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

DAVID A. CLARK,

a Justice of the York Town Court,
Livingston 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 (John J. Postel, Of Counsel) for the Commission

Honorable David A. Clark, *pro se*

The respondent, David A. Clark, a justice of the York Town Court, Livingston County, was served with a Formal Written Complaint dated November 1,

2004, containing one charge. Respondent filed an answer dated December 3, 2004.

By order dated February 24, 2005, the Commission designated Maryann Saccomando Freedman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 19, 2005, in Rochester. The referee filed a report dated December 1, 2005.

Commission counsel filed a brief with respect to the referee's report, recommending that respondent be admonished. No brief was filed by respondent. Oral argument was waived.

On February 2, 2006, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the York Town Court, Livingston County, since January 1984. Respondent is not an attorney.

2. From on or about February 29, 2004, to on or about April 3, 2004, as set forth below, respondent engaged in a close, personal relationship with Barbara Osypiewski, the result of which was to lend the prestige of his judicial office to advance Ms. Osypiewski's private interests and to convey the impression that she was in a special position to influence him.

3. On or about February 29, 2004, at approximately 8:00 A.M., Ms. Osypiewski appeared at respondent's home and advised him that she wished to file a criminal complaint against Robert Volkmar for allegedly threatening to kill her. Ms. Osypiewski was upset and crying.

4. At the time, Ms. Osypiewski resided in an apartment owned by Mr. Volkmar, her boyfriend, in the Town of York. Respondent had no personal relationship with Ms. Osypiewski prior to February 29, 2004. Respondent had seen Ms. Osypiewski around the community and when she appeared with Mr. Volkmar in respondent's court around December 2003 in connection with a landlord/tenant proceeding.

5. Respondent advised Ms. Osypiewski to contact the Sheriff's Department about her criminal complaint. Ms. Osypiewski had already done so. Ms. Osypiewski left stating she would return in about forty minutes. Shortly thereafter, a dispatcher from the Sheriff's Department telephoned respondent and inquired about Ms. Osypiewski's whereabouts, stated that an officer was on his way over pursuant to Ms. Osypiewski's request, and advised respondent that the Sheriff's Department had a report that Ms. Osypiewski was suicidal.

6. When Deputy Snyder arrived, Ms. Osypiewski was not on the premises. Deputy Snyder returned to his car, which was parked in respondent's driveway, to await Ms. Osypiewski's return. Upon her return, the deputy met with her in the driveway. Respondent remained in his house and took no part in the discussion. Deputy Snyder left about a half hour later.

7. Following the deputy's departure, Ms. Osypiewski, who was crying and distraught, sat on respondent's steps. Respondent told Ms. Osypiewski that she could not sit on his steps and asked what she was going to do. Ms. Osypiewski responded that she had nowhere to go and returned to her car, which was parked in respondent's

driveway.

8. Ms. Osypiewski later returned to respondent's steps. Respondent again told her that she had to leave. She asked him if he would go with her to Mr. Volkmar's home to retrieve a three-wheeled vehicle. Respondent accompanied her to Mr. Volkmar's home, where respondent assisted her in retrieving the vehicle. While present, both Ms. Osypiewski and Mr. Volkmar referred to respondent as "Judge."

9. During this time, respondent observed behavior by Mr. Volkmar which led him to have some concern for Ms. Osypiewski's safety.

10. Upon his return to his home, respondent found Ms. Osypiewski sitting in her car in his driveway. Respondent again told her that she could not stay there, whereupon she started to cry and told him that she had no place to go.

11. Respondent felt that he could not leave Ms. Osypiewski sitting on the steps. Respondent told her that he was going to Chili for a dinner at his daughter's future in-laws' home and offered to drive her there. She accepted. When they arrived, Ms. Osypiewski remained in the car and respondent went inside. Someone saw Ms. Osypiewski and invited her inside. After dinner, respondent and Ms. Osypiewski drove back to respondent's home.

12. On the drive home, Ms. Osypiewski again told respondent that she had nowhere to go. Because she had nowhere to go and no resources, respondent told her that she could stay at his home for a day or two in an extra room. She accepted the offer, and she continued to reside at respondent's home until April 3, 2004. On prior occasions

respondent had allowed friends of his children who were unknown to him to stay at his house when they had no place to go.

13. During the entire period she stayed with respondent, Ms. Osypiewski slept in a separate bedroom. At some point in March 2004, the relationship between respondent and Ms. Osypiewski began to involve romantic feelings and physical contact. There was no sexual contact between them.

14. On or about March 5, 2004, respondent, two friends, his brother and Ms. Osypiewski went to Mr. Volkmar's home to retrieve Ms. Osypiewski's remaining property. They were met there by a deputy sheriff. While at Mr. Volkmar's home, the deputy referred to respondent as "Judge." Respondent did not refer to his judicial office.

15. Respondent did not take part in loading Ms. Osypiewski's belongings because he thought that doing so would lend the prestige of his office improperly.

16. Sometime after returning to his house on March 5, 2004, respondent learned that Ms. Osypiewski had a claim for damages allegedly caused by Mr. Volkmar to her personal property, and she told him that she wanted to bring a small claim. Respondent advised her to contact the court clerk. On March 10, 2004, Ms. Osypiewski met with the court clerk and commenced a small claims action in respondent's court seeking damages of $599.00 and $2,872.00.

17. Upon his first encounter with Ms. Osypiewski when she appeared at his house on the morning of February 29, 2004, respondent had advised her that because

of her appearance at his home he would be disqualified from hearing her case.

18. Respondent notified the court clerk and his co-judge that he could not hear any action brought by Ms. Osypiewski.

19. On or about March 20, 2004, respondent drove Ms. Osypiewski to the Livingston County Sheriff's station in Lakeville. The station comprises a small building containing one small room. Respondent accompanied her into the station and waited for her there while she met with Deputy Dougherty to file a criminal complaint against Mr. Volkmar. Deputy Dougherty knew that respondent had accompanied Ms. Osypiewski, knew that respondent was a judge and referred to him as "Judge Clark" while he was at the station. Ms. Osypiewski listed respondent's address as her residence on the supporting deposition she filed with the Sheriff's Department.

20. On or about March 20, 2004, an accusatory instrument was filed in the York Town Court charging Mr. Volkmar with Aggravated Harassment 2nd Degree.

21. By March 23, 2004, as a consequence of respondent's personal relationship with Ms. Osypiewski, both respondent and his co-judge had disqualified themselves from the criminal and small claims cases involving Ms. Osypiewski that had been commenced in the York Town Court. All the matters were transferred to other courts.

22. Respondent properly disqualified himself from all matters involving Ms. Osypiewski's legal claims and actions.

23. Respondent took no action in any matter involving Ms. Osypiewski

and did not contact any judge involved in any of Ms. Osypiewski's proceedings in any other courts. At no time did respondent attempt to influence, nor discuss Ms. Osypiewski's cases with, any judge or law enforcement officer or lay person.

24. Respondent believed that by disqualifying himself and taking no action in connection with the small claims and criminal matters, he was insulating his private conduct from his judicial office and upholding the integrity of the court.

25. Respondent belatedly realized that he should have acted to preclude Ms. Osypiewski from making reference to or using respondent's judicial office or her personal relationship with him in connection with her dealings with the courts or law enforcement officials.

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(B), 100.2(C) and 100.4(A)(3) 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.

Respondent abandoned the proper role of a judge -- that of a neutral, impartial magistrate -- by commencing a personal relationship with a prospective criminal complainant and by lending the prestige of his judicial status to assist her both outside of

court and in pursuing her legal claims.

On the same day that Ms. Osypiewski came to respondent's home and advised him that she wished to file a criminal complaint against her former boyfriend, respondent permitted her to move into his home and accompanied her to the boyfriend's home to retrieve her property. Thereafter, they began a romantic relationship, and while she continued to reside at respondent's home, respondent accompanied her again to the boyfriend's home while she retrieved her belongings, and to the sheriff's department while she filed a criminal complaint. At the station, Ms. Osypiewski provided respondent's address as her residence, and although respondent did not overtly assert his judicial status, the deputy was aware that respondent had accompanied her, and the deputy addressed him as "judge."

Respondent's conduct violated well-established ethical standards that prohibit a judge from using his or her judicial status to advance private interests and from conveying, or permitting others to convey, the impression that they are in a special position to influence the judge (*see* Rules, §100.2[C]). Both at her boyfriend's home and at the sheriff's station, respondent's very presence lent the prestige of judicial office to advance Ms. Osypiewski's personal interests and no doubt influenced the treatment she received. Respondent should have recognized that his presence at the boyfriend's home, while Ms. Osypiewski retrieved her belongings, could be construed as a quasi-official sanction for her behavior, and that his presence with her at the sheriff's station might be interpreted as an implicit request for favorable treatment. As the Court of Appeals has

stated:

> [N]o judge should ever allow personal relationships to color his conduct or lend the prestige of his office to advance the private interests of others. Members of the judiciary should be acutely aware that any action they take, on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved. There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. [Citations omitted.]

Matter of Lonschein v. Comm. on Judicial Conduct, 50 NY2d 569, 571-72 (1980).

A judge's conduct, both on and off the bench, must be and appear to be beyond reproach if respect for the courts is to be maintained. Respondent's conduct showed poor judgment and a serious misunderstanding of the role of a judge in our legal system. *See, Matter of Kaplan*, 1997 Annual Report 96 (Comm. on Judicial Conduct) (judge was admonished for asserting his judicial influence in connection with his friend's claims against her former husband); *Matter of Friess*, 1982 Annual Report 109 (Comm. on Judicial Conduct) (judge was censured for providing overnight lodging at his home to a female defendant after arraignment and assisting her in obtaining counsel). Although respondent disqualified himself from both the criminal and civil proceedings involving Ms. Osypiewski and took no official action in either matter, his actions compromised his impartiality and diminished public confidence in the judiciary as a whole.

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

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

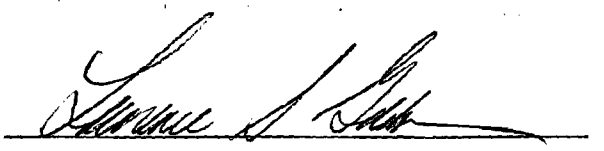
Mr. Goldman, Mr. Pope, Mr. Coffey and Judge Klonick dissent only as to the sanction and vote that respondent be admonished.

Mr. Emery dissents and votes to return the case to the referee.

CERTIFICATION

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

Dated: March 27, 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

DAVID A. CLARK,

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Livingston County.

DISSENTING OPINION
BY MR. GOLDMAN, IN
WHICH MR. COFFEY
JOINS

- -

I respectfully dissent from the Commission determination that respondent be censured. I believe that on the record presented the appropriate sanction is admonition.

A distraught 42-year-old woman went to the home of respondent, a divorced, 63-year-old, non-lawyer judge, for help. She told respondent she had no place to go, and respondent allowed her to stay in a spare room at his home. Eventually a romantic relationship developed. On two occasions respondent accompanied her to her former boyfriend's home, where she, once in the presence of a deputy sheriff, retrieved her belongings, and later respondent accompanied her to the sheriff's station to file a criminal complaint.[1] Respondent did not overtly assert his judicial influence or refer to

[1] The other dissenting opinion states that respondent "assisted her" in filing a small claims action against her former boyfriend. The "assistance" given was that after she told him she wanted to pursue a small claims action, he advised her to contact the court clerk.

his judicial office (though certainly most of the individuals involved in these events knew that he was a judge), and he notified his court clerk and co-judge that he would be disqualified from any matters involving the woman.

It seems apparent that respondent believed that by disqualifying himself from the woman's cases and by staying in the background while she pursued her claims, he could insulate his private conduct from his judicial office. There is no evidence that he intended to influence, or did in fact influence any official or other person. On these facts, I accept the recommendation of Commission counsel and vote to admonish respondent. I believe that the sanction of censure is too harsh.

I am constrained to respond to the view that it is the proper role of the Commission to return this matter for additional evidence, as suggested by the other dissenting opinion. The Commission has a two-tiered responsibility: in the early stages of a case it investigates and determines whether to charge, somewhat similar to a grand jury. Once charges are voted, however, the Commission sits in a judicial-like capacity. Here, there was no error by the referee in excluding evidence. The Commission should not remand for further witnesses or evidence simply because it feels that there might be more evidence to justify a more severe sanction.

It is staff's burden to prove by a preponderance of the evidence whether the facts are sufficient to warrant a finding of misconduct and an appropriate sanction. If the case presented is inadequate to justify either a finding of misconduct or a particular

sanction, the Commission, sitting in its judicial and not its investigative capacity, should vote accordingly.

Here, staff counsel presented its case at a hearing. At this juncture, after an evidentiary hearing and a referee's factual findings, the Commission should not remand and suggest to staff -- or to the respondent -- whom to call as witnesses or what evidence to present.

This approach is not inconsistent with the Commission's right to reject an agreed-upon statement of facts upon the basis that the facts are insufficient and to suggest to both sides that the Commission would consider an agreed statement if certain further facts are included. At times we have rejected an agreed statement of facts, just as a judge occasionally rejects a plea of guilty, because there are insufficient facts to justify a finding of misconduct or a particular sanction. Here, however, there was a hearing at which both sides had a full opportunity to present their cases, and a referee's report has been filed. Staff counsel should not have a second chance to present a potentially stronger case. Nor should the judge be required to undergo once again the anxiety and cost of a hearing.

In any case, as I see it, there is no reasonable likelihood that a further hearing would provide a basis to remove respondent. I believe that even the determination of censure is too severe.

Dated: March 27, 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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DISSENTING OPINION
BY MR. EMERY

DAVID A. CLARK,

a Justice of the York Town Court,
Livingston County.

- -

In the Josef Von Sternberg movie classic "The Blue Angel," Marlene Dietrich portrays a torch singer whose allure overwhelms an aging esteemed professor, transforming him from a respected community figure into a blathering fool. Respondent's behavior, which has led the Commission majority to censure him, was similarly foolish. He forthrightly admits to being smitten by a younger woman whom he characterizes as manipulating him. As instinctively sympathetic as one may feel for the professor, and respondent's plight as he presents it, the question before the Commission is whether his actions were merely foolish, constituting an appearance of impropriety, or whether he attempted to manipulate, or actually did manipulate, the legal system, using his judicial prestige for his own, or his girlfriend's, benefit. Because the record in this case, which comprises only respondent's testimony and certain documentary exhibits, is inadequate to make that decision, *one way or the other*, I must dissent.

Originally, this case was presented to the Commission for disposition based upon an Agreed Statement. Finding that approach inadequate, we sent the case back for a hearing. But the hearing added little because the evidence came solely from the respondent, leaving open the same questions not answered in the Agreed Statement. What the limited record discloses is that respondent – on the bench of the Town of York since 1984, divorced for 17 years, father of four and 63 years old – befriended a younger, apparently unstable woman whom he found crying on his doorstep one morning. He knew that she knew that he was the town justice. She was seeking his help and influence to deal with her estranged boyfriend who had just evicted her from their residence. Respondent also knew the boyfriend: he had previously officiated at the boyfriend's wedding, and the boyfriend had appeared before him as a litigant and had recently inquired about purchasing respondent's car. Apparently, attracted to her and feeling sorry for her, respondent accompanied this woman to the boyfriend's house to pick up her property, which, with a judge present, went very smoothly. He then invited her to accompany him to visit his daughter and, later that day, to live with him at his home. His testimony was that they had no sexual relationship though they engaged in "romantic" physical contact, whatever that means.

After they began to live together, respondent helped his new friend with her continuing legal problems with her former boyfriend. According to him, he again went to the boyfriend's house (along with the woman and a sheriff's deputy) to retrieve more

property; he assisted her in filing a small claims action in his court against the boyfriend; and he accompanied her to a local police station to swear out a criminal complaint against the boyfriend, all the while knowing that the deputies taking the complaint knew him to be a judge and allowing his new friend to use his address as her own. Exercising an abundance of caution, respondent disqualified himself from sitting on the small claims and criminal cases although it is unclear at what point in the sequence of events he took this action.

The problem I have with this record in attempting to determine whether censure or removal is the proper outcome is that I cannot tell whether respondent's actions constituted an appearance of impropriety, or whether he used his office to attempt to pervert, or actually to "pervert justice for [his] own benefit." *See Matter of Cook* and *Matter of LaClair* (Aug. 21, 2005) (Emery Dissents) and *Matter of Blackburne* (Nov. 18, 2005) (Emery Dissent). If respondent engaged in conduct that satisfies the latter characterization of his actions, he ought to be removed.

Without doubt respondent appeared to influence the deputies' actions against the boyfriend. But without their testimony it is impossible to conclude that he actually did. Notably, he did not exercise any formal judicial power on behalf of the object of his affections and, according to him, he did not try to influence any other judge or official, but when and how he notified others, including his girlfriend, his co-judge and the deputies, of his disqualification is not established. In fact, what the record does not

illuminate, one way or the other, is whether he used the prestige of his office to attempt to influence, or actually to influence, the small claims court, the deputies, or the former boyfriend in ways that made it far easier for his housemate, with whom he was concededly "romantically" involved, to gain an advantage in her disputes with her boyfriend.

Commission staff charged respondent with "len[ding] the prestige of judicial office to advance the private interests of [the woman], with whom respondent had a personal and romantic relationship" (Charge I, par. 5). To sustain this charge requires proof of actions which attempted to or actually "advance[d] [his] private interests," not merely created an appearance of the improper use of his judicial prestige. Were his or his new friend's private interests advanced by his actions? I cannot tell from the testimony and exhibits in this record. The testimony of the girlfriend, the boyfriend, the co-judge and the deputies – as well as evidence regarding the course and outcome of the small claims and criminal cases against the boyfriend – are critical to make this determination. Respondent's self-serving testimony is, at best, incomplete and sheds little light, in my view, on whether he attempted to or actually "advanced...private interests" for his own benefit. At a minimum, we need to know (1) whether he actually recused himself and when; (2) what the deputies did, or did not do, because the judge was present; (3) the circumstances under which his co-judge acted to transfer the cases in their court to other courts; and (4) whether the woman contradicts the judge's testimony describing the

timing and course of his actions when he so overtly helped her with her legal problems.

After reviewing this evidence, I might well agree that censure is appropriate, if what he did was – as he testified – a foolish mistake in allowing himself to be manipulated so that his prestige would appear to play a role in the self-help actions and official proceedings against the boyfriend. On the other hand, full development of the testimony and evidence might convince the Commission that he should be removed for attempting to pervert, or in fact succeeding in perverting, the proper course of the judicial and law enforcement processes for his own benefit during his romantic interlude with this woman. Because I believe there is a "neutral principle" (*see Cook* and *LaClair*) on which to base removal decisions in cases addressing improper judicial attempts to influence outcomes for personal gain, a full review of the relevant facts is essential to draw fair conclusions. For this reason, I think finding censure without more development of the record is expedient in this case.

By taking this position, I do not fault the Commission staff in any way. As a member of the Commission, I take full responsibility for failing to specify the prerequisite facts that should have been developed after the Commission rejected the prior Agreed Statement. Ultimately, however, the issue of "fault" is irrelevant. The only salient point is that, in my view, the record lacks information that may well be crucial to making the appropriate determination in this case. Surely we would not render a determination if, hypothetically, we found that a respondent had been denied the right to

present material evidence to the referee. We similarly should not render a determination where, as here, a more fully developed record might well reveal that the respondent is unfit to remain on the bench. *See, e.g., In re Rizza*, 288 AD2d 795, 733 NYS2d 308 (3rd Dep't 2001) (affirming decision by Unemployment Insurance Appeal Board to return matter to administrative judge for further development of factual record); *In re Dialogue Systems Inc.*, 231 AD2d 756, 647 NYS2d 300 (3rd Dep't 1996) (same).

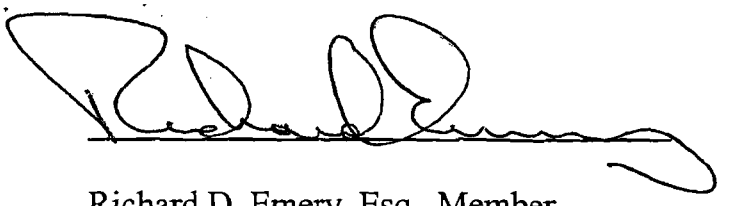
It bears emphasis that this Commission does *not* sit as an appellate tribunal reviewing determinations rendered by an inferior tribunal. The referee in this proceeding did not *decide* anything. The referee merely provided this Commission with *proposed* findings and conclusions, which is all that the referee was empowered to do. *See* 22 NYCRR §§7000.6(l), 7000.7. *We*, as members of this Commission, are the sole arbiters in proceedings that come before us. I therefore am not suggesting that we "remand" the case to the referee in the sense of ceding jurisdiction to an inferior court. I am merely suggesting that the fact-finding process that we have delegated to the referee is incomplete, and that we should take steps to ensure that it is completed before we rule. It is axiomatic that we are empowered – indeed, obligated – to ensure that an ample record has been developed before we dispose of a case, one way or the other.

My two colleagues suggest that it is not the proper role of the Commission to return this matter for additional evidence because "[s]taff counsel should not have a second chance to present a potentially stronger case" and because this judge should not

"be required to undergo once again the anxiety and cost of a hearing." This, however, is not a criminal proceeding, and the Double Jeopardy Clause and other safeguards that attach when the stakes include the personal liberty of a criminal defendant obviously do not apply. Ironically, what really is at stake here is not respondent's personal liberty, but rather the liberty and other interests of those who appear before him and are subjected to his considerable judicial powers. We must not lose sight of the fact that our solemn responsibility is to preserve the integrity of the judiciary by thoroughly and completely investigating and adjudicating accusations of judicial misconduct, not to minimize the extent to which such proceedings may inconvenience judges who we have determined have been credibly accused of misconduct.

Because it may well be that respondent's actions require removal, I respectfully dissent and vote to return the case to the referee with a direction to Commission staff to present additional evidence.

Dated: March 27, 2006



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