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

DETERMINATION

ELLEN YACKNIN,

a Judge of the Rochester City Court,
Monroe County.

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro[1]
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission

Trevett Cristo Salzer & Andolina P.C. (by James C. Gocker) for the Respondent

[1] Ms. DiPirro resigned from the Commission on October 30, 2008. The vote in this matter was taken on October 24, 2008.

The respondent, Ellen Yacknin, a Judge of the Rochester City Court, Monroe County, was served with a Formal Written Complaint dated March 5, 2007, containing two charges. The Formal Written Complaint alleged that respondent, while a candidate for Supreme Court, personally solicited the support of two attorneys who were in the courthouse and about to appear before her, and that respondent issued and/or authorized campaign literature containing a misrepresentation. Respondent filed a Verified Answer dated April 17, 2007.

By Order dated April 27, 2007, the Commission designated Steven Wechsler, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 29, September 12 and October 31, 2007, in Rochester. The referee filed a report dated July 18, 2008.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of censure, and counsel to respondent recommended a confidential letter of caution.

On October 24, 2008, the Commission heard oral argument[2] and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has served as a Judge of the Rochester City Court since 2003.

[2] Respondent was present and was advised that she could address the Commission for 10 minutes if she wished to do so. Respondent did not ask to speak. By letter dated October 27, 2008, counsel to respondent requested that the argument be reopened so that respondent could address the Commission. The Commission denied the request by letter dated November 6, 2008.

As to Charge I of the Formal Written Complaint:

2. In 2005 respondent was a candidate for nomination for Supreme Court Justice.

3. In the course of her campaign respondent communicated with between 100 and 130 attorneys asking for their support in the campaign.

4. Eftihia Bourtis is an attorney in private practice who appears in Rochester City Court on occasion.

5. On July 13, 2005, respondent placed a telephone call to Ms. Bourtis at her office with the intent of seeking Ms. Bourtis' support for her campaign. Ms. Bourtis was on vacation, and respondent left a message that she had called. At the time respondent made this call, Ms. Bourtis did not have any cases pending before respondent. Ms. Bourtis received respondent's message on July 25, 2005.

6. The next day, July 26, 2005, Ms. Bourtis was present in respondent's courtroom for the purpose of appearing in *People v. Hall*, in which she represented the defendant. After respondent took the bench but before *People v. Hall* was called, respondent asked Ms. Bourtis to approach the bench, and Ms. Bourtis did so.

7. At the bench, respondent and Ms. Bourtis had a brief conversation. Ms. Bourtis alluded to respondent's telephone message, explaining that she had just returned from vacation. Respondent then stated to Ms. Bourtis that she was running for Supreme Court and asked Ms. Bourtis for support in the campaign and whether she could use Ms. Bourtis' name in connection with the campaign. Ms. Bourtis felt that she had to

say yes, and she did say yes. After this conversation, the *Hall* case was called, and Ms. Bourtis' client rejected the plea offered by the District Attorney's office. Respondent adjourned the case, which was later dismissed for failure to prosecute.

8. Respondent testified that immediately after her conversation with Ms. Bourtis at the bench, respondent "felt terrible" and realized that it was inappropriate to have such a conversation under these circumstances.

9. At no time did respondent ask an attorney or any other person for a monetary contribution to support her campaign.

As to Charge II of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.5(A)(4)(a) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established. Charge II is not sustained and therefore is dismissed.

By soliciting support for her candidacy for Supreme Court from an attorney in her court, moments before the attorney was scheduled to appear before her with a

client, respondent engaged in conduct that compromised her impartiality and independence and promoted her political interests in the courtroom. Such behavior is inconsistent with the high ethical standards required of judges.

Respondent has acknowledged that she discussed her candidacy at the bench with attorney Eftihia Bourtis, whom she had telephoned earlier to ask for support. (Respondent had left a message since the attorney was on vacation.) Although respondent disputes that she called the attorney to the bench, respondent acknowledges that at the bench she stated that she had called about the campaign and she asked if Ms. Bourtis would support her. Ms. Bourtis, who testified that the request made her "uncomfortable," agreed to support respondent and to allow the campaign to use her name. As Ms. Bourtis testified, under the circumstances "I felt that I had to say yes."

While judges and judicial candidates are permitted to engage in significant political activity on behalf of their own campaigns for judicial office (Rules, §100.5), the ethical standards require a candidate to "act in a manner consistent with the impartiality, integrity and independence of the judiciary" (Rules, §100.5[A][4][a]; *see also* §100.2[A]). By asking for political support from an attorney standing before her in court, respondent severely damaged any possibility that she could handle the attorney's case without an appearance of bias. Regardless of the attorney's response, respondent's impartiality was compromised. (Indeed, if the attorney had immediately requested the judge's recusal, respondent would have had little choice but to grant the request.) Moreover, respondent should have recognized that her request would present the attorney with a serious

professional conflict. Respondent, by her actions, impaired her impartiality and the judiciary's independence.

A judge's campaign activities must be strictly separated from the performance of judicial duties in order to avoid any appearance of using judicial authority to advance the judge's private interests. The Court of Appeals has stated that even off the bench, a judge "remain[s] cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others" (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]; *see also*, *Matter of Lonschein*, 50 NY2d 569, 571 [1980]). In her courtroom, wearing her robes, respondent was clothed not just figuratively but literally with the trappings of judicial status, which made her request for political support from the attorney particularly coercive. (*See, Matter of Kaplan*, 1984 Annual Report 112 [Comm on Judicial Conduct]; *Matter of McNulty*, 2008 Annual Report 177 [Comm on Judicial Conduct] [judge's charitable activities in the courthouse, including solicitation of attorneys who appeared before her, "could have a considerable coercive effect," since the attorneys could not help feeling pressured to cooperate].)

The political benefit or desirability of obtaining endorsements is contemplated by the Rules in the designation of committees of responsible persons who seek such public support on behalf of a judicial candidate. While prohibiting the candidate from "personally solicit[ing]" contributions, the Rules provide that a candidate may establish a committee to "solicit and accept reasonable campaign contributions **and support** from the public, including lawyers..." (Rules, §100.5[A][5]) (emphasis added).

An attorney who did not wish to support a judge-candidate would be far less pressured to decline such a request made by a campaign committee than one coming from the candidate herself – especially when the attorney has a case before the judge who is making the request.

We disagree with our colleague's view that New York's political activity restrictions are an unconstitutional abridgment of a judicial candidate's First Amendment rights and that purported inconsistencies in the rules somehow mitigate respondent's misconduct. As the Court of Appeals has held, New York's restrictions on political activity by judges are not only constitutionally sound, but fair and necessary to "preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State's court system" (*Matter of Raab*, 100 NY2d 305, 312 [2003]). The alleged anomalies in the rules, cited in the dissenting opinion, do not invalidate the entire body of the rules; nor are they relevant to respondent's conduct in this case, which, as Mr. Emery acknowledges, was clearly wrong. The impropriety of soliciting any favor or benefit from an attorney in the courtroom while presiding over the attorney's case is well-established, apart from the specific restrictions on political activity.

In considering the sanction, we note that although respondent has testified that she immediately regretted her conversation with Ms. Bourtis and realized that it was inappropriate, she has acknowledged making a similar request for support of an attorney in the courthouse lobby a few weeks later. Respondent should have been more sensitive to her obligation to avoid engaging in political activity in the courthouse.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Harding, Ms. Hubbard, Judge Konviser, Judge Ruderman and Judge Peters concur. Mr. Coffey files a concurring opinion, in which Mr. Belluck joins.

Mr. Emery dissents in a separate opinion as to the sanction and votes that respondent be issued a letter of caution.

Ms. DiPirro and Mr. Jacob were not present.

CERTIFICATION

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

Dated: December 29, 2008

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

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

- -

I do not agree with the entire thrust of Mr. Emery's dissent. Nonetheless, I do concur in his overall critical observation of the quite incomprehensible application of New York's rules pertaining to judicial political activity.

Dated: December 29, 2008

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

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DISSENTING OPINION
BY MR. EMERY

- -

Judge Ellen Yacknin's solicitation of political support from Eftihia Bourtis for her candidacy for Supreme Court by calling Ms. Bourtis up to the bench in her courtroom, on a day when Ms. Bourtis appeared as counsel for a criminal defendant, presents a snapshot of the degradation which New York's elective system for selection of judges inflicts on judicial candidates. Because I believe that the ambiguous and unrealistic rules that we impose upon judges facing election do not fairly and effectively address this and other compromising political scenarios, I must dissent as to the imposition of a public reprimand and vote to privately caution Judge Yacknin.

I have written extensively in the past about the defects in the judicial conduct rules that govern judges when they run for office under our system. *Matter of Campbell*, 2005 Annual Report 133 (Concurring Opinion); *Matter of Farrell*, 2005 Annual Report 159 (Concurring Opinion); *Matter of Spargo*, 2007 Annual Report 107

(Opinion Concurring in Part and Dissenting in Part); *Matter of King*, 2008 Annual Report 145 (Concurring Opinion). Regrettably, the Court of Appeals has upheld the rules which restrict judicial candidates from supporting other candidates and actively participating in party politics. *Matter of Watson*, 100 NY2d 290 (2003); *Matter of Raab*, 100 NY2d 305 (2003). It has done so notwithstanding the clear holding of *Republican Party of Minnesota v. White*, 536 US 765 (2002), which I believe is a clarion call that protects judges from campaign conduct rules which are either under-inclusive (do not prohibit plainly improper conduct) or over-inclusive (prohibit clearly protected conduct). Thus, in my view, because New York's rules for judicial candidates prohibit conduct that is clearly protected political activity (engaging in unfettered party politics) and condone conduct that clearly should be prohibited (judges accepting contributions from lawyers who are appearing in their courts), this entire regulatory scheme violates the First Amendment.

In the past, when these issues came before the Commission I disagreed with the Commission decisions but concurred in the result because I am bound by the Court of Appeals' rulings. I understand and sympathize with the Court's pragmatic impulse to muddle through this mire, attempting to maintain the integrity and stature of the judiciary by separating it from unseemly political party activity and, at the same time, allowing judges to participate in the politics that are an inescapable part of our state constitutionally mandated elective selection system. But the result of this conundrum is that the Court of Appeals has upheld an entirely unworkable and untenable system of

judicial candidate regulation in which the conduct rules are unrealistic, unclear and contradictory.

Judge Yacknin was operating within this Kafkaesque maze. The rules she was supposed to follow prohibited her from "personally solicit[ing] or accept[ing] campaign contributions" (§100.5[A][5]), but did not bar her from personally seeking the "support" (whatever that means) of attorneys who were appearing before her. Moreover, she was allowed to form a committee that asked lawyers for contributions to her campaign (§100.5[A][5]). She was allowed to ask lawyers to serve on her campaign committee (Adv. Op. 92-19). And she was allowed to attend and speak at the fund-raisers that her committee arranged (§100.5[A][2][i]; Adv. Op. 03-122a, 97-41). Although judicial candidates are *advised* that judges must be shielded from knowledge of the identity of their contributors (Adv. Op. 02-06; *Judicial Campaign Ethics Handbook*, p. 8), by attending their own fund-raising events, candidates can quickly glean who is contributing. And, most importantly, a judge is specifically permitted to preside over cases in which a lawyer appears who openly supported the judge's candidacy (*e.g.* Adv. Op. 90-182, 90-196, 03-64, 03-77), even if the judge knows that the lawyer contributed to the judge's campaign (Adv. Op. 04-106).

This is the unseemly scheme of judicial campaigning which infects the integrity of our system of judicial election in every election cycle, in every part of the State. It plainly should be prohibited. But it is not. The Court of Appeals has approved it.

In this case, the Commission establishes for the first time that a judge may not solicit campaign support from the bench. As obvious as this proposition may sound, there is no specific rule against it. No cases or judicial advisory opinions address this unseemly activity. (The closest precedent is Advisory Opinions urging caution in the use in campaign literature of photographs taken in the courthouse "because the courthouse may not be used for political purposes" [*Campaign Ethics Handbo*ok, p. 10].)

The ethical rules that the Commission concludes address this violation state, in relevant part, that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (§100.2[A]) and that a judicial candidate "shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary" (§100.5[A][4][a]). Ironically, these rules, on their face, seem to more directly prohibit the election activities that the same rules are specifically interpreted to approve – asking currently appearing lawyers to serve on the judge's campaign committee and knowing the identity of currently appearing lawyer/contributors. Neither the rules nor their extant interpretations, however, specifically address Judge Yacknin's offense -- solicitation of general support from the bench. Thus, it is hard for me to square the juxtaposition of these campaign activities and find that only Judge Yacknin's conduct is sanctionable when the other far more corrosive activity has, in a sad bow to political reality, been immunized from normal ethical misconduct analysis.

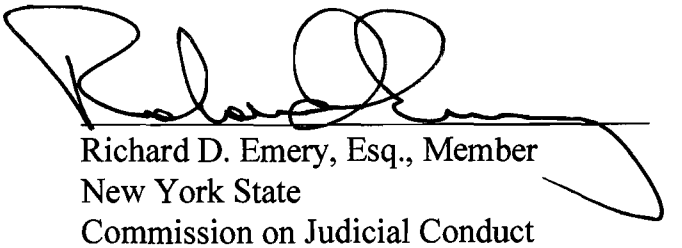
Common understanding should dictate that it is improper to solicit support from the bench (just as it should be clear that judges should not have contributors appear before them). But judges are allowed to solicit "support" virtually anywhere from lawyers who have cases pending before the court. In this case, Judge Yacknin acknowledged during the investigation that she personally contacted 100-130 attorneys to solicit their support, and the Commission staff made no argument that such conduct was anything other than business as usual. As clear as it is that solicitation from the bench is improper, especially when a client is sitting in the courtroom, I fail to see a meaningful distinction between such solicitation and repeated and insistent calls for campaign support from judges to individual lawyers who regularly appear before the judge. In either case coercion, and the whiff of bribery, are palpable. In light of this overall scheme that allows lawyers to finance judicial campaigns, it seems otherworldly to punish Judge Yacknin for her particular transgression.

The entire system of regulating judicial campaigns is riddled with hypocrisy. It reduces judges to supplicants of the lawyers and clients who should hold them in high esteem. Expressing ad hoc outrage when one judge happens to come to our attention for her obtuse behavior feels like fiddling while Rome burns. We really deserve better and the independence of our judiciary demands much more.

I refuse to make Judge Yacknin a posterperson for judicial campaign misconduct even though, as she forthrightly acknowledges, she clearly should not have

done what she did. Therefore, I dissent and recommend that she be given a private caution.

Dated: December 29, 2008



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