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

THOMAS J. SPARGO,

a Justice of the Supreme Court,
Albany 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 (Cathleen S. Cenci and Kathryn J. Blake,
Of Counsel) for the Commission

E. Stewart Jones, Jr., for the Respondent

The respondent, Thomas J. Spargo, a Justice of the Supreme Court, Albany County, was served with a Formal Written Complaint dated January 25, 2002, containing

four charges. Respondent filed a verified answer dated February 22, 2002. Respondent was served with a Supplemental Formal Written Complaint dated May 13, 2002, containing one charge, and filed a verified answer dated July 8, 2002. Respondent was served with a Second Supplemental Formal Written Complaint dated March 23, 2004, containing one charge, and filed a verified answer dated April 23, 2004.

By order dated October 8, 2002, the Commission designated Robert L. Ellis, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The Commission proceedings were stayed pending the resolution of litigation commenced by respondent in federal and state courts.

On April 23, 2004, respondent moved to dismiss the Second Supplemental Formal Written Complaint. On May 13, 2004, counsel to the Commission filed papers in opposition to the motion, and counsel to respondent filed a response on May 21, 2004. By decision and order dated June 17, 2004, the Commission denied the motion.

On December 21, 2004, counsel to the Commission moved to disallow the substitution of E. Stewart Jones, Jr., as counsel to respondent. On January 3, 2005, Mr. Jones filed papers in opposition to the motion. By order dated January 20, 2005, after oral argument on that date, the referee granted the motion. After further litigation in state court, Mr. Jones was substituted.

A hearing was held on August 1, 2, 3, 22 and 23, 2005, in Albany. The referee filed a report dated December 15, 2005.

The parties submitted memoranda with respect to the referee's report. Counsel to the Commission recommended that respondent be removed from office.

Counsel to respondent argued that the charges were not sustained. On February 2, 2006, the Commission heard oral argument at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has served as a Supreme Court Justice, Third Judicial District, since January 2002. Prior to that, respondent was a town justice of the Town of Berne, Albany County, from January 2000 through December 2001.

2. Respondent is an attorney who was admitted to practice law in 1971. As a practicing attorney, respondent had election law expertise.

As to Charge I of the Formal Written Complaint:

3. In the fall of 1999 respondent was a candidate for town justice of the Town of Berne. On one occasion shortly before the election, while campaigning outside of a convenience store near Berne, respondent handed out gift certificates worth $5.00 each to the first four or five individuals who bought gasoline at the store. The gift certificates were "Good for all products including gas" at the store. At the same time he handed out the gift certificates, respondent gave the recipients his business card and identified himself as a candidate for town justice.

4. On several occasions in the weeks preceding the election, respondent went to a local restaurant and, after being introduced as a candidate for town justice, bought the patrons a round of drinks. Respondent spent a total of approximately $2,000 on these occasions at the restaurant in the weeks prior to the election.

5. The town of Berne was heavily Democratic. Respondent, a Republican, won the election for town justice in November 1999 by approximately 85 votes out of a total of about 1,200 votes.

As to Charge II of the Formal Written Complaint:

6. In November 2000, while serving as a town justice in the Town of Berne, respondent accepted Paul Clyne, an assistant district attorney and a candidate for Albany County District Attorney, as a legal client in connection with a recount in the contested election for District Attorney. Respondent's work for the Clyne campaign lasted a week to ten days. Mr. Clyne was ultimately declared the victor and assumed office as District Attorney on January 1, 2001.

7. As a town justice, respondent presided over criminal and traffic cases prosecuted by the District Attorney's office. The District Attorney's office appeared in respondent's court one night a month, generally by an assistant district attorney.

8. In or about November 2000, respondent submitted to the Clyne campaign committee a bill for $10,000 for his legal services in connection with the recount. Respondent was paid in two installments of $5,000 each on January 24 and January 31, 2001.

As to Charge III of the Formal Written Complaint:

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

As to Charge IV of the Formal Written Complaint:

10. On May 18, 2001, respondent, while a town justice, gave the keynote address at the 39th Annual Monroe County Conservative Party Dinner in Rochester, New York. The dinner was a fund-raising event for the Conservative Party in Monroe County.

11. Respondent's name was listed as the keynote speaker in the program. Prior to the event, respondent was aware that it was a fund-raiser for the Conservative Party.

12. In his keynote speech, respondent spoke concerning his activities on behalf of the Bush campaign in connection with the Presidential recount in Florida in November 2000.

13. In May 2001 there were two vacancies for Supreme Court in the Third Judicial District, which includes Albany County. (Monroe County is not in the Third Judicial District and is about 160 miles from Albany County.) Respondent had applied for appointment to one of the vacancies in early 2001.

14. At the dinner, respondent was introduced as a candidate for Supreme Court, although he had not yet formed a committee.

As to Charge I of the Supplemental Formal Written Complaint:

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

As to Charge I of the Second Supplemental Formal Written Complaint:

16. In May 2003, with respondent's knowledge and approval, the

Thomas J. Spargo Legal Expense Trust was established for the purpose of paying legal expenses respondent had incurred in connection with federal litigation he had brought challenging the Commission's proceedings against him. Respondent's mother was the grantor of the trust; his long-time friend Brian Sanvidge was a co-trustee; and George Cushing, whose wife is a long-time friend of Albany County Surrogate Cathryn Doyle, a friend of respondent, was the other trustee.

17. In the summer of 2003, Sanford Rosenblum, a long-time friend of respondent, visited Albany attorney John Powers at Mr. Powers' law office. Mr. Rosenblum, an attorney who had been active in raising funds for political and charitable causes for many years, told Mr. Powers that a fund was being set up to assist in defraying respondent's legal expenses associated with his litigation with the Commission and asked Mr. Powers to contribute. Mr. Powers, whose firm's practice is limited to plaintiffs' personal injury litigation, told Mr. Rosenblum that he would have to check with the other attorneys in his firm before making a contribution. Mr. Rosenblum said that he was going to visit another attorney, E. Stewart Jones, Jr., and asked Mr. Powers if he would like to come along.

18. Mr. Rosenblum and Mr. Powers then went to Mr. Jones' office, where they met with Mr. Jones. Mr. Rosenblum suggested that the attorneys contribute $10,000 to respondent's legal expense fund.

19. Mr. Rosenblum later made a follow-up visit to Mr. Jones, after which Mr. Jones wrote a check dated November 7, 2003, payable to the "Thomas J. Spargo Legal Expense Fund." At Mr. Rosenblum's direction, Mr. Jones mailed the

check to Brian Sanvidge, who deposited the check into the Spargo fund bank account on November 17, 2003. At that point, the only other contributions to the fund were the initial $1,000 contribution from respondent's mother and a $200 contribution from a co-worker of Mr. Sanvidge, who contributed at his request.

20. Mr. Powers later determined not to make any contribution to the fund after he and his firm members heard complaints from the personal injury defense bar that the plaintiffs' bar was being asked to contribute and it appeared that this would become an issue in cases before respondent.

21. In 2003 respondent was assigned to Ulster County Supreme Court. Attorney Bruce Blatchly of New Paltz and his partner had approximately 20 cases pending before respondent in the fall of 2003, including a case in which Mr. Blatchly was representing attorney Alfred Mainetti and his partner, Joseph O'Connor, in a claim by a former partner of their law firm. Apart from their professional relationship, Mr. Blatchly had no personal relationship with respondent. Mr. Blatchly is also a part-time town justice of the Town of Gardiner.

22. On or about November 13, 2003, at the Ulster County Supreme Court, respondent approached Mr. Blatchly and asked to speak with him privately. Respondent asked Court Clerk Beth Cornell to leave the room because he had a "judge matter" to discuss with Mr. Blatchly, so Ms. Cornell stepped outside and closed the door, leaving Mr. Blatchly and respondent alone in chambers.

23. While they were alone in chambers, respondent told Mr. Blatchly that the legal expenses associated with his litigation against the Commission were rising,

that he was going to be raising funds, and that he was looking for $30,000 from attorneys in Ulster County. Respondent's legal bills had reached over $140,000 by that point.

24. Respondent further told Mr. Blatchly that rather than solicit a number of lawyers for small contributions, he had decided to go to three attorneys who were often in court, Mr. Blatchly, Mr. Mainetti and Maureen Keegan, and that he would be asking for $10,000 from each of them. Mr. Blatchly said that he was not sure what he could do but that if respondent could get him some information, he would consider it.

25. Respondent knew at the time of this meeting with Mr. Blatchly that Mr. Blatchly had recently settled a case that was pending before respondent for $3 million dollars, and respondent assumed that Mr. Blatchly had received one-third of that amount as his fee.

26. On December 1, 2003, respondent telephoned Mr. Blatchly at his law office and invited him to lunch on December 11, 2003. Respondent said that the lunch was in furtherance of what they had discussed previously. Respondent said that they would "meet some people" there and that Mr. Mainetti and Ms. Keegan were also invited. Respondent had never previously invited Mr. Blatchly out to eat.

27. Mr. Blatchly was concerned about attending the lunch and about the propriety of making a substantial contribution to respondent's legal expense fund since he had cases pending before respondent, including the one involving the Mainetti firm. Mr. Blatchly did some research and concluded that he could not ethically contribute to the fund.

28. Respondent also invited Kingston attorneys Mr. Mainetti, Ms.

Keegan and her partner Eli Basch to the lunch on December 11. These practitioners have substantial plaintiffs' personal injury practices and had numerous cases pending before respondent at the time.

29. Respondent also invited his friends Sanford Rosenblum and Judge Doyle to the lunch, which took place at Le Canard Restaurant in Kingston on December 11, 2003.

30. Attending the lunch at Le Canard, in addition to respondent, Judge Doyle and Sanford Rosenblum, were attorneys Al Mainetti and his partner Joseph O'Connor, Maureen Keegan and her partner Eli Basch, and Bruce Blatchly. Respondent introduced his friends as "Sandy Rosenblum" and "Kate Doyle."

31. At the lunch, respondent's federal litigation against the Commission was a topic of discussion. Two days earlier, the U.S. Court of Appeals for the Second Circuit had issued an opinion remanding the case to the District Court with the direction to abstain from exercising jurisdiction.

32. Mr. Mainetti was the first to leave the lunch. Mr. Blatchly was the next to leave, and as he left the table to get his coat from the coatroom, Mr. Rosenblum followed him.

33. In the coatroom, Mr. Rosenblum said to Mr. Blatchly, "We're looking for $10,000 from you. Can you help us out?" Mr. Blatchly responded that he had concerns about contributing to the Spargo fund because he was a town justice and had cases pending before respondent. Mr. Blatchly asked Mr. Rosenblum for something confirming that it was appropriate to contribute to the fund. Mr. Rosenblum requested

Mr. Blatchly's business card and said he would get back to him; he never did so. As the two of them were talking, respondent and Judge Doyle left the restaurant; Mr. Blatchly briefly said good-by to respondent and then went to the courthouse where he had a conference scheduled with respondent's law clerk.

34. After respondent had left, Mr. Rosenblum rejoined the remaining attorneys at the table, Mr. O'Connor, Ms. Keegan and Mr. Basch. Mr. Rosenblum told the attorneys that a group was forming to raise funds for respondent's legal expenses, and he asked the attorneys to contribute and mentioned $10,000 as an amount. Mr. Basch asked Mr. Rosenblum to provide something in writing. Mr. Basch paid the bill for the lunch. Ultimately, none of the attorneys contributed to the Spargo fund.

35. Despite respondent's denials, a fair preponderance of the evidence establishes that respondent knew in 2003 that Mr. Rosenblum was soliciting contributions to respondent's legal expense fund from attorneys with cases before respondent, and the lunch at Le Canard was arranged for that purpose.

36. Eight days later, on December 19, 2003, respondent telephoned Mr. Blatchly's law office. Mr. Blatchly was out, and respondent was given Mr. Blatchly's cell phone number. Respondent reached Mr. Blatchly on his cell phone in his car. Respondent told Mr. Blatchly that the new judicial assignments had just been issued for the upcoming year and that respondent was going to be assigned again to Ulster County.

37. Respondent further stated that Judge Hummel's caseload had been assigned to Judge Doyle, and he reminded Mr. Blatchly that Judge Doyle had been at the lunch a week earlier. Respondent said, "It looks like a good Christmas for me," or words

to that effect. Respondent knew that Mr. Blatchly's personal divorce case was then pending before Judge Hummel.

38. Respondent's telephone call was intended to induce Mr. Blatchly to contribute to respondent's legal expense fund.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.4(D)(1)(a), 100.4(D)(1)(b), 100.5(A)(1)(c), 100.5(A)(1)(d), 100.5(A)(1)(f) 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. Charges I, II and IV of the Formal Written Complaint and Charge I of the Second Supplemental Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge III of the Formal Written Complaint and Charge I of the Supplemental Formal Written Complaint are not sustained and are therefore dismissed.

Faced with burgeoning legal expenses incurred in litigation challenging the disciplinary proceedings against him, respondent used the power of judicial office, directly and indirectly, to solicit contributions to his legal expense fund from lawyers who appeared before him. Respondent brazenly asked one local attorney, in a private meeting in chambers, to donate $10,000, then continued to pressure the attorney over the next few weeks to make the contribution. Over the same period, with respondent's

apparent knowledge and approval, a close friend of respondent asked several other attorneys, all who regularly appeared before respondent, to contribute a similar amount to help defray respondent's legal expenses. Such conduct is totally inconsistent with the high standards of integrity and propriety required of members of the judiciary.

The record establishes that respondent was not only aware of, but involved in the solicitation of contributions to help pay his legal bills. Initially, with respondent's knowledge and approval, a legal expense fund was created in May 2003 with, as grantor, respondent's mother and, as co-trustees, a friend of respondent and another individual whose wife was a close friend of respondent's friend, Albany Surrogate Cathryn Doyle. As respondent's legal expenses mounted – reaching approximately $140,000 by the fall of 2003 – the strategy for raising funds became clear: large donations would be solicited from a few attorneys, many of whom had an active practice in respondent's court. It is undisputed that respondent's close friend Sanford Rosenblum solicited $10,000 contributions from some attorneys. We accept the referee's findings that within the same time frame, in a private conversation in chambers, respondent personally asked attorney Bruce Blatchly to contribute a similar amount.

In that conversation, respondent raised the subject of his rising legal expenses with Mr. Blatchly, an attorney who regularly appeared before respondent in Ulster County, and said that he would be seeking contributions of $10,000 from Mr. Blatchly and several other local attorneys. As the referee concluded, Mr. Blatchly was a credible witness whose testimony was corroborated by persuasive evidence supporting respondent's involvement in the fund-raising scheme. Moreover, respondent knew at the

time he approached Mr. Blatchly that the attorney had recently settled a $3 million dollar case and thus was likely to have received a million dollar fee. Respondent's version of this conversation – that he raised the subject of money only to say, "I'm not soliciting anything" in response to Mr. Blatchly's asking, "How are you doing?" (Comm. Ex. 5, p. 16; Tr. 745-46) – is not just illogical, but incredible.

A legal expense fund for a judge, in which attorneys are asked to help pay a judge's legal expenses in connection with a disciplinary proceeding (or, as here, a court challenge to the disciplinary proceedings), raises serious ethical issues. The money collected helps pay the judge's personal debt, and every dollar raised is one less dollar the judge has to spend from personal funds. Judges have been disciplined by the Commission for soliciting and accepting *loans* from attorneys (*e.g.*, *Matter of Garvey*, 1982 Annual Report 103 [Comm. on Judicial Conduct]; *Matter of Katz*, 1985 Annual Report 157 [Comm. on Judicial Conduct]); the egregious impropriety of soliciting what is essentially a monetary *gift* for the judge is self-evident, and having an intermediary solicit money on the judge's behalf does not diminish the impropriety.

The Advisory Committee on Judicial Ethics has opined on one occasion that a legal defense fund for a judge was ethically permissible (Adv. Op. 96-33), although the Committee cautioned that its opinion was limited to the unique circumstances of that case and did not constitute a blanket authority for the future. It is notable that respondent, who repeatedly professed familiarity with the ethical advisory opinions, claims to have relied on that opinion apparently without noting either its strongly worded cautionary language or the two subsequent opinions holding that such a fund under the

circumstances was not permitted (Adv. Op. 97-94, 03-12); nor, indeed, did he seek an opinion in his own case. Most significantly, in the opinion respondent purportedly relied on, the Committee underscored in emphatic terms that a judge must "take no part whatsoever" in soliciting such funds in order to protect public confidence in the integrity and independence of the judiciary. Whether a legal expense fund for a judge is appropriate clearly depends on the circumstances and must be considered on a case-by-case basis. Before consenting to the establishment of such a fund, it would be prudent for a judge to seek an opinion from the Advisory Committee. Here, the circumstances reveal that respondent's participation in the solicitation of contributions lent the prestige of judicial office to advance his private interests, contrary to Section 100.2(C) of the Rules.

A few weeks after their conversation in chambers, respondent invited Mr. Blatchly to lunch, along with several other local attorneys. While respondent maintains that the lunch was intended as a purely social gathering, the evidence elicited at the hearing demonstrates convincingly that the lunch was an integral part of an ongoing scheme to solicit specific attorneys to contribute to respondent's legal expense fund. Respondent had no apparent social relationship with the attorneys; he had never invited Mr. Blatchly to lunch previously; and the invited attorneys had a significant caseload before respondent in Ulster County. Moreover, respondent also invited his friend Sanford Rosenblum, who, not coincidentally, had already asked at least two other attorneys to contribute $10,000 to respondent's legal expense fund. Nor was it coincidental that after the lunch, when Mr. Blatchly rose to leave, Mr. Rosenblum followed him to the coatroom and advised him, "We're looking for $10,000 from you"

and that, after respondent had departed, Mr. Rosenblum delivered the same message to each of the attorneys who remained.

In a final effort to induce a contribution, respondent telephoned Mr. Blatchly a week later – going to the trouble to reach him on his cell phone – to advise him that Judge Doyle, who had been at the lunch, would be taking over Judge Hummel's caseload, which included Mr. Blatchly's own pending divorce case. As part of a course of conduct over several weeks in which Mr. Blatchly had been importuned to "donate" $10,000, that message, which respondent admits delivering, was implicitly coercive, even without respondent's strange parting comment that "It looks like a good Christmas for me." As the referee concluded, respondent's call to Mr. Blatchly was a pointed reminder of respondent's influence.

This series of overt acts by respondent convincingly establishes his role as an active participant in raising funds for his personal benefit from lawyers with cases before him, including his direct solicitation of a $10,000 contribution from Mr. Blatchly. Respondent has conceded that if the Commission finds that he solicited funds from Mr. Blatchly as alleged, he should be removed. At the oral argument, he stated: "Frankly, if you find that, you must remove me" (Oral argument, p. 77). We agree. Having found that respondent engaged in such conduct, we concur that ultimate sanction of removal is required.

In addition, in considering the remaining charges, we find several other instances of misconduct. As demonstrated by these disparate acts of wrongdoing, respondent failed to recognize and avoid misconduct as a judicial candidate, as a part-

time town justice, and as a full-time jurist.

First, as a candidate for town justice, respondent failed to abide by the high standards of conduct required of judicial candidates by giving away $5.00 coupons ("good for all products including gas") at a convenience store to prospective voters and by buying drinks for patrons at a bar while identifying himself as a judicial candidate. While a candidate is permitted to distribute promotional literature and materials, distributing items of more than nominal value is strictly prohibited. *See*, *Matter of Therrian*, 1987 Annual Report 141 (Comm. on Judicial Conduct) (judicial candidate was removed for giving $5.00 bills to prospective voters). Indeed, giving "money or other valuable consideration" to prospective voters as an inducement to vote constitutes a crime (*see* Election Law §17-142). We need not find that respondent's activities literally constituted "vote-buying" in order to conclude that such campaign conduct was unseemly and should be avoided. Respondent, who asserts that he acted in the good faith belief that his actions were consistent with the ethical standards, has apologized for this conduct.

Second, it was improper for respondent, as a town justice, to accept the District Attorney-elect as his law client in connection with a recount. Since the District Attorney was the attorney of record in the criminal cases in respondent's court, respondent's voluntary business relationship with the District Attorney-elect created an appearance of impropriety and a potential ongoing conflict with his duties as a judge. Respondent should have avoided business dealings that would raise such issues (Rules, §100.4[D][1][b]).

Third, respondent engaged in impermissible political activity by speaking at

a political party's fund-raising dinner in 2001. As the keynote speaker for the event, respondent permitted his name to be used in connection with the fund-raising activities of a political organization, which is improper regardless of whether he was a declared candidate at the time (Rules, §100.5[A][1][d]; *see* Adv. Op. 01-27). (Although respondent had not yet created a committee, he was introduced at the dinner as a candidate for Supreme Court [*see* Rules, §100.0[A].) While a judicial candidate may *attend* political fund-raising events and "speak to gatherings on his or her own behalf" (Rules, §100.5[A][2][i], [v]), respondent's participation in this event exceeded the boundaries of permissible conduct.

As the Court of Appeals has stated, removal is "a drastic sanction which should only be employed in the most egregious circumstances" (*Matter of Steinberg,* 51 NY2d 74, 84 [1980]), but may be necessary "to remove the stain from the judiciary" created by conduct that implicates a judge's integrity (*Matter of Cohen*, 74 NY2d 272, 278 [1989]). Such is the case here. By engaging in a series of acts that conveyed an appearance of "exploiting his judicial office for personal benefit" (*Matter of Cohen*, *supra*; Rules, §100.4[D][1][a]), respondent diminished public confidence in the integrity of the judiciary as a whole and has irretrievably damaged his usefulness on the bench.

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

Mr. Goldman, Mr. Pope, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder,

Ms. Hernandez, Judge Klonick, Judge Luciano and Judge Ruderman concur as to the sanction of removal and concur as to misconduct, except as set forth below.

As to Charge II, which is sustained in part, Mr. Coffey, Mr. Emery and Mr. Pope dissent and vote to dismiss the charge in its entirety.

As to Charge III, which is dismissed, Mr. Felder, Judge Klonick, Judge Luciano and Judge Ruderman dissent and vote to sustain the charge insofar as it alleges that respondent engaged in improper political activity by attending the Florida recount sessions.

As to Charge IV, which is sustained, Mr. Coffey, Ms. DiPirro and Mr. Emery dissent and vote to dismiss the charge.

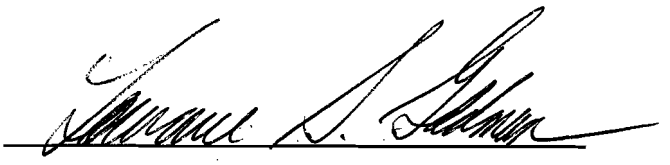
Judge Peters did not participate.

Judge Klonick did not participate as to the Commission's consideration of Charge IV.

CERTIFICATION

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

Dated: March 29, 2006



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

THOMAS J. SPARGO,

a Justice of the Supreme Court,
Albany County.

OPINION BY MR. EMERY CONCURRING IN THE RESULT AND DISSENTING IN PART, IN WHICH MR. COFFEY JOINS

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The *Spargo* case is a sad tale and, at the same time, a paradigm for what is wrong with our adversarial elective system for selecting judges. More to the immediate point, the Commission majority's tableau of dispositions starkly demonstrates how enforcement of the misconduct Rules in the context of judicial campaigns undermines our articulated noble goals: to preserve and instill dignity, independence and integrity in the judiciary during hotly contested, partisan judicial election campaigns (Rules, §100.5[A][4][a]). Regrettably, though I concur in the ultimate result in this proceeding, I am compelled to explain, at some length, both my policy and constitutional concerns with many of the interstitial results we have reached.

With his competitive juices overflowing, after an accomplished career in one of the most combative specialties of New York lawyering – election law – Tom Spargo decided to run for town justice against the dominant party candidate in his home

district. Employing creative but blatantly unseemly tactics, he won by a few votes. His victory apparently encouraged him to seek elevation to the Supreme Court. Again, against seemingly overwhelming odds, Spargo played a typical political game and secured cross-endorsements which assured his victory. *See*, *Lopez Torres v. NYS Board of Elections*, NYLJ, 2/3/06, p. 18 (Eastern Dist NY) (Gleeson, J.). Newly invested in his robes, he then embarked upon what most observers concluded was the beginning of a distinguished judicial career, only to let his competitive juices once again get the best of him when the Commission challenged him for his earlier excessive electioneering zeal.

The initial Commission charges were focused on alleged misconduct during respondent's campaign for town justice. Charge I asserts that he violated Section 100.1 of the Rules by failing to maintain high standards of conduct, Section 100.2(A) by not complying with law and for impropriety in conducting his campaign, and Section 100.5(A)(4)(a) by failing to maintain dignity and integrity in his political activities. These charges stem from his providing to potential voters free coffee and doughnuts, $5.00 product coupons, free pizza, free half gallons of cider and free rounds of drinks. In what I can only describe as a Solomonic parsing of these admitted campaign activities, we find that the product coupons and $2,000 worth of drinks at a bar were essentially an attempt to buy votes, but that the other conduct is *de minimis*, more in the nature of party favors or refreshments at typical campaign events.[1]

[1] With respect to these charges, I believe that, at least in the campaign context, *Republican Party of Minnesota v. White*, 536 US 765 (2002), casts considerable doubt on the validity of

Charge II focuses on alleged violations of Sections 100.1, 100.2(A) and (C), 100.3(E)(1) and 100.4(D)(1)(a), (b) and (c) of the Rules, which prohibit judges from conveying the impression that a litigant is in a position of special influence, or from engaging in business relationships with litigants or organizations "that ordinarily will come before the judge." Respondent admits that he accepted, as an election law client, the local District Attorney-elect who was defending a recount of election results and who later, when he had assumed office, appeared himself on one occasion, and whose assistants regularly appeared, before respondent. The newly elected District Attorney's campaign committee paid respondent's $10,000 fee during the first month of the new District Attorney's term. A majority of the Commission concludes that this relationship violated all of the above rules, except Sections 100.4(D)(1)(c) (prohibiting business dealings that involve the judge in "continuing business relationships" with lawyers or persons likely to come before the judge) and 100.3(E)(1) (requiring that a judge recuse when his or her impartiality might reasonably be questioned).

Section 100.1, requiring judges to "maintain[] and enforc[e] high standards of conduct...so that the integrity and independence of the judiciary will be preserved"; Section 100.2(A), requiring judges to "promote[] confidence in the integrity and impartiality of the judiciary"; and Section 100.5(A)(4)(a), requiring, generally, a judicial candidate to "maintain the dignity appropriate to judicial office...." These sections would seem to suffer from constitutional overbreadth and vagueness infirmities, sweeping plainly permissible campaign conduct within their ambit, to the extent that can be determined from their language. Therefore, I think it would be the wiser course for the Commission to no longer charge under these sections. I do not reach this question, however, because I conclude, along with my fellow members of the Commission, that two of the ingratiating measures respondent employed to get elected Town Justice were akin to an attempt to buy votes – conduct that is plainly impermissible and a potential violation of Election Law §17-142.

I dissent from this finding of misconduct because I do not believe that an improper business relationship exists when a part-time judge represents a candidate, not yet in office, in an election law matter that does not relate in any way to the matters at issue later, when the former client appears before his former counsel – the judge. *See* Adv. Op. 02-68 of the Advisory Committee on Judicial Ethics (permitting a part-time judge to represent a candidate for election to public office provided the judge avoids involvement in the candidate's political campaign and is fairly compensated); and *Matter of Voetsch*, 2006 Annual Report ___ (Comm. on Judicial Conduct) (judge engaged in business dealings with the family of a defendant he had recently sentenced and in a matter involving property that was subject of a holdover proceeding over which he had presided). Moreover, I think that no one could reasonably believe – and there is no evidence – that as a result of this past relationship, respondent conveyed the impression that the District Attorney was in a special position to influence him. The $10,000 payment from the campaign committee was for past work and could not have been viewed as a factor in any of respondent's decisions in low level criminal matters during the few weeks it was a debt. The main point is, however, that this was not an ongoing business relationship and the fact of respondent's prior one-time representation was well-known. Peculiar to this case is the circularity of the alleged offense: if respondent had lost the recount for his client-elect, then his former client would have never appeared before him as District Attorney and there would be no arguable misconduct. Our

misconduct findings should not hinge on whether a representation was successful.

Certainly, town justices know, and have all sorts of relationships with, many who appear before them. More is required than a single, short, attorney-client relationship to disqualify a judge who later sits on matters unrelated to that relationship. *E.g.*, *Matter of Jacon*, 1984 Annual Report 99 (Comm. on Judicial Conduct) (judge granted a favorable disposition to a defendant who was the judge's long-time client, after negotiating the disposition himself); *Matter of Latremore*, 1987 Annual Report 97 (Comm. on Judicial Conduct) (judge disposed of numerous cases involving clients of his insurance business); *Matter of Hayden*, 2002 Annual Report 105 (Comm. on Judicial Conduct) (judge presided over a small claims case involving a party who was the judge's client in a matter involving the same incident). That is why the rules require a "continuing business relationship" (Rules, §100.4[D][1][c]) or "a special position to influence" the judge (Rules, §100.2[C]).

In addition, in this case, the lawyer appearing before the judge represented the State in his official capacity, rather than as an individual with personal interests. The District Attorney and his assistants appear before courts very differently than ordinary litigants. It is far more reasonable to conclude that the individual criminal cases and their particular facts determine outcomes rather than any residual prejudice in favor of the individual who, on behalf of the State, employs the assistant district attorney appearing in any particular case. This is a situation very different from civil litigants appearing before a

judge who has previously represented one of them, where there is some continuing duty of loyalty, arguably, at stake. In any event, I cannot conclude that respondent conveyed the appearance in any way that he was swayed in favor of his former client's office under these circumstances. And, of course, there is no allegation that he was actually influenced.

Charge III accuses respondent of improper partisan political activity violating Sections 100.1, 100.2(A), and 100.5(A)(1)(c), (d) and (e) of the Rules, based on a trip he took to Florida at the behest of his client, the Bush for President committee, to assist in the Bush-Gore recount in November 2000. At the time, he was a town justice who remained a high profile election lawyer. As many other election lawyers did at the time, respondent went where the action was, to aid his client. Once there, he admits that he was part of a nationally televised brief demonstration calling for the Florida recount to be performed in the presence of the press.

A majority of the Commission votes not to sustain this charge. I agree that this is the right result for the simple reason that respondent's partisan political activities in Florida are protected by his First Amendment rights notwithstanding his part-time judgeship. After all, he was permitted to have the Bush campaign committee as a client (*see*, Adv. Op. 02-68) while he was a judge. So it would be strange indeed if he were punished for expressing his own views, or his client's views, during a demonstration in Florida, just because CNN happened to cover it for a New York audience. Were it otherwise – if Section 100.1 or 100.2(A) or 100.5(A)(1)(c), (d) and (e) were applied to

prohibit this conduct – then such application would suffer from constitutionally fatal underinclusiveness, in that it would restrict unambiguous First Amendment rights within a regulatory scheme that, at the same time, allowed the practice of election law by a sitting part-time judge on behalf of unadorned political entities. It seems to me fairly clear that such a result could not pass constitutional muster. *See infra* at pp. 13-15; and *Matter of Farrell*, 2005 Annual Report 159 and *Matter of Campbell*, 2005 Annual Report 133 (Comm. on Judicial Conduct) (Emery Concurring Opinions).

Charge IV accuses respondent of violating Sections 100.1, 100.2(A) and 100.5(A)(1)(c),(d),(f) and (g) of the Rules, prohibiting partisan political activity, use of his name in connection with the activities of a political organization, speech on behalf of a political party and attending a political gathering. These charges flow from a speech respondent gave at the Monroe County Conservative Party fund-raising dinner in May 2001, describing his Florida presidential recount effort on behalf of the Bush campaign. He asserts that, at that time, he was running for the Supreme Court seat in Albany he later won. There is no dispute that he was introduced to the gathering as a candidate for the Supreme Court. There is also no dispute that he had not yet formed a campaign committee. Apparently, the press had reported that he was running, though he had not "announced" his candidacy at a formal press conference.

I dissent from the Commission's majority vote to sustain the charge for the simple reason that whatever formalities becoming a candidate may entail – the Rule

requires either "a public announcement of candidacy" or "authoriz[ing] solicitation or acceptance of contributions" (Rules, §100.0[A]) – these activities are not sufficiently defined anywhere by the rules or precedent to warn judicial candidates, who consider themselves running, that they may not engage in their First Amendment right to campaign. What constitutes a "public announcement of candidacy" is apparently unclear, since Commission counsel argued in this case that respondent was not an announced candidate notwithstanding that he was introduced as a candidate at this major political dinner. Either because the rules are unclear or because any rule that did prohibit such campaign activity in seeking judicial office would unequivocally violate his First Amendment rights after *Republican Party of Minnesota v. White*, respondent's speech, attendance and activities in support of the Conservative Party (even outside of the geographical location of his election) cannot be misconduct.

Becoming a candidate is not a talismanic act. Publicly declaring or forming a campaign committee has little significance for constitutional purposes in the context of multiple other undisputed campaign activities in the face of an impending election for office. It may be that the state can regulate who is, and who is not, a declared candidate by publishing relevant and realistic specific rules. But it has not done so. In the absence of carefully crafted rules, the benefit of the doubt must go to a person who undisputably was seeking the office at the time of the campaign activities we seek to circumscribe. This makes sense as a matter of fairness and it is compelled as a matter of constitutional

right. In fact, at the time of the Monroe County speech, it is undisputed that respondent was seeking the office. He had sought appointment from the Governor to the unfilled position just three months earlier. The press had apparently reported that he was running and he had done nothing to deny the reports. And he was introduced as a candidate when he took the podium.

The majority states that respondent's conduct was wrong regardless of whether he was a candidate since he "permitt[ed] his... name to be used in connection with [an] activity of a political organization" (Rules, §100.5[A][1][d]). Once again, such a prohibition on a declared candidate is plainly foreclosed by *Republican Party of Minnesota v. White*, particularly in a system that permits partisan judicial elections. *See Republican Party of Minnesota v. White*, 416 F3d 738 (8th Cir 2005) (decision on remand), *cert. denied*, __ US __, 126 S Ct 1165, 163 L Ed2d 1141 (2006). It is hard to conceive of a more dramatic example of the constitutional infirmity of underinclusiveness than a rule which allows a judge to campaign and run on a party line, with a slate of party nominees, and, at the same time, prohibits the judicial candidate from "permitting his...name to be used in connection with any activity of a political organization" during a campaign for office. *See,* discussion of *Minnesota v. White*, *infra* at pp. 13-15; *see also, Matter of Farrell* and *Matter of Campbell* (Emery Concurring Opinions), *supra.*

In the first place, it appears to be an oxymoron, if it is read literally. In the real world of campaigns, it certainly is implausible to pretend that this Rule can be

rationally applied. At best, it is double-speak, worthy of Kafka or Carroll. In any event, to discipline respondent for this core First Amendment activity when he plainly was a candidate is unfair and unconstitutional.

Charge I of the Supplemental Formal Written Complaint was not sustained by the referee, and the Commission unanimously agreed, dismissing this allegation. Though I agree with this result, it is in some sense the most remarkable disposition of any among the myriad charges against respondent. The Commission originally charged respondent with violating Sections 100.1, 100.2(A) and 100.5(A)(4)(a) of the Rules mandating judicial integrity, high standards, independence, promotion of public confidence and avoidance of any appearance of impropriety. It is alleged that respondent's campaign payments of $5,000 each to Thomas S. Connolly, Jr. and Jane McNally gave the appearance of improper *quid pro quos* for their respective nominations of respondent at the Independence and Democratic judicial nominating conventions.

The undisputed facts were that Connolly was a media consultant who was retained by respondent during the summer before the election to reserve electronic media advertising time in the event he had a contested race. Perhaps not so coincidentally, Connolly also happened to be the chair of the Rensselaer County Independence Party. It is common knowledge that no candidate can win contested judicial races in this district (and many others) without two ballot lines, by virtue of the nomination of two parties. *See, Lopez Torres v. NYS Board of Elections*, *supra* at p. 2; *see also,* testimony of Gerald

Jennings in this proceeding (Tr. 466-76). What raised suspicion in this case and led to the Commission's charge of misconduct was that the media services Connolly performed for the $5,000 he was paid by the Spargo campaign were preliminary, at best, since there was no campaign after respondent secured the cross-endorsements. Moreover, Connolly issued an invoice for this amount on October 9, 2001, one day after he nominated respondent for, and respondent won, the Independence Party ballot line at that party's judicial nominating convention.

The Jane McNally story is somewhat similar. McNally was a long-time supporter of respondent's, though she was a Democrat. She had volunteered to help respondent's campaign for Supreme Court and, as once again luck would have it, she was also a delegate to the Democratic judicial nominating convention in 2001. At the convention, she nominated respondent to be the Democratic Party choice, and he won this nomination by the slimmest of margins – 20 to 18. Subsequently, respondent's campaign paid McNally an unexpected (Tr. 134) $5,000 bonus for her "volunteer" work.

I describe these events not to cast doubt on the referee's and our unanimous finding that no *quid pro quo* was proven. There simply is no proof that either of these Spargo supporters or respondent himself did anything wrong. And that is in fact my point.

I find it ironic that the Rules and cases condone the indisputably corrosive appearance that these payments create and, at the same time, punish $5.00 coupon

giveaways and buying drinks at the bar. The Rules prohibit judicial candidates from making a campaign contribution to a political party or other candidate (Rules, §100.5[A][1][h]); yet, we allow candidates to receive substantial contributions from the very party officials they cannot support, as well as from the lawyers whose livelihoods depend on the judges who receive their contributions (Rules, §100.5[A][5]). Judicial candidates cannot even anonymously participate in a phone bank (*see, Matter of Raab*, 100 NY2d 305 [2003]), though they can publicly buy tickets to, and attend, political party functions (Rules, §100.5[A][2][v]). Judicial candidates can join and campaign on a political party slate (Rules, §100.5[A][2][iii]); yet, we routinely discipline judicial candidates who "endorse" any other candidate (Rules, §100.5[A][1][e]; *see, e.g., Matter of Campbell*, 2005 Annual Report 133 [Comm. on Judicial Conduct]; *Matter of Crnkovich*, 2003 Annual Report 99 [Comm. on Judicial Conduct]; *Matter of Cacciatore*, 1999 Annual Report 85 [Comm. on Judicial Conduct]; *Matter of Decker*, 1995 Annual Report 111 [Comm. on Judicial Conduct]).

In effect, the misconduct Rules regulating judicial campaigns are a patchwork of compromises and *ad hoc* judgments which fail to address the central causes of the unseemliness of judicial campaigns: party control and the candidate's need to raise money. We allow our judicial elective system to metastasize the appearance of judgeships for sale and judgeships under party control by obliviously punishing penny ante partisan and financial campaign activities -- nipping around the edges of the real

problem -- while, at the same time, like the proverbial ostrich, we permit judicial candidates to engage in financial and partisan activities which stain the majesty of their function.

This is precisely what the Supreme Court forbade in *Republican Party of Minnesota v. White*, 536 US 765 (2002). *White* held that the First Amendment forbids a state from compelling judicial candidates to run for office and then unnecessarily restricting the scope of their core political expression: "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles" (*Id.* at 788). As Justice O'Connor put it in her concurring opinion:

> [By] cho[osing] to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system . . . the State has voluntarily taken on the risks to judicial bias . . . . As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.
>
> *Id.* at 792

See also id. at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech"). Applying strict scrutiny, *White* made unmistakably plain that in order to be constitutional, rules regulating judicial campaign activity can be neither

overinclusive nor underinclusive -- that is, they can neither burden more speech than is necessary, nor leave unregulated those activities that directly undermine the State's supposedly compelling interest in restricting speech. New York's patchwork quilt approach -- half lion and half ostrich -- comes nowhere close to surviving the searching scrutiny required by *White*.

One has to admire the ranks of New York State Supreme Court Justices for maintaining their composure, their high standards of ethics and their independence in the face of such an onslaught of corrupting influence. It is almost impossible to imagine rising above the cynicism and depression which a system such as ours must engender in those whose legal idealism leads them to the financial sacrifice of serving as an elected judge. But scores of excellent judges do it. How they maintain a sense of moral and ethical equilibrium when they are forced to curry favor with, and be obsequious to, self-important political martinets, as well as, unavoidably, solicit contributions from the practitioners whose cases they judge, is far more than I can fathom.

To make matters worse, this Commission subjects judicial candidates to the State's confusing and ill-conceived campaign rules during the very season when candidates are required to pander to the powerful. This baroque dichotomy between their sublime aspirations of judicial excellence and the ridiculous rules to which they have to conform while they pirouette to the demands of politicians and titans of the bar must bend the minds of the best and idealistic judicial candidates like a pretzel. We are destroying

the very institution we are trying to save. And the public, for all its self-preservative ignorance of the specifics, knows well enough what is going on.

Hopefully reform is in the offing, thanks to the Chief Judge, Dean John Feerick, the Brennan Center for Justice, and U.S. District Court Judge John Gleeson. *See*, "Panel Recommends Overhaul Of Nominating Conventions," NYLJ, 2/7/06 (p. 1); *Lopez Torres v. NYS Board of Elections, supra.* But it cannot come soon enough for those of us who care about New York's judiciary and its vaunted legal system. I, for one, hope that reform is not patchwork and political, perpetuating the scheme of requiring judges to run for office between the Scylla and Charybdis of currying favor, raising money and campaigning, on the one hand, and pretending to maintain the majesty of the robes while a candidate on the other. This is a cruel joke, the price for which we all pay in the pervasive cynicism about our legal system. At least an appointive system has only one-half of the vise that squeezes elected judges – currying favor with leaders – and takes unseemly campaign antics out of our courts and off the streets. As long as elections are associated with parties, nominations, contributions, and public campaigns on hot button issues, our judiciary will never be able to rise much above its current bipolar state. As a half measure, though, at least this Commission can struggle to rationalize the application of New York's judicial campaign rules so as to lessen the burden on the current crop of judicial candidates.

In this case, tellingly, aside from the last galaxy of charges, the majority

finds that respondent's misconduct is limited to dispensing $5.00 coupons and drinks during a campaign, representing a DA-elect who later appeared before him, and speaking at a political fund-raiser before his candidacy was "officially" declared. By any stretch, these are not removable offenses, more like a slap on the wrist. Nonetheless, we are voting to remove him, *as he concedes we must,*[2] because we find that he was responsible for personally soliciting funds to defray his legal expenses in litigating his challenges to our authority to discipline him for these minor violations. *See, Spargo v. Commission*, 351 F3d 65 (2nd Cir 2003); *Spargo v. Commission*, 23 AD3d 808 (3d Dept 2005). His tragic overzealousness can only be characterized as a self-inflicted wound. The story is not pretty.

By the fall of 2003, respondent owed his lawyers $140,000 for litigating against the Commission. His friends had started a defense fund and collected $11,200. Respondent vehemently asserts that he had no knowledge of and no role in raising and attempting to raise funds. Yet the referee found by clear and convincing evidence that he did. And no matter how much of the benefit of the doubt I give to respondent, I am constrained to agree.

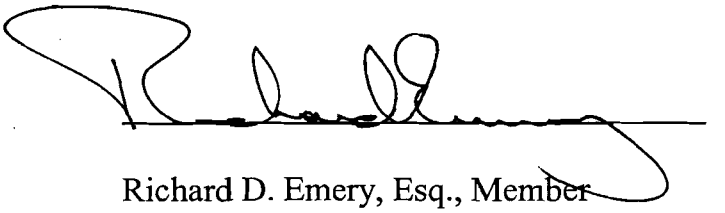
The Commission opinion convincingly sets forth facts that make it clear that respondent arranged a luncheon to raise money for his defense from several lawyers who

[2] At the oral argument, respondent stated: "...I'm trusting that you don't find that I solicited money. Frankly, if you find that, you must remove me" (Oral argument, p. 77).

had many cases pending before him, including one case in which the lawyers at the luncheon were defendants. One lawyer in this group, without any apparent reason to lie, testified that respondent repeatedly, personally solicited him, during a court conference, on the telephone and on a cell phone call, during which respondent informed him that he and another judge, with whom respondent was friendly, were assigned for the next year to continue on this lawyer's cases. This lawyer said that respondent emphasized that the other judge – respondent's friend – was to take over the caseload of the judge handling that lawyer's pending personal divorce. Respondent acknowledges making this strange call, no matter what its exact content. A court clerk corroborates the fact, though not the content, of the *ex parte* conversation after a court conference. And the lawyer's reasonably prompt report to the Commission of the solicitations, with no ulterior motive of any type, as well as the very real possibility of severe adverse personal and career consequences to him, corroborate his credibility and confirm the referee's and Commission's unanimous conclusions. Regrettably, this very thoroughly developed record leaves no room for an alternative innocent explanation of these events.

Thus, a finding of very serious misconduct is required for violating, at a minimum, Sections 100.2(C) and 100.4(D)(1)(a) of the Rules, which prohibit lending the prestige of judicial office for personal gain and engaging in personal financial dealings that could be perceived as exploiting judicial office. Therefore, I am constrained to concur in the result.

Dated: March 29, 2006



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