chambers he never saw Bland emerge from petitioner's office upset or angry, except on the one occasion in which she was disciplined. Finally, 14 character witnesses—many of whom were women who worked with petitioner—took the stand and testified as to petitioner's strong moral character and excellent reputation in the court system.

The Referee determined that Bland was telling the truth and that petitioner was not. The Commission adopted the Referee's credibility determination and we find no basis to disturb it (*see, Matter of Mulroy,* 94 N.Y.2d 652, 656, 709 N.Y.S.2d 464, 731 N.E.2d 120; *Matter of Assini,* 94 N.Y.2d 26, 29, 698 N.Y.S.2d 605, 720 N.E.2d 882).

On February 21, 2000, approximately three and a half months after the Commission made its determination, petitioner ***11** moved to "renew/reconsider" it.[1] He based his application on an affidavit from a woman named Shelley Williams dated January 14, 2000. Williams, a former roommate of Rucker, averred that, prior to testifying before the Referee, Rucker told her that she (Rucker) and Bland planned to lodge false accusations against petitioner. On March 7, 2000, the Commission's Deputy Counsel interviewed Williams on the record with Williams' counsel present. Deputy Counsel then opposed petitioner's motion asserting that Williams was not a credible witness as she had lied numerous times in the past. Deputy Counsel included Rucker's March 12 affidavit, in which she denied Williams' allegations. Rucker averred that she and Williams had been friends but, for reasons unrelated to this case, enmity developed between them and Williams had vowed to "get" Rucker.

Deputy Counsel also furnished the Commission with a transcript of his interview with Williams. That transcript is filled with repeated admissions, after recesses in which Williams consulted with her attorney, that earlier deposition testimony was false. It includes a bold assertion that Williams was associated with a "hit man" and that Rucker had sought Williams' assistance in arranging for the murder of Rucker's husband and another Judge.

In light of Williams' bizarre and inconsistent testimony, the Commission, not surprisingly, determined on April 6, 2000 that the new evidence did "not create a reasonable possibility or a probability that [the] Determination would be altered." ****1275** Petitioner sought review of that determination before this Court. By decision dated June 20, 2000, we unanimously dismissed, *sua sponte,* the request for review on the ground that

> "the Court of Appeals does not have jurisdiction to entertain a request for review of such a determination (*see,* *****675** *Matter of Lenney,* 70 N.Y.2d 863 [523 N.Y.S.2d 492, 518 N.E.2d 4]; NY Const, art VI, § 22; Judiciary Law § 44)" (*Matter of Shaw,* 95 N.Y.2d 823, 712 N.Y.S.2d 907, 734 N.E.2d 1208).

On the review of the determination before us, petitioner now asks that we remand the case to the Commission, arguing **12 again that Williams' newly discovered exculpatory testimony should be heard firsthand by the Referee or the Commission.[2]

The New York State Constitution, Judiciary Law, and our precedents lead to the inescapable conclusion that this Court is limited to reviewing the Commission's determination of censure on the record as it was before the Commission at the time of the original determination. As the June 20, 2000 dismissal reflects, the reconsideration determination is nonreviewable. Thus, the additional evidence sought to be introduced on reconsideration *cannot* now be considered by this Court in its review of the original determination.

Article VI, § 22(a) and (d) of the New York State Constitution mandates the conclusion of limited review. Subdivision (a) states that "[t]he commission on judicial conduct shall * * * investigate and hear complaints * * * and, in accordance with subdivision d of this section, *may determine that a judge or justice be admonished, censured or removed* * * * The commission shall transmit *any such* determination to the chief judge of the court of appeals * * *. Such judge or justice may either accept the commission's determination or make written request * * * for a review of *such determination* " (emphasis added). Subdivision (d) provides that "[i]n reviewing a determination of the commission * * * the court of appeals may admonish, censure, remove or retire * * * any judge * * *. In reviewing a determination of the commission * * * the court of appeals *shall review* the commission's findings of fact and conclusions of law *on the record of the proceedings upon which the commission's determination was based* " (emphasis added).

The Judiciary Law mirrors these limited review provisions. Section 44(1) provides that the "commission * * * may determine that a judge be admonished, censured or removed." Section 44(7) states that "[a]fter a hearing, the commission may determine that a judge be admonished, censured, removed or retired. The commission shall transmit *its written determination,* together with its findings of fact and conclusions of law *and the record of the proceedings upon which its determination is based,* to the chief judge of the court of appeals." (Emphasis added.) Section 44(9) reiterates that "[i]n its review of a determination of the commission, the court of appeals *shall review* the commission's findings of fact and conclusions of law *on the* **13 *record of the proceedings upon which the commission's determination was based.* After *such review,* the court may accept or reject the determined sanction." (Emphasis added.)

The references in the Constitution and the Judiciary Law to the word "determination" consistently refer to an original determination of admonishment, censure or removal by the Commission. The language is crystal clear that this Court is **1276 only empowered to review an admonishment, censure or removal determination. The phrase "on the record of the proceedings upon which the commission's determination was based" unequivocally refers to the record as compiled before the Commission in connection with the initial sanction determination.[3]

***676 Nothing in these provisions confers on this Court jurisdiction to entertain appeals from, or otherwise review, any other orders (such as a denial of a motion to renew or reconsider) issued by the Commission. Our precedents clearly support this view (*see, Matter of LaBelle,* 79 N.Y.2d 350, 357, n. 2, 582 N.Y.S.2d 970, 591 N.E.2d 1156; *Matter of Lenney,* 70 N.Y.2d 863, 523 N.Y.S.2d 492, 518 N.E.2d 4).

The parties did gratuitously include the motion papers and the transcript of Williams' deposition in the record for review of the Commission's *original* determination. That act, however, does not abrogate our earlier jurisdictional decision, nor does it somehow expand the basis for the Commission's original determination. The Constitution limits our subject matter jurisdiction in this regard; the parties are without authority to stipulate to bring the facts and circumstances of the reconsideration denial before us (*see, e.g., Robinson v. Oceanic Steam Nav. Co.,* 112 N.Y. 315, 324, 19 N.E. 625). The dissent would ignore the determination of a court or quasi-judicial body presented with a motion to reconsider to reject the "newly discovered evidence" (*see, e.g.,* CPL 440.30[2], [4]; CPLR 5015[a] [2]). Under the dissent's analysis, simply *considering* the motion and its supporting affidavits makes the new "evidence" part of the original determination.

In essence, the dissenter is faced with an insurmountable dilemma arising out of the constitutional and statutory limitations on our powers in this proceeding—solely to review the Commission's determination of guilt and sanction—as this Court recognized in its unanimous dismissal of petitioner's prior review request. The nebulous due process claim petitioner ***14** asserts here is indistinguishable from that asserted in the prior motion. There we correctly recognized our jurisdictional restrictions, and the dissent does not explain what has changed to enlarge our powers to review and change the Commission's disposition of a motion to reconsider in the present procedural posture of this matter.

Accordingly, the determined sanction should be accepted, without costs.

ROSENBLATT, J. (concurring).

I am constrained to agree that this Court lacks jurisdiction to review the import of the newly discovered evidence that Justice Shaw presented to the Commission. I write separately to express my concern with a process in which newly discovered allegations of perjury were never heard firsthand by a neutral arbiter.

This is no ordinary case. The Commission's original censure determination was based entirely on the testimony of Jacqueline Bland and Caroline Rucker, each of whom alleged that Justice Shaw engaged in sexual harassment. While review of the censure determination was pending before us, Shelley Williams told Justice Shaw that Rucker admitted to having fabricated the charges along with Bland.

Based on Williams' affidavit, Justice Shaw moved the Commission for reconsideration. As part of his motion he requested ****1277** that a neutral party (the Referee or the Commission itself) conduct a hearing to evaluate Williams' testimony firsthand before rendering a decision. With no one except Williams' attorney present, Commission Counsel—the prosecutorial arm of the Commission—interviewed Williams on the record. He compellingly impeached Williams' credibility as to various collateral matters. He did not, however, disprove her central allegation—that Justice Shaw had been framed and that the testimony against him was perjured.

*****677** Arguing that Williams was not credible, Commission Counsel thereafter opposed Justice Shaw's motion to reconsider. He submitted an affidavit by Rucker (in which she denied Williams' allegations) and a transcript of the Williams interview. Based on these submissions, the Commission denied Justice Shaw's request for a hearing (and for reconsideration generally), holding that the Williams evidence did "not create a reasonable *possibility or a probability* that [the] Determination would be altered." (Emphasis added.) The Commission thus mingled two wholly distinct evidentiary criteria—"possibility" ***15** and "probability."[1] Consequently, Williams was never produced before the Commission or the Referee. In the end, Justice Shaw received less consideration than is normally accorded parties in criminal or civil cases who come in with newly discovered evidence. I find this troubling.

When a criminal case defendant moves for reconsideration based on newly discovered evidence, the evidence typically is in the form of a witness affidavit. At that stage, the court may deny the motion summarily only if the new allegation of fact "is conclusively refuted by unquestionable documentary proof" (CPL 440.30[4][c]) or there is otherwise "no *reasonable possibility* that such allegation is true" (CPL 440.30[4][d][ii] [emphasis added]). If the allegations have not been refuted documentarily and there remains a reasonable *possibility* that the allegation is true, the court must conduct a hearing (CPL 440.30[5]; *see also, People v. Staton,* 224 A.D.2d 984, 637 N.Y.S.2d 838; *People v. Beach,* 186 A.D.2d 935, 589 N.Y.S.2d 626).[2] To gain a new trial, however, the defendant must go further, and adduce testimony at the hearing sufficient to establish that there is a "*probability* that had [the newly discovered] evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10[1][g] [emphasis added]). A similar practice exists in civil cases when, pursuant to CPLR 5015(a)(2), a litigant challenges a judgment or order based on newly discovered evidence. Thus, in *Pollio Dairy Prods. Corp. v. Sorrento Cheese Co.*, 62 A.D.2d 1015, 1016, 403 N.Y.S.2d 556, the trial court committed reversible error when it failed to conduct a hearing with regard to newly discovered allegations of fraud and instead decided a CPLR 5015 motion solely on affidavits.

Williams might well have been lying. Based on the parties' submissions to the **1278 Commission, however, I cannot rule out the reasonable possibility that she was telling the truth as to the *16 alleged frame-up. The gravity of her allegations called for direct inquiry by a neutral arbiter. I would have voted to remand the matter for that purpose, had we the jurisdiction to do so.

The Commission is of course entitled to create its own standard in dealing with newly discovered evidence. Here, however, it formulated one that is impracticable as a result and the Williams evidence was ***678 never adequately considered. This is not to say that the CPL's "reasonable possibility" standard is per se obligatory on the Commission or that the Commission should be governed in all instances by the rationale expressed in *Pollio Dairy Prods. Corp. v. Sorrento Cheese Co.* (*supra*). Both, however, provide useful guidance and, if followed, would not have resulted in what strikes me as an unsatisfactory resolution.

At oral argument Commission Counsel stated graciously that there is an arguable basis for us to review the newly discovered evidence, perhaps as part of our plenary review of the entire record (*see,* N.Y. Const., art. VI, § 22 [d]; Judiciary Law § 44). Similarly, the Commission, by letter dated May 12, 2000, stated that it has no objection to our doing so. For better or worse, however, our jurisdiction may not be conferred by consent or good faith offers, and I join the majority in concluding that jurisdiction is lacking here. In future cases, the Commission would of course be free to grant the motion to reconsider and render a new determination which may be the same or different from the original one. Under those circumstances, the Court may find an appropriate basis for review. Short of that, if there is to be any judicial review of the Commission's treatment of newly discovered evidence, it would seem necessary to amend the governing statutes if not the Constitution.

SMITH, J. (dissenting).

The Commission on Judicial Conduct, after receiving a report from a Referee, determined, on November 8, 1999, that the petitioner should be censured for sexual harassment. That determination was based on the credibility of the witnesses and, particularly, the credibility of complainants Jacqueline Bland and Caroline Rucker. Subsequent to the Commission's determination, the petitioner moved for reconsideration based on an affidavit by Shelley Williams. In that affidavit, Williams avers that Rucker admitted that she and Bland fabricated the charges against the petitioner. Williams also avers that Rucker attempted to get Williams to support the contention.

*17 Williams was questioned only by the Commission attorney, acting as a prosecutor in this case. The Referee who heard the other witnesses never saw Williams and the Commission itself never heard her testimony. Nevertheless, after submissions from the Commission attorney and the petitioner, the Commission, by decision dated April 6, 2000, denied the motion to reconsider. The Commission stated "that [petitioner's] motion and offer of new evidence do not create a reasonable possibility or a probability that its Determination would be altered."

In his motion for reconsideration by the Commission, the petitioner raised the issue of due process under both the Federal and State Constitutions. Petitioner stated that he "is entitled to confront Ms. Rucker and Ms. Bland with Ms. Williams' testimony. He is entitled to present Ms. Williams as a witness in his defense." In response to a request by the Commission on Judicial Conduct, petitioner waived any bar to the **1279 Commission's exercise of jurisdiction caused by his retirement. The Administrator/Counsel to the Commission opposed the motion to reconsider but, in the alternative, argued that the matter should be referred back to the Referee on the limited issue of whether his findings would be affected by the new evidence.

Before this Court, petitioner makes several arguments, including a claim that his due process rights under the Federal and State Constitutions have been violated by the denial of the opportunity to confront Bland and Rucker with the allegations made by Williams. The majority states ***679 that it has no authority to review Williams' affidavit or her deposition testimony even though both are a part of the record before us.

I dissent because I cannot agree that this Court has no jurisdiction and no obligation to review the events subsequent to the original decision by the Commission, particularly when the Commission, although denying petitioner's motion for reconsideration, has apparently reviewed that evidence on the merits. Those events are a part of the Commission's determination

and there are due process claims concerning the fairness of the proceedings. New York Constitution, article VI, § 22(d) states, "[i]n reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based." The reason why this Court should not adhere to its June 20, 2000 order dismissing, *sua sponte*, petitioner's motion for leave to appeal from the Commission's denial of the motion for reconsideration is because it prevents this Court from ***18** performing a constitutional duty to review the determination of the Commission. This Court rather than the Commission is charged with the interpretation of the Federal and State Constitutions.

What is clear is that the Commission has made the proceedings involving Williams a part of this record and a part of its determination. While it states that it has denied the motion for reconsideration, the Commission has, in effect, reconsidered its decision and adhered to it.[1] Because this new evidence, which goes to the heart of its determination, has been considered by the Commission, there is no valid reason why this Court should ignore that evidence. The only possibility of review of the Commission's determination, including its treatment of the contentions of Williams, is this Court.

If this Court concludes that the Commission did not make a determination on the merits of petitioner's due process claims, it can send the matter back to the Commission or hold the appeal in abeyance while the petitioner requests the Commission to make a determination on his due process claims. In *Matter of Klein v. State Commn. on Judicial Conduct*, 63 N.Y.2d 895, 483 N.Y.S.2d 209, 472 N.E.2d 1037, this Court denied a motion to remand a proceeding to the Commission or to supplement the record on review without prejudice to an application to the Commission to reconsider its decision. This Court held a review in abeyance pending a decision on that application. Similarly here, this Court can hold any decision in abeyance while the petitioner makes a motion ****1280** before the Commission for a review of his due process claims that the Referee or the Commission should hear Williams' testimony and possibly additional testimony, with both sides participating in the questioning.

Any action by the Commission should be preceded by a continued waiver by the petitioner of any objection to the jurisdiction of the Commission.

Judges LEVINE, CIPARICK, WESLEY, ROSENBLATT, GRAFFEO and SULLIVAN[2] concur in Per Curiam *****680** opinion; Judge ROSENBLATT ***19** concurs in a separate concurring opinion; Judge SMITH dissents in another opinion; Chief Judge KAYE taking no part.
Determined sanction accepted, without costs.

All Citations

96 N.Y.2d 7, 747 N.E.2d 1272, 724 N.Y.S.2d 672, 2001 N.Y. Slip Op. 01473

Footnotes

1 Although petitioner's motion was untimely, the Commission apparently waived its timeliness rule (*see*, Rules of Commission on Judicial Conduct [22 NYCRR] § 7000.6[f][6]).

2 The remittal remedy is not within the powers conferred on us by the Constitution or the Judiciary Law (*see*, N.Y. Const., art. VI, § 22 [d]; Judiciary Law § 44[9]).

3 Had the Commission granted the motion to reconsider and then adhered to its original determination, that might be an entirely different matter. However, that is not the case before us.

1 The Commission may have blended the "possibility" of truth standard in CPL 440.30(4) with the "probability" of ultimate success standards in both CPL 440.10(1)(g) and CPLR 5015(a)(2). The possibility standard governs the right to have newly discovered evidence heard by a Judge at a hearing, whereas the probability standard governs whether the Judge should grant a new trial. In any event, here the standard was improperly blended, rendering it undiscernable.

2 *Cf., United States v. LaFuente,* 991 F.2d 1406, 1409 (8th Cir.) (remanding to District Court for hearing to determine credibility of "newly discovered" sworn allegations); *DeBinder v. United States,* 303 F.2d 203, 204 (D.C.Cir.) (newly discovered confession by defendant's twin brother, as alleged in affidavits by defendant's counsel and mother, should be "tested" at a hearing in open court).

1 In *Corey v. Gorick Constr. Co.,* 271 A.D.2d 911, 706 N.Y.S.2d 512, the Appellate Division determined that even though the trial court had denied reargument, that court had really granted reargument, reconsidered the facts and adhered to its prior decision. Under CPLR 2221, the adherence to a decision by a trial court, after reconsideration, would be appealable (*see also, Rubeo v. National Grange Mut. Ins. Co.,* 93 N.Y.2d 750, 755, 697 N.Y.S.2d 866, 720 N.E.2d 86).

2 Designated pursuant to N.Y. Constitution, article VI, § 2.

51 N.Y.2d 397
Court of Appeals of New York.

In the Matter of Norman H. SHILLING, as a Judge of the Civil Court of the City of New York, Kings County, Petitioner,

v.

STATE COMMISSION ON JUDICIAL CONDUCT, Respondent.

Nov. 25, 1980.

Synopsis
In disciplinary proceeding, the Court of Appeals held that a judge whose conduct off the bench demonstrates a blatant lack not only of judgment but also of judicial temperament and complete disregard of the appearances of impropriety inherent in his conduct should be removed from office notwithstanding that his reputation for honesty, integrity and judicial demeanor in the legal community has been excellent.

Ordered accordingly.

Fuchsberg, J., filed a dissenting opinion.

Attorneys and Law Firms

***398** *****909** ****900** Stanley D. Steinhaus, Brooklyn, for petitioner.

***399** Gerald Stern and Jean Savanyu, New York City, for respondent.

OPINION OF THE COURT

PER CURIAM.

A Judge whose conduct off the Bench demonstrates a blatant lack not only of judgment but also of judicial temperament and complete disregard of the appearances of impropriety inherent in his conduct, should be removed from office notwithstanding that his reputation for honesty integrity and judicial demeanor in the legal community has been excellent. The commission's findings of fact should be confirmed but its determined sanction of censure should be rejected and the sanction of removal imposed, as hereafter directed.

Petitioner is a Judge of the Civil Court, Kings County. He is also a trustee of the Associated Humane Societies of New Jersey (AHS), a not-for-profit corporation which in 1977 was seeking a permit to operate an animal shelter in ***400** Kings County. In December, 1977, John Esteves, the manager of the AHS shelter, received three summonses, one from the city department of health for operating the Kings County shelter without a permit, and two from the ASPCA for violations relating to health certificates for dogs shipped from New Jersey and to the *****910** manner in which certain animals were kept. Other violations were investigated apparently in March or May, 1978, and a further summons issued.

****901** In relation to the permit application, petitioner had several telephone conversations with Dr. Alan Beck, Director of the New York City Department of Health, Bureau of Animal Affairs. In these conversations, petitioner identified himself as a Judge, inquired why the AHS permits had not been granted and on receiving an explanation became angry and screamed so

loudly into the telephone that Dr. Beck could not keep the phone to his ear. He also informed Dr. Beck that he had more political clout than Dr. Beck, and in vulgar language told Dr. Beck he should stop impeding the AHS application. The permit came up also in the courtroom corridor conversation, hereafter detailed, between petitioner and Dr. Howard Levin, Chief Veterinarian of the City Department of Health, when petitioner raised the question why it had not been issued and suggested that "he had people in high places that he hadn't even tapped as yet."

In relation to the summonses, petitioner was called by Esteves at the time the 1978 summons was issued. Esteves then put Dr. Levin, who had just inspected the shelter, on the phone with petitioner. Levin was told by petitioner, in what Levin characterized as a threatening voice, that the department was abusing its authority. Petitioner also contacted Dr. John Kullberg, Executive Director of the ASPCA, and Eric Plasa, its Law Enforcement Director, in an effort to have the 1977 summonses dropped. Dr. Kullberg declined that suggestion but informed petitioner that the society would make an unannounced reinspection and inform the court of its results when the violations came on for trial. Petitioner requested that he be notified in advance of such a reinspection. No reinspection was ever made.

Thereafter, when the Esteves matter came on before Judge EUGENE NARDELLI in Criminal Court, petitioner sat ***401** in the rear of the courtroom, and Judge NARDELLI was informed by the AHS attorney, during discussions, that petitioner sat on the AHS board. After the matter had been adjourned, petitioner approached the Bench and commented to Judge NARDELLI that if the ASPCA and the department of health were really interested in animals, they would not be proceeding as they were. In the corridor outside Judge NARDELLI's courtroom there ensued a heated discussion participated in by petitioner, the AHS attorney, Dr. Levin, the ASPCA attorney and two ASPCA officers. All three of the ASPCA personnel testified, as did Dr. Levin, that petitioner was angry, was talking in a loud voice and stated during the conversation both that he was a Judge and that he had friends in high places.

The commission determined that it was improper for petitioner to have attempted to persuade ASPCA officials to withdraw the summonses and to identify himself as a Judge while so doing, to interfere with department of health officials on behalf of AHS in relation to issuance of a permit, to have identified himself as a Judge in so doing and to have addressed those officials in a hostile, profane and loud manner, to have spoken in a loud voice in the public corridor outside the courtroom and referred to his political influence, and to have interfered in the Esteves case by speaking to Judge NARDELLI about the case. It concluded that "the blatant impropriety (petitioner) has evinced (is) seriously compounded by his refusal in this record to acknowledge that his actions even appear improper," but nevertheless determined that the appropriate sanction was censure, which was what the commission administrator, with some misgivings,* had recommended.

*****911** Petitioner denied any intent to influence anyone and testified that as a Judge elected as a reform Democrat in Brooklyn he had no political clout, but never directly denied making ***402** ****902** remarks attributed to him. He admitted speaking in emphatic tones, and did not deny the vulgarity attributed to him, saying that he did not remember the exact words and that he could have used another word (a euphemism, which would have conveyed the same meaning). Though he, thus, has not categorically denied the factual basis for the charges, he argues before us, as he did before the commission, that he was not acting as a Judge and gave no appearance of impropriety, that the evidence does not sustain the charges, that the procedures followed were improper and that the Referee improperly ignored the many lawyers and Judges who testified to his reputation for integrity, honesty and judicial demeanor.

As in Matter of Steinberg, 51 N.Y.2d 74, 83, 431 N.Y.S.2d 704, 409 N.E.2d 1378, so here, we cannot accept petitioner's "contention that conduct off the Bench may give rise to removal only where there has been some act of overt illegality or extreme 'moral turpitude' ", since "(a)ny conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function" (Matter of Kuehnel, 49 N.Y.2d 465, 469, 426 N.Y.S.2d 461, 403 N.E.2d 167). Thus, petitioner's insistence that because he was acting on behalf of a not-for-profit corporation his acts had "nothing to do with my judicial position" is misguided. Equally misguided is the suggestion that general reputation testimony, even though in the numbers and from persons of such standing as testified on petitioner's behalf, make the findings of the Referee and the commission against the weight of

the evidence. As we noted in People v. Miller, 35 N.Y.2d 65, 69, 358 N.Y.S.2d 733, 315 N.E.2d 785: "Character evidence does not exist in a vacuum, and its value, influence or the weight to be accorded it depends in great part upon the other evidence in the case. * * * If the evidence of guilt against a defendant is cumulative and reliable, the influence of contrary evidence of good character is likely to be slight. Under other circumstances, such evidence may be so good, if believed, as to create a reasonable doubt where without it none would exist."

After careful review of the record we find the evidence of petitioner's misconduct, which comes not only from other ***403** witnesses but from the subjective nature of his defense and his inability to controvert the objective evidences of that misconduct, to be both cumulative and reliable, and find neither reason to disturb the commission's findings and conclusions concerning that misconduct nor any basis for holding that there was any infirmity in the procedure followed.

We do, however, reject the commission's determined sanction. We recognize that the power given us by subdivision 9 of section 44 of the Judiciary Law to do so is not lightly to be exercised and that the ultimate sanction of removal is not normally to be imposed for poor judgment, even extremely poor judgment (Matter of Steinberg, supra, 51 N.Y.2d at p. 81, 431 N.Y.S.2d 704, 409 N.E.2d 1378). The situation with which we deal here is clearly more egregious than that involved in Matter of Lonschein, 50 N.Y.2d 569, 430 N.Y.S.2d 571, 408 N.E.2d 901, where the Judge sought special consideration for a license applicant but never asserted his judicial office and did not more than request expedition of the application. Here petitioner, having identified himself as a Judge, nevertheless thought it not improper to request the ASPCA, the complaining and prosecuting agency, to cause dismissal of pending *****912** charges. He also asked for preferential treatment for *AHS*, clearly contrary to the spirit and purpose of the regulatory provisions being enforced, by requesting that he be given advance notice of when reinspection might take place. Likewise, he felt it not improper to address a remark to the Judge before whom the matter was eventually called and which impugned the motives of ASPCA and the department of health in seeking to enforce those regulatory provisions. That it may have been improbable that the same Judge would sit when the matter was again called before the court ****903** appears, like petitioner's suggestion that he lacks political clout, to be an afterthought which may temper but does not excuse the initial transgression.

Also not improper in petitioner's mind was the threat, made on two separate occasions to Dr. Beck and during the courthouse corridor confrontation, to use political influence to obtain the ends he sought, made in intemperate tones and with the use of vulgarity. That he could be wholly unmindful of the impression that would be made upon others present in that corridor by the spectacle of a person identifying ***404** himself as a Judge and speaking in loud and threatening tones of his friends in high places strongly suggests a lack of judicial temperament. Not without significance in that respect is the private admonishment of petitioner by the former State Commission on Judicial Conduct in March, 1977 for having used profane, vulgar and inappropriate language in open court on several occasions in November, 1976.

Compounding those four separate instances of impropriety, as the commission noted, is petitioner's continued insistence that his actions involved neither impropriety nor the appearance of impropriety. Judicial office, concerned as it is with concepts of reasonable care, arbitrariness, capriciousness, substantiality of evidence, excessiveness of discipline, involves a large measure of discretion. Public acceptance of the judicial product, however exemplary on a substantive level, cannot survive the acceptance of such invective and pressure politics as petitioner's conduct suggests. As in Matter of Steinberg, 51 N.Y.2d 74, 84, 431 N.Y.S.2d 704, 409 N.E.2d 1378 supra, we conclude "that petitioner's complete insensitivity to the special ethical obligations of Judges (renders) him unfit for judicial service".

For the foregoing reasons we confirm the commission's findings and conclusions except as to sanction and direct that petitioner be removed from office as a Judge of the Civil Court of the City of New York effective at midnight December 31, 1980, and that, during the period between the date of service upon him of a copy of the order to be entered on this decision and December 31, 1980, petitioner be suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service.

FUCHSBERG, Judge (dissenting).

It is a source of regret that I find it necessary to state my strong objection to the catastrophic consequences which the majority so sweepingly visits on the respondent.

Not a single one of those who officially have participated in the investigations and determinations, or in the personal confrontations on which they were based, expressed the opinion that the nature of respondent's improprieties warranted *405 the judicial beheading ordered today. For instance, the counsel who, exhaustively and meticulously, presented the case on behalf of the Commission on Judicial Conduct summed up his conclusions in this way: "I regard the respondent, and I say this as an adversary to the Commission, as a person of integrity. His testimony was credible from the very beginning of this case. He cooperated; he told the truth. I think that removal from office would be too harsh a penalty".

So too all 11 members of the commission, each a distinguished jurist, lawyer or layperson, and each experienced in hearing and ***913 deciding such matters, voted, without exception, that the appropriate punishment be public censure. Consonantly, the respondent having elected to appeal to this court, the brief filed by the commission's administrator recommends that we accept the sanction. And, as to the majority's concern that the respondent is not contrite enough, the record shows that he has avowed that, "In the future I will not do it". More mea culpas would serve no purpose.

In passing on the sanction, it cannot be unimportant that there is here not even a suggestion that the acts on which these charges were based in any way or at any time interfered with the proper conduct of Judge SHILLING'S judicial duties. Nor is the unexampled and impressive demonstration **904 of support by the host of 56 character witnesses, most of whom are Judges and one of whom is the Administrative Judge of the very court on which he serves, to be blithely cast aside. It certifies to the respect he has earned for his judicial deportment among those in whose midst he must carry out his public responsibilities day in and day out.[1]

What is involved here essentially is overzealous conduct on behalf of an eleemosynary institution which, in the respondent's private life, he had long served as a devoted *406 trustee. This organization, the Association of Humane Societies of New Jersey, is dedicated to animal welfare. Without gainsaying the lack of sensitivity with which it has been found that the respondent functioned on its behalf on the occasions which precipitated this proceeding, it would seem that a proper balance demands equal acknowledgement that the criticizable conduct was not motivated by venality or personal gain or any other mean, selfish or dishonorable impulse.

There was nothing wrong per se in the respondent's participation in the society's affairs. Jurists do not have to sit in isolated, cloistered, legal splendor, completely detached from responsibilities to the community at large. True, there are boundaries that must be respected, but they are free to live normal lives and to identify themselves with or engage in charitable activities. In fact, the Code of Judicial Conduct (Canon 5, subd. B) expressly permits them to hold officerships and directorships in educational, religious, charitable, fraternal and civic organizations, so long as these activities are not conducted for the economic and political advantage of their members and so long as they do not detract from either the dignity or the performance of judicial office.

It is against this background that we now turn to the misguided conduct out of which this case arose. It started when the Humane Society decided to enlarge the geographical scope of its operations by establishing an animal shelter in Brooklyn. This brought on a flood of licensing, zoning and other objections from the American Society for the Prevention of Cruelty to Animals (ASPCA) and the New York City Department of Health. The Humane Society, justly or unjustly, was convinced that the objections were meritless and had been fueled by reluctance on the part of the ASPCA, which enjoys limited law enforcement powers in New York City, to abide the intrusion of the New Jersey agency. Be that as it may, when the grant of the license had been delayed inordinately and the ASPCA had issued several summonses against the Humane Society and John Esteves, the employee in charge of its newly opened Brooklyn facility, it turned to Judge ***914 SHILLING. As the Humane *407 Society trustee who resided in Brooklyn, he was asked to and, undisputably, though very unwisely, did undertake to communicate with the ASPCA and the health department to try to persuade them to cease what he and his colleagues at the society perceived to be an

attempt to destroy the society's newborn project. Initially, this took the form of the telephone calls to which the majority alludes, and, later, at the behest of the society's counsel, to his attendance in court, where he was asked to be available, on behalf of the society, to approve any agreement that might be arrived at between the parties at a conference expected to be held there that day.

There appears to be little question but that the respondent, moved by an obvious passion for the society's cause, waxed indignant about what he and his colleagues conceived to be the unfair exclusionary tactics of those in opposition to its Brooklyn inroads, and that, at times, the depth of his irritation, perhaps with some unconscious loss of control and dignity, came through in **905 angry tones. And, in one telephone conversation, he did use an expletive which, while not acceptable in the "polite society" of a by-gone age, regrettably is no longer an uncommon feature of private parlance in the world of today. In the course of the conversations, he suggested that, if the ASPCA were intent on pressing the court proceedings it had started, these could just as well be tested against the society without involving the employee as an individual.[2]

In the courthouse episode, though it was indiscreet for him to be there at all, the fact is that the respondent sat mutely in the back of the room until the conference was concluded, never speaking to the Judge, who in any event was not expected to have any continuing connection with the matter, until the meeting was over. After the court recessed, the parties and their attorneys were already engaged in a heated corridor discussion when the respondent, having approached the group to offer some information on *408 the zoning question and having received a rejoinder that appeared to challenge his credibility, proudly responded, "I am a Judge of the City Court. I don't lie. When I state a fact, it is a fact".

Now, it would seem that altogether too much has been made of the fact that the respondent introduced himself as "Judge" SHILLING when he had the telephone conversations. It is clear that, if anything, the relevant association that was stressed was, in the words of a communicant called by the commission, "the Judge Shilling who was involved with the AHS". Titular identification of Judges, even after they no longer hold judicial office, is the accepted practice. Former Judges are usually so addressed when they appear in court as lawyers. It would be unreal then, to expect that Judges (or for that matter, clergymen, physicians, professors or doctors of philosophy), just because they may find themselves addressing people with whom they have a difference of opinion in private matters, should be required to move about with a cloak of anonymity. The important thing, of course, is that a Judge should conduct himself, off or on the Bench, in a manner respectful of the title he or she bears.

Now, we must not lose sight of the fact that, no matter how we subdivide it into its details, overall this case involves only one situation, the controversy between the Humane Society and the ASPCA, in which, the respondent, for idealistic and humane reasons, foolishly permitted himself to be swallowed up. Withal, he insists that he never intended to exert the influence of his office. This must be accepted for, whatever may be said about his judgment or the care with ***915 which he expressed himself in this instance, one thing that appears established, and confirmed, is his principled veracity.

Corroborative is the fact that, though some may have formed the impression that he intended to exert influence on behalf of the Humane Society, there is nothing at all to indicate that he ever tried to do so. The threat, indeed, may have been largely within the minds of the witnesses as a reaction to the vigor and vehemence of his repeated requests on behalf of the society. While the Judge should have been *409 mindful that there could be such reaction and controlled his conduct accordingly, in the circumstances here I cannot accept judicial action, which, repudiating the commission's determination, insists on a result that not even a post-Watergate public image syndrome would justify.[3] The sanction voted by the Commission on Judicial Conduct should be accepted.

**906 Determined sanction rejected without costs, the sanction of removal imposed and Norman H. Shilling removed from his office of Judge of the Civil Court of the City of New York, effective at midnight December 31, 1980, and, during the period between the date of service upon him of *410 a copy of the order to be entered herein and December 31, 1980, he is suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service.

COOKE, C. J., and JASEN, GABRIELLI, JONES, WACHTLER and MEYER, JJ., concur in Per Curiam opinion.

FUCHSBERG, J., dissents and votes to accept the determined sanction in a separate opinion.

Determined sanction rejected, without costs, the sanction of removal imposed and Norman H. SHILLING removed from his office of Judge of the Civil Court of the City of New York, effective at midnight December 31, 1980, and, during the period between the date of service upon him of a copy of the order to be entered herein and December 31, 1980, he is suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service.

All Citations

51 N.Y.2d 397, 415 N.E.2d 900, 434 N.Y.S.2d 909

Footnotes

* Immediately following the portion of the administrator's statement quoted in the second paragraph of the dissent appears the following:

"But where a judge so totally lacks sensitivity to his obligations, his ethical obligations, and where he acts in such a manner to distort the processes of justice, removal was not and is not out of my mind a question as a recommendation.

"However, there are only two alternatives in my mind, and I recommend public censure."

1 These appraisals were in the face of the private admonition he had once received some years earlier for courtroom use of "inappropriate" language, a circumstance that appears never to have repeated itself. As the unimpeached judicial testimony indicates, a sense of perspective requires us to also note that the sundial that marked this single blemish did not record the impartiality, industry, wisdom and otherwise excellent temperament that characterized Judge SHILLING'S judicial performance.

2 It is interesting to note, for whatever it is worth in these proceedings, that ultimately the license was granted and the summonses against the employee in the main were dismissed.

3 Since none of the three disciplinary cases cited by the Per Curiam (Matter of Lonschein, 50 N.Y.2d 569, 430 N.Y.S.2d 571, 408 N.E.2d 901; Matter of Kuehnel, 49 N.Y.2d 465, 426 N.Y.S.2d 461, 403 N.E.2d 167; Matter of Steinberg, 51 N.Y.2d 74, 431 N.Y.S.2d 704, 409 N.E.2d 1378) would justify the drastic disposition in the present case, I append the following comments on each:

In Lonschein (pp. 571, 572), the respondent had intervened in two nonjudicial matters, one on behalf of a close personal friend who had encountered difficulties with various New York City administrative agencies from whom he was seeking to obtain a lease to a car service base station, the other by communicating with a deputy counsel of the City Taxi and Limousine Commission to urge the removal of "various impediments * * * thwarting approval" of a "lucrative contract". The determination of the commission was that the Judge be censured on each. This court rejected the determined sanction as excessive on the one charge and, though it found that "petitioner was aware that his judicial position would affect the subsequent conduct of the * * * counsel" and nevertheless "placed the prestige of his office behind the request * * * ", it reduced the sanction on the second to admonishment.

In Kuehnel (p. 469), where the commission's recommendation of removal was accepted by the court, the respondent, inter alia, after detaining four youths without cause, engaged in "two frenzied displays of overt physical violence" towards young boys, engaged in "repeated outbursts * * * (of) virulent racism", displayed "at the very least a gross lack of candor" before the officer who heard the charges. There can be no comparison between this case and that of Judge SHILLING.

In Steinberg, where the commission's recommendation of removal was accepted by the court, the respondent was found, inter alia, for years to have been using his chambers to conduct a loan brokerage business, had utilized a judicial employee to collect his loan payments and had deliberately falsified his income tax returns. Again, there can be no comparison between this case and that of Judge SHILLING.

25 A.D.3d 267, 805 N.Y.S.2d 69, 2005 N.Y. Slip Op. 09217

****1** In the Matter of Leo L. Wong (Admitted as Leo Lehon Wong), an Attorney, Respondent.
Departmental Disciplinary Committee for the First Judicial Department, Petitioner

Supreme Court, Appellate Division, First Department, New York
December 6, 2005

CITE TITLE AS: Matter of Wong

SUMMARY

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on November 19, 2001 at a term of the Appellate Division of the Supreme Court in the First Judicial Department as Leo Lehon Wong.

HEADNOTE

Attorney and Client
Disciplinary Proceedings

Respondent attorney, who was convicted of the class A misdemeanor of attempted grand larceny in the fourth degree in violation of Penal Law §§ 110.00 and 155.30 (1), a serious crime within the meaning of Judiciary Law § 90 (4), was guilty of professional misconduct. Under the totality of circumstances, including the respondent's age and inexperience at the time he improperly received unemployment benefits, his cooperation with the Grievance Committee and other authorities, and numerous attestations as to his good character, respondent was publicly censured.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Attorneys at Law §§ 88, 93.

Carmody-Wait 2d, Officers of Court §§ 3:245, 3:277, 3:279, 3:282.

McKinney's, Judiciary Law § 90 (4); Penal Law §§ 110.00, 155.30 (1).

NY Jur 2d, Attorneys at Law §§ 323, 325, 400, 403, 408.

ANNOTATION REFERENCE

See ALR Index under Attorney or Assistance of Attorney: Discipline and Disciplinary Actions.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: censure* & convict! /s attempted /4 larceny

APPEARANCES OF COUNSEL

Thomas J. Cahill, Chief Counsel, Departmental Disciplinary Committee, New York City (*Jun Hwa Lee* of counsel), for ***268** petitioner. *Benjamin Brotman & Associates, P.C.* (*Howard Benjamin* of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Leo L. Wong was admitted to practice as an attorney in New York by the First Judicial Department on November 19, 2001, as Leo Lehon Wong. At the time respondent engaged in the misconduct at issue, he had not yet been admitted to practice as an attorney.

In August 2004, the Departmental Disciplinary Committee filed a petition, pursuant to Judiciary Law § 90 (4), seeking an order finding respondent was convicted of a "serious crime." The basis of the petition was respondent's conviction, on March 11, 2004, in Criminal Court of the City of New York, upon his plea of guilty, of attempted grand larceny in the fourth degree in violation of Penal Law §§ 110.00 and 155.30 (1), a class A misdemeanor. Respondent admitted unlawful receipt of unemployment benefits in the amount of $3,240 from September 10, 2001 to November 4, 2001, while employed by an investment bank on a temporary, full-time basis. [1]

This Court granted the petition by unpublished order dated October 29, 2004, and directed respondent to appear before a Hearing Panel on the sole issue of the appropriate sanction to be imposed.

At the hearing, respondent testified, as did eight character witnesses, each affirming respondent's good character. [2] Respondent testified that in the beginning of August 2001 he was laid off from a position at Goldman Sachs, and in September 2001, he applied for and started receiving unemployment benefits. On September 10, 2001, respondent started work as a temporary employee at UBS Warburg, LLC. Respondent attempted to call the Department of Labor to inquire whether he still qualified for unemployment benefits, but it was difficult to get through in the wake of September 11, 2001. Instead, he relied on his roommate, a restaurant manager, who told him that as long as the position was temporary he could still receive unemployment.

On November 10, 2001, respondent was offered a permanent position at UBS, at which time he stopped seeking and receiving ***269** unemployment benefits. Respondent was admitted to practice on November 19, 2001 and continued to work at UBS. Thereafter, from August 2002 to September 2004, respondent became a law clerk for Chief Judge Gambardella of the United States Bankruptcy Court in Newark, New Jersey. Judge Gambardella testified, among other things, that because of his excellent work, she had extended the standard one-year clerkship to two years with respect to respondent, something she had only done on one or two occasions during her previous 19 years on the bench.

Thereafter, in January 2003, respondent received a letter from the Department of Labor notifying him that he had received an overpayment of benefits and requesting that he contact them. Although respondent attempted to contact the Department of Labor by leaving telephone messages, he never made contact and did not follow through. In May 2003, the District Attorney's office contacted respondent about the overpayment of benefits and asked him to come to their offices, where he was arrested. ****2**

Respondent acknowledged that his acceptance of benefits was inexcusable and that he alone was responsible.

At the end of the hearing, Committee staff recommended respondent be suspended for a period of six months, and respondent requested public censure or a lesser sanction.

In addressing the appropriate sanction, the Panel credited respondent's explanation that he mistakenly believed he was entitled to the unemployment benefits during his temporary employment and that his numerous housing changes thereafter resulted in his lack of communication with the Department of Labor. The Panel also noted that once

confronted with the charges, respondent admitted responsibility, pleaded guilty and made full restitution. The Panel credited further "respondent's relative inexperience as an attorney at the time of the conduct complained of as well as the numerous character witnesses called on his behalf including, . . . the Hon. Rosemary Gambardella." Furthermore, the testimony of the character witnesses "established a picture of a young man who made a youthful mistake which is unlikely to recur in the future." Accordingly, the Panel recommended that respondent receive a public censure.

The Committee now seeks an order pursuant to 22 NYCRR 603.4 (d) and 605.15 (e) confirming the determination of the Hearing Panel and granting such other relief as justice may ***270** require. Respondent's counsel has submitted an affirmation in which he concurs with the Committee's motion to confirm the Hearing Panel's recommendation of censure.

We agree that given the nature of the misconduct and taking into account various mitigating factors, public censure is the appropriate sanction. Respondent was a young, inexperienced, not yet admitted attorney (*see Matter of Dorfman*, 304 AD2d 273 [2003]). Even if respondent had not been a law school graduate, it would be difficult to credit his statement that he mistakenly believed he could receive unemployment benefits while working at a temporary job. Nonetheless, respondent cooperated with the Committee, took responsibility for his wrongful conduct, which included pleading guilty to a misdemeanor, and made full restitution. Furthermore, as the Panel noted, respondent's improper conduct, which did not involve the practice of law, has affected and will continue to affect his future career opportunities. Lastly, respondent presented numerous attestations as to his integrity and good character.

Accordingly, the Committee's petition to confirm the Hearing Panel's recommendation of public censure should be granted and respondent should be publicly censured.

Mazzarelli, J.P., Friedman, Marlow, Sullivan and Nardelli, JJ., concur.

Respondent publicly censured.

FOOTNOTES

Footnotes

1 Respondent was sentenced to a one year conditional discharge and made restitution to the Department of Labor in the sum of $3,240.

2 Respondent also introduced several letters attesting to his good character.