

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

MARGARET CHAN,

a Judge of the New York City Civil Court,
New York County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Brenda Correa, Of Counsel) for the Commission
Godosky & Gentile, PC (by Richard Godosky) for the Respondent

The respondent, Margaret Chan, a Judge of the New York City Civil Court,
New York County, was served with a Formal Written Complaint dated January 26, 2009,
containing three charges. The Formal Written Complaint alleged that respondent

personally solicited campaign contributions during her campaign for judicial office and that her campaign literature (i) misrepresented that she had been endorsed by the *New York Times* and (ii) displayed a pro-tenant bias.

On June 18, 2009, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On September 23, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Civil Court of the City of New York since January 2007. She was admitted to the practice of law in New York in 1994.
2. Respondent was a candidate in the Democratic Party's primary election held on September 12, 2006, for Civil Court Judge in Manhattan's Second Municipal Court District. There were two other Democratic candidates for the single vacancy: David Cohen and Andrea Masley. The winner of the Democratic primary would run unopposed in the general election because the other major political parties did not nominate candidates for the seat.
3. Respondent established a campaign committee for this election named the Friends of Margaret Chan (the "Chan Committee"). The treasurer of the

committee was Stacy Lee.

4. Respondent had never run for judicial office before.

As to Charge I of the Formal Written Complaint:

5. In August 2006 the *New York Times* endorsed David Cohen for Civil Court Judge in the Second Municipal Court District. Respondent was not endorsed by the *New York Times*.

6. In August 2006 the *New York Times* also endorsed Ken Diamondstone, who was running for State Senate in District 25.

7. Prior to the primary election, the Chan Committee prepared and widely disseminated a piece of campaign literature that included pictures of respondent and Diamondstone, described both respondent and Diamondstone as “Progressive Democrats,” and used the words “Endorsed by the *New York Times*” in such a manner as to make it appear that both respondent and Diamondstone had been so endorsed, when only Diamondstone had.

8. Respondent approved the literature described above. Respondent acknowledges that such literature could appear confusing to the average reader and may have led prospective voters to believe that she received the *New York Times* endorsement.

9. The State Board of Elections certified the results of the primary election as follows: Margaret Chan received 5,278 votes; David Cohen received 5,133 votes; and Andrea Masley received 2,352 votes. Thereafter, respondent ran unopposed in the general election on November 7, 2006. Respondent was sworn into office in January

2007.

As to Charge II of the Formal Written Complaint:

10. During her 2006 campaign for election to the New York City Civil Court, respondent and/or her campaign committee prepared and distributed campaign literature that advertised a lecture respondent planned to give with “Tenant Attorney and Activist Steven DeCastro.” The literature stated that “Margaret Chan and Veteran Tenant Attorney Steven DeCastro will show you how to stick up for your rights, beat your landlord, ... and win in court!”

11. Respondent acknowledges that she is responsible for the campaign literature described above, that she handed out the literature, and that the literature may have led a prospective voter to conclude that respondent would favor tenants over landlords if elected to the Civil Court. Respondent further acknowledges that the literature did not comport with the Rules and that the language implying partiality should have been omitted.

As to Charge III of the Formal Written Complaint:

12. While a candidate for Civil Court Judge, respondent signed a letter dated August 24, 2006, announcing her candidacy and seeking contributions to her campaign. The letter stated in part: “Running for elected office means I have to get my message out to voters through costly mailings and advertising. Your financial support will help me establish an effective campaign and deliver my message to the people that count, the constituents of the 2nd Judicial District.” The Chan Committee sent the letter to

members of the Women's Bar Association.

13. Respondent acknowledges that the letter should not have been sent in her name and that she should not have signed it.

14. Respondent took immediate remedial measures upon being made aware that the letter violated the Rules. Respondent instructed her campaign treasurer that her campaign committee could not accept any contributions that were received as a result of this impermissible solicitation and to return any such contributions that were received.

Additional finding:

15. Respondent acknowledges as to Charges I, II and III that it is the candidate's obligation pursuant to the Rules to ensure that his or her campaign committee adheres to the relevant laws and rules.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(4)(a), 100.5(A)(4)(d)(i), 100.5(A)(4)(d)(ii), 100.5(A)(4)(d)(iii) and 100.5(A)(5) 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 III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Judicial candidates are held to higher standards of conduct than candidates for non-judicial office, and the campaign activities of judicial candidates are significantly circumscribed in order to maintain public confidence in the integrity and impartiality of the judicial system. Among other requirements, a judicial candidate may not “make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office,” or “make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office...with respect to cases, controversies or issues that are likely to come before the court” (Rules, §100.5[A][4][d][i], [ii]). Nor may a judicial candidate knowingly misrepresent facts about the candidate or an opponent (Rules, §100.5[A][4][d][iii]).

Respondent’s campaign literature was clearly inconsistent with these ethical requirements. Certain literature, which respondent herself handed out, advertised a lecture she planned to give with a “tenant attorney and activist” on how to “beat your landlord...and win in court!” As the Court of Appeals has stated, “candidates need not preface campaign statements with the phrase ‘I promise’ before their remarks may reasonably be interpreted by the public as a pledge to act or rule in a particular way if elected” (*Matter of Watson*, 100 NY2d 290, 293 [2003]). Respondent has acknowledged that her literature may have given prospective voters the impression that she would favor tenants over landlords in housing matters, which are often the subject of Civil Court proceedings. By distributing such literature, which appeared to commit herself with respect to issues likely to come before her court, she compromised her impartiality. *See*,

Matter of Watson, supra; Matter of Birnbaum, 1998 Annual Report 73 (Comm on Judicial Conduct).

Other campaign literature, which respondent specifically approved, was deceptive in that it conveyed the erroneous impression that respondent had been endorsed by the *New York Times*. This literature, which was prepared and widely disseminated by respondent's campaign committee, juxtaposed her photograph with that of another candidate and positioned the language "Endorsed by the *New York Times*" in such a way that it could be construed as referring to both candidates, when in fact respondent did not have the *Times*' endorsement. Such deceptive practices have no place in campaigns for judicial office. It is especially important for judicial candidates to adhere to the highest standards of integrity and honesty because judges are called upon to administer oaths and are "sworn to uphold the law and seek the truth." *Matter of Myers*, 67 NY2d 550, 554 (1986). Judicial candidates are expected to be, and must be, above such tactics.

Although it cannot be ascertained whether this literature played a significant role in respondent's successful campaign, a judge's election is tarnished by campaign practices which are contrary to the ethical rules. *See, Matter of Watson, supra; Matter of Hafner*, 2001 Annual Report 113 (Comm on Judicial Conduct).

Judicial candidates are strictly prohibited from personally soliciting campaign contributions (Rules, §100.5[A][5]). By signing a letter addressed to "Dear Friend" that was an explicit appeal for campaign contributions, respondent violated this prohibition. Although the letter was mailed by respondent's campaign committee, this

letter appeared to be, and was in fact, a personal appeal for contributions. We note that upon being made aware that this letter did not comport with the Rules, respondent instructed her campaign treasurer that any contributions that were received as result of this impermissible solicitation could not be accepted and should be returned.

Every candidate for judicial office has the obligation to be familiar with the relevant ethical standards and to ensure that his or her campaign literature and practices are consistent with these standards.

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

Judge Klonick, Mr. Harding, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

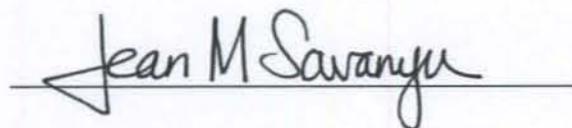
Mr. Coffey and Mr. Emery dissent and vote to reject the Agreed Statement and to dismiss the charges. Mr. Emery files a dissenting opinion.

Mr. Belluck and Judge Konviser were not present.

CERTIFICATION

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

Dated: November 17, 2009

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a solid horizontal line.

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

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DISSENTING OPINION
BY MR. EMERY

The Agreed Statement the majority accepts in the case of Civil Court Judge Margaret Chan is defective on its face and punishes the judge for constitutionally protected conduct. To condone the judge's acquiescence to this disposition degrades the Commission. Notwithstanding that the agreed sanction of admonition allows Judge Chan to continue to wear her robes and allows her to avoid further expensive and onerous Commission proceedings, I believe that we should refuse to strike this pragmatic bargain when basic ethical principles of judicial conduct are at stake. Because the alleged misconduct is factually and legally unsupported by the Agreed Statement, I must dissent and vote to dismiss the charges.

Each of the Commission's charges relates to Judge Chan's campaign activities in her run for Civil Court in Manhattan. Charge I accuses her of distributing a flyer showing her picture alongside another candidate in a way that implies that she is endorsed by the *New York Times* when only the other candidate actually was. Factually,

whether the flyer is misleading is highly debatable, given the placement of the *Times* endorsement on the flyer. But we do not have to reach this dicey question because Judge Chan in the Agreed Statement only “acknowledges that such literature *could* appear confusing to the average reader and *may have* led prospective voters to believe that she received the *New York Times* endorsement” (par. 8) (emphasis added). This limited “acknowledgment,” by its terms, is insufficient to satisfy violation of Rule 100.5(A)(4)(d)(iii), which requires, according to the Agreed Statement itself, a “*knowing*[] misrepresent[ation]” of facts about the candidate (par. 10) (emphasis supplied). Judge Chan simply has not conceded facts which constitute a knowing attempt to confuse voters. Her concession merely states the obvious: the flyer *could have* confused somebody. Plainly, that is not enough.¹

Charge II is similarly suspect. Because Judge Chan’s literature advertised her participation in a lecture during the campaign that described legal tactics tenants can use “to stick up for your rights, beat your landlord...and win in court,” she is accused of making a “pledge or promise” and a “commitment” that are “inconsistent with the impartial performance of the adjudicative duties of the office” in violation of Rule 100.5(A)(4)(d)(i) and (ii) (Agreed Statement, par. 13). However, once again, Judge Chan only agreed that this flyer for the lecture “*may have* led a prospective voter to conclude

¹ To further confuse the issue, paragraph 7 of the Agreed Statement states: “...the Chan Committee prepared and widely disseminated a piece of campaign literature that...used the words ‘Endorsed by the *New York Times*’ in such a manner as to make it appear that both respondent and [the other candidate] had been so endorsed, when only [the other candidate] had.” In light of Judge Chan’s quite specific contradictory statement in paragraph 8, quoted in the text above, this equivocal acknowledgment muddies the issue even further. It certainly does not qualify as an admission of a “knowing” misrepresentation.

that [Judge Chan] would favor tenants over landlords” (par. 12) (emphasis added). This too is not enough to establish that she pledged, promised, or committed to anything.²

Not only are Judge Chan’s concessions inadequate, but it is highly doubtful that advertisements for such a lecture, let alone the lecture itself, constitute misconduct. Candidates for judicial office (and judges) are plainly permitted to write articles, give lectures and express views even on controversial legal issues so long as they do not violate specifically defined prohibitions in the misconduct rules, such as the bans on pledges and promises, commitments and comments on pending cases. Speculation as to the future bias of a judge based on campaign or other speech is not a constitutional basis to ground misconduct.

As the United States Supreme Court has observed, “judges often state their views on disputed legal issues outside the context of adjudication -- in classes that they conduct, and in books and speeches,” and the Model Code of Judicial Conduct “not only permits but encourages this” (*Republican Party of Minnesota v. White*, 536 US 765, 779 [2002]; see, §§100.4[B] [“A judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Part”] and 100.4[C][1] [permitting judges to speak publicly on “matters concerning the law, the legal system (and) the administration of justice”]). And they plainly can advertise such activities. The fact that Judge Chan’s campaign chose a tactic which appeals to tenant voters is an inescapable outgrowth of this right. After all, an election campaign by necessity must be

² Unlike Charge I, the Agreed Statement with respect to Charge II contains no further gloss on Judge Chan’s speculation.

designed to appeal to voters based on the candidate's history and activities. A lecture on a controversial subject is no exception. If certain constituents feel they can predict a judicial candidate's views on controversial subjects that s/he may have to someday face in court, that is part of the price we pay for the free flow of information critical to the electoral choice of judges. It is not, however, misconduct for a judicial candidate to express views, even controversial ones.

As I have repeatedly written, punishing campaign activity of this sort treads on the First Amendment. *Matter of Yacknin*, 2009 Annual Report 176 (Dissenting Opinion); *Matter of King*, 2008 Annual Report 145 (Concurring Opinion); *Matter of Spargo*, 2007 Annual Report 107 (Opinion Concurring in Part and Dissenting in Part); *Matter of Farrell*, 2005 Annual Report 159 (Concurring Opinion); *Matter of Campbell*, 2005 Annual Report 133 (Concurring Opinion). In *Republican Party of Minnesota v. White*, *supra*, the Supreme Court drastically narrowed the judicial campaign activity which can be proscribed, pretty much limiting it to *explicit* pledges and promises. The Court recognized that when states choose to elect their judges, they sacrifice decorum for judges and buy into sometimes unseemly judicial campaigns that, for the most part, are protected speech. 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.*

(*Supra*, 536 US at 792) (Emphasis added.)

The New York Court of Appeals, in *Matter of Raab*, 100 NY2d 305 (2003), bridled at the breadth of the Supreme Court's dictate and narrowly construed its reach to struggle to keep judicial campaigns within some semblance of propriety. Rejecting a constitutional challenge to Rule 100.5 in the wake of the *White* decision (which had struck down a Minnesota rule prohibiting a judicial candidate from "announc[ing] his or her views on disputed legal or political issues"), the New York Court refrained from applying *White* to other aspects of campaign activity, stating:

The [Supreme] Court did not declare, however, that judicial candidates must be treated the same as nonjudicial candidates or that their political activity or speech may not legitimately be circumscribed. To the contrary, the Court distinguished Minnesota's announce clause from other rules restricting the speech of judicial candidates, taking no position on the validity of other judicial conduct provisions (*see Republican Party of Minn. v White*, 536 US at 770, 773 n 5). (*Id.* at 313-14)

Similarly, in *Matter of Watson*, 100 NY2d 290, 301 (2003), the Court declared:

White itself distinguished the announcements at issue in that case from "pledges or promises," which are covered by another Minnesota rule [*White*, 536 US at 770]. Thus, *White* does not compel a particular result here.

Consequently, I recognize that our Court of Appeals has held, in tension with *White*, that *implied* promises of future conduct by a judicial candidate may be the basis for discipline (*Matter of Watson, supra*, 100 NY2d at 298). Stating that a candidate's statements "must be reviewed in their totality and in the context of the campaign as a whole" to determine whether they constitute a prohibited pledge or

promise, the Court declared: “[C]andidates need not preface campaign statements with the phrase ‘I promise’ before their remarks may reasonably be interpreted by the public as a pledge to act or rule in a particular way if elected” (*Id.*). And, of course, I am bound by that decision.

However, even under the *Watson* standard, Judge Chan’s campaign statements do not at all resemble the expressions of pro-police affinity by candidate Watson (*e.g.*, “we need a judge who will work with” and “assist” police and other law enforcement personnel “as they aggressively work towards cleaning up our city streets”) that were held to be improper. Judge Watson’s statements *committed* to harshly sentence out-of-town law violators. This was a far cry from general expressions of predispositions as part of campaigning, such as fairness for defendants in criminal cases, right to life, or respect for the rights of tenants. *See, e.g., Matter of Shanley*, 98 NY2d 310, 313 (2002) (not misconduct for a judicial candidate to refer to herself as a “law and order” candidate since there was no showing that the phrase “compromises judicial impartiality” or constituted a prohibited pledge, promise or commitment); *see also* Adv Op 93-52.

Therefore, notwithstanding the Court of Appeals’ reluctance to embrace the breadth of *White*, neither *Raab* nor *Watson* supports a misconduct finding based on an advertisement -- even one distributed in support of a judge’s campaign -- for a lecture teaching tenants their rights. Nothing in *Raab* or *Watson* deprives a judicial candidate of the right to address issues -- all kinds of provocative issues. Can it possibly be argued that by appearing with a tenants’ advocate and urging voters to know their rights against landlords, the candidate made an actual pledge, promise or commitment to decide a

future case in favor of tenants? It is inconceivable that on these facts the Supreme Court would uphold the constitutionality of an application of a misconduct rule that prohibited Judge Chan's advertisement for her appearance. By finding misconduct for such statements, the Commission is adding a gloss on *White* that cannot be justified by any reading of that decision.

Notably, some federal courts have declared the pledges, promises and commitment prohibitions unconstitutional (*Family Trust Foundation of Kentucky v. Wolnitzek*, 345 FSupp2d 672 [ED Ky 2004]; *North Dakota Family Alliance v. Bader*, 361 FSupp2d 1021 [ND 2005]). Other jurisdictions, in upholding the prohibitions, have underscored that only *express* promises or commitments as to future rulings can be prohibited. A Pennsylvania court, concluding that the *Watson* interpretation of the rule failed to satisfy constitutional overbreadth concerns, held that to withstand a constitutional challenge, the "pledges and promises" and "commit" rules must be narrowly construed to prohibit judicial candidates "from promising [or]... committing themselves to particular rulings once elected" (*Pennsylvania Family Institute v. Celluci*, 521 FSupp2d 351, 378, 379-30 [ED Pa 2007]). A Wisconsin court declared: "A promise, pledge or commitment typically includes one of those three words or phrases like 'I will' or 'I will not'," and "Absent a statement committing the speaker to decide a case, controversy or issue in a particular way, the speaker can be confident that the rule is not violated" (*Duwe v. Alexander*, 490 FSupp2d 968, 976 (WD Wisc 2007)). Because of constitutional concerns, in 2006 New York eliminated the prohibition against statements that "*appear to commit*" the candidate with respect to controversies and issues (former

Rule 100.5[A][4][d]), thereby, at least by negative inference, limiting misconduct to an *express* commitment.

While it is plain to me that application of the misconduct rules which prohibit *implicit* commitments or promises cannot pass constitutional muster, even *Watson* is readily distinguishable from the facts here. There the candidate made implicit promises, pledges and commitments. Here, Judge Chan's implicit criticism of landlords was not a pledge, promise or commitment that she would rule against them. In any event, the Agreed Statement concedes only that the allegedly offending advertisement for Judge Chan's lecture "*may have*" caused a voter to believe that she would favor tenants. As such, she has only conceded a non-proscribed "appearance" of bias which is the essence of what *White* and the 2006 New York amendments to Rule 100.5[A][4][d] protects.

The fact that most judicial candidates in New York run campaigns that avoid discussion of issues that may come before their courts does not mean that they do not have free speech rights under *White* that permit them to discuss such issues. If a candidate makes a statement during a campaign that is not a pledge, promise or commitment, but, nevertheless, may be construed by the cognoscenti to favor a particular class of litigants, that is the price we pay for judicial election campaigns and the candidate may not be disciplined.

Regrettably, too often the Commission has become a peripatetic watchdog of judicial campaign activity. *E.g.*, *Matter of Yacknin, supra*; *Matter of King, supra*; *Matter of Spargo, supra*; *Matter of Farrell, supra*; *Matter of Campbell, supra*; *Matter of Raab, supra*; *Matter of Watson, supra*; *Matter of Schneier*, 2004 Annual Report 153;

Matter of Crnkovich, 2003 Annual Report 99; *Matter of Shanley*, *supra*; *Matter of Mullen*, 2002 Annual Report 199; *Matter of Williams*, 2002 Annual Report 175; *Matter of Hafner*, 2001 Annual Report 113; *Matter of Fiore*, 1999 Annual Report 101; *Matter of Herrick*, 1999 Annual Report 102; *Matter of Polito*, 1999 Annual Report 129. In my view, our role is hands off except in the clearest cases. This is not one of those. This is a case of misconduct charges that cannot be supported on the facts or the law. We should not abide such a result even if the judge agrees.

Our purpose is not to monitor all literature, all campaign activity and impose discipline if the statements or actions during a campaign are confusing, unclear or may suggest certain conclusions. Our task is to determine whether this candidate *knowingly* misrepresented facts to the voters or *stated* an improper pledge, promise or commitment. When the staff and a judge present an agreed statement of facts to us in lieu of a referee's report, the agreed facts need to be unequivocal. We need a basis to impose discipline. That basis is absent on the record before us.

Finally, a word about Charge III, which accuses Judge Chan of personally soliciting members of the Women's Bar Association for contributions. She admits signing a letter that solicited funds and admits that it was improper for her to have done so since Rule 100.5(A)(5) prohibits judicial candidates from "personally" soliciting or accepting contributions. As soon as she realized that she had erred by not having her surrogates make the plea (even though her personal letter was sent by her committee and it appears that donations were returnable to the committee), she apologized and arranged to return all the funds that had been contributed as the result of her improper importuning

(Agreed Statement, par. 16). Her technical violation of the ban against personal solicitations was effectively mitigated. In such cases of unwitting transgressions that are timely admitted, corrected and apologized for, the Commission's general practice is to issue a private caution or to dismiss outright.

The decisions in *Watson* and *Raab* do not address the prohibition on personal solicitation of contributions. In the wake of *White*, however, several federal courts in other jurisdictions, including two appellate courts, have struck down such a ban (*Weaver v. Bonner*, 309 F3d 1312 [11th Cir 2002]; *Yost v. Stout*, Memorandum and Order [District of Kansas 11/16/08]; *Carey v. Wolnitzek*, Opinion and Order [ED Ky 10/15/08]; *Republican Party of Minnesota v. White*, 416 F3d 738 [8th Cir 2005]; *Siefert v. Alexander*, 597 FSupp2d 860 [WD Wisc 2009]). As these decisions make clear, “[t]he impartiality concerns, if any, [raised by soliciting contributions] are created by the State’s decision to elect judges publicly” (*Weaver, supra*, 309 F3d at 1322), and “only a system of public financing or a change in the method of judicial selection” can eliminate such concerns (*Seifert, supra*, 597 FSupp2d at 888).

Since judicial candidates can easily ascertain the identity of their contributors notwithstanding the prohibition, and since solicitations by a committee may be no less coercive than a personal solicitation, the personal solicitation ban has been viewed as both ineffectual and antiquated:

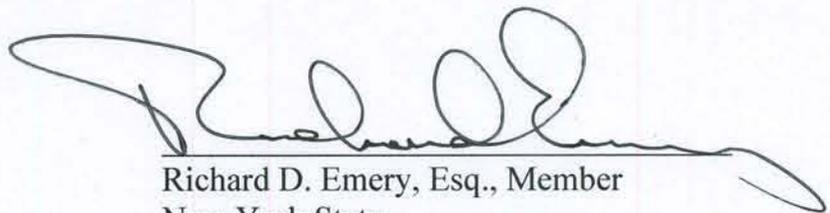
In the end, it appears that [the personal solicitation ban] furthers no interest at all, except perhaps one of saving judicial candidates from the unseemly task of asking for money. [Citation omitted.] There is almost a nostalgic quality about it, harkening back to the days of early America when

candidates for office thought it was in bad taste to campaign on their own behalf, instead letting their surrogates do all the dirty work. (*Id.*)

Interestingly, after the ban on personal solicitations was struck down in Minnesota, that state revised its rule to permit a candidate, *inter alia*, to sign a letter for distribution by the candidate's campaign committee, provided that contributions were returned to the committee³ – which appears to be the exact conduct that occurred here. However doubtful the constitutionality of a general ban on personal solicitations, it is even more unlikely that such a ban could be upheld as applied in Judge Chan's circumstances – a letter signed by the judge and sent by the judge's committee with contributions returnable to the committee. Like the application of the “misrepresent” and “pledges and promises” rules in this case, the “solicitation” rule, as applied here, serves only to stifle protected core campaign conduct rather than any realistic or legitimate ethical concern.

Because Charges I and II are defective and the Agreed Statement inadequate, and because the violation in Charge III should never have been charged, I dissent and vote to dismiss.

Dated: November 17, 2009



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

³ Canon 5(B)(2) of the Minnesota Code of Judicial Conduct provides in part: “A candidate may (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.”