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

DONALD G. LUSTYIK,

a Justice of the Norfolk Town Court,
St. Lawrence County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission

Pease and Gustafson, LLP (by Eric J. Gustafson) for the Respondent

The respondent, Donald G. Lustyik, a Justice of the Norfolk Town Court, St. Lawrence County, was served with a Formal Written Complaint dated July 1, 2013, containing one charge. The Formal Written Complaint alleged that respondent lent the

prestige of his office to advance private interests by witnessing a written statement using his judicial title in a matter unrelated to any matter pending in his court. Respondent filed a verified answer dated July 22, 2013.

On October 17, 2013, the Administrator, 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 October 31, 2013, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Norfolk Town Court, St. Lawrence County, since January 1, 1986. His current term expires on December 31, 2017. He is not an attorney.

2. At all times pertinent to this matter, Jane Doe was the stepdaughter and adopted daughter of John Doe.

3. On February 17, 2011, during a criminal investigation in which John Doe's son was ultimately charged with murder, Jane Doe gave a sworn statement to state police, saying *inter alia* that she had been sexually abused by John Doe. There is no evidence that respondent was aware of Ms. Doe's statement to state police.

4. In the spring of 2011, John Doe was engaged in a Family Court proceeding for custody of his granddaughter, whose father is Mr. X. There is no evidence

that respondent was aware that John Doe was engaged in such proceeding.

5. On or before April 19, 2011, John Doe asked respondent to witness a statement, and respondent agreed to do so.

6. On April 19, 2011, respondent met John Doe and Jane Doe on the main floor of the Norfolk Town Hall, where the courtroom and respondent's chambers were located. Respondent had not previously met or otherwise been acquainted with Ms. Doe.

7. In a room at the town hall in the presence of respondent and Mr. Doe, Jane Doe signed a two-sentence statement that (A) indicated her intention not to "sign any statements saying that my Step-Father [John Doe] had touched me, or molested me at any point in my life" and (B) noted her assertion that Mr. X. had "mistaken" her words.

8. Jane Doe wrote the statement at the behest of her stepfather, John Doe.

9. Respondent signed the statement, "Wit: Hon Donald G Lustyik," directly below Jane Doe's name. Although respondent had not previously met or otherwise been acquainted with Ms. Doe, he did not ask her for any form of identification to establish her identity. Respondent made no inquiry into the meaning or purpose of the statement, whether it would be used in any judicial proceeding or police investigation, or the fact that it referred to molestation, a possible crime. Respondent did not inquire of Ms. Doe whether she was making the statement willingly.

10. At the time she wrote and respondent witnessed the statement, Jane Doe was involved in a Family Court proceeding for custody of her own child. There is no evidence that respondent was aware that Ms. Doe was engaged in such proceeding. Ms. Doe's proceeding was unrelated to the custody matter in which John Doe was engaged.

11. Although John Doe's sister, who is also his secretary, made certain financial payments to Jane Doe after Ms. Doe executed and respondent witnessed her statement, there is no evidence that respondent was aware of the financial arrangements between John Doe and Jane Doe.

12. After the statement was signed, respondent gave the original to John Doe.

13. There was no proceeding or matter pending before respondent's court that was related to the statement signed by Jane Doe and witnessed by respondent.

14. While respondent, John Doe and Jane Doe were at the town hall, respondent asked Mr. Doe what he intended to do about numerous tickets that were long pending in his court and said he could not hold onto them much longer. At the time, there were five tickets for Vehicle and Traffic Law violations and one for an Environmental Conservation Law violation pending against Mr. Doe in respondent's court. Subsequently, the six tickets were disposed of with either a guilty plea or reduction or dismissal or civil compromise on consent of the prosecution. Fines and surcharges were assessed and paid.

Additional Factors

15. Respondent recognizes in hindsight that he lent the prestige of his judicial office for the private benefit of another when he used the facility in which his courtroom and chambers are located to do a favor for an acquaintance. Respondent also recognizes in hindsight that he implicitly invoked his judicial office by identifying himself in writing as "Hon." when witnessing Jane Doe's statement, that a third party might be more inclined to credit such statement because it was witnessed by a judge, and that such statement might be used in connection with proceedings in other courts, given that both John Doe and Jane Doe were at that time engaged in separate and unrelated Family Court custody proceedings.

16. Respondent recognizes in hindsight that he should not have witnessed the statement without verifying Jane Doe's identity or making an inquiry into the reason for the statement and its intended use.

17. Respondent has been cooperative with the Commission.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.2(C) 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, and respondent's misconduct is established.

By witnessing and affixing his judicial title to a woman's written statement promising not to accuse her stepfather of molesting her, respondent allowed his judicial status to be used to advance private interests as a favor to an acquaintance in a matter where, as he should have recognized, the potential for serious impropriety and significant legal consequences was considerable.

Well-established ethical standards prohibit a judge from lending the prestige of judicial office to advance private interests (Rules, §100.2[C]). While there is no *per se* ethical bar to witnessing an unsworn statement unrelated to a court matter, or indeed from notarizing such a document (*see* Advisory Ops 90-161, 94-78), it is not a judge's responsibility to witness every document presented to him or her by an acquaintance or litigant. Such conduct necessarily implicates the prestige of judicial office, and before signing and affixing his judicial title to the statement presented to him, which was unrelated to his judicial duties or any matter in his court, respondent should have made sufficient inquiry to ensure that his participation was consistent with the ethical rules, including his obligation to avoid even the appearance of impropriety (Rules, §100.2).

Witnessing a document means not just verifying the signer's identity, but feeling assured that the signer understands what he or she is doing and is proceeding willingly and without duress or coercion. Given the brevity of Jane Doe's two-sentence statement, it seems inconceivable that respondent would not have at least glanced at the contents and understood the gist of it: that she was promising not to accuse her stepfather

John Doe (who had asked respondent to witness the statement) of molesting her. On its face, the statement should have raised red flags. Witnessing the statement put respondent in the middle of a serious situation in which he would play a part in protecting an acquaintance from accusations of sexual abuse. Respondent, who had been a judge for 25 years, should have recognized that his judicial status was being used in that effort and that his conduct would convey that appearance. While the Doe statement was not a legal document that required a witness, a third party might be more inclined to credit such a statement because it was witnessed by a judge.

It is stipulated that prior to witnessing the statement, respondent made no inquiry into whether Ms. Doe was making it willingly; nor did he inquire into the meaning or purpose of the statement; nor is there any evidence that he was aware of the underlying facts, including that Ms. Doe had previously given a sworn statement to police accusing her stepfather of molesting her, that she would receive money from Mr. Doe's secretary (his sister) after signing the statement, and that both she and Mr. Doe were involved in pending, unrelated custody proceedings. Even if respondent did not know all the facts – which, in their totality, paint a disturbing picture – he showed insensitivity to his ethical obligations by failing to make any inquiry into the circumstances, for which he bears responsibility. His misconduct in lending his judicial imprimatur to the statement without even questioning the circumstances is exacerbated by the fact that he acted as "a favor" to Mr. Doe, conveying the impression that respondent's judgment may have been clouded and that Mr. Doe was in a special position to influence him (Rules, §100.2[C]).

The fact that Mr. Doe had numerous tickets that had long been pending in respondent's court, which respondent would have to adjudicate, adds to the appearance of impropriety.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Ms. Corngold, Mr. Harding, Mr. Stoloff and Judge Weinstein concur. Judge Weinstein concurs in an opinion, which Judge Acosta and Mr. Cohen join.

Mr. Emery dissents in an opinion on the basis that the Agreed Statement of Facts should be rejected because the facts as presented are insufficient for the Commission to make a determination and the matter should be referred to a referee for a hearing.

CERTIFICATION

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

Dated: March 25, 2014

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

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CONCURRING OPINION BY JUDGE WEINSTEIN, WHICH JUDGE ACOSTA AND MR. COHEN JOIN

I agree that an admonition is the proper response to the misconduct alleged in this case. I write separately to note respectfully my disagreements with my dissenting colleague, and to explain why I believe that a hearing is unwarranted before we may accept the Agreed Statement of Facts and approve the recommended sanction.

The Dissent contends that we should hold a hearing to address those matters "left unanswered" by the Agreed Statement, set forth in a list of no less than thirty-four separate inquiries (Dissent at 10-11). My colleague views the answers to these questions – many of which involve matters not referenced in the charges made against respondent in the Commission's complaint – as potentially revealing some alternative construction of the facts in this matter. I am not clear as to what exactly my colleague expects to discover, but it apparently involves some nefarious conduct by respondent, including knowledge of or participation in a "bribery or extortion scheme that suppressed a material witness' testimony" (Dissent at 1-2).

The Dissent's speculation is based on the presumption that his theories are

not addressed in the Agreed Statement because they were not fully explored during the staff investigation. I would suggest an alternative and (to my mind) far more plausible conclusion, one supported by the Agreed Statement itself: the investigation simply revealed no evidence to support the factual scenarios my colleague would concoct.

Were one to learn about this case only from reading the Dissent, it would appear we are rushing to judgment before any accounting of the facts. That is just not so. Here, the staff carried out an investigation in which it had the power to "examin[e] witnesses under oath or affirmation, requir[e] the production of books, records, documents or other evidence that the commission or its staff may deem relevant or material to an investigation, and . . .. examin[e] under oath or affirmation of the judge involved" (22 NYCRR § 7000.1[j]). On the basis of its investigation, the Commission approved a formal written complaint, and the staff entered into the Agreed Statement, which recounts, among other things, that "[t]here is no evidence that Respondent was aware" of the Family Court proceedings in which John Doe and Jane Doe were engaged (ASOF ¶ 5, 11); there is no evidence the judge "was aware of Ms. Doe's statement to the State Police" (*Id.* ¶ 4); and the judge had not "previously met or otherwise been acquainted with Ms. Doe" (*Id.* ¶ 7). In short, the statement addresses many of the issues the Dissent raises, and states that they were without support in the investigative record.

My colleague nonetheless presumes that the investigation was inadequate, the staff "adopt[ed] the most innocent version of events," and the majority has rubber stamped a narrative based solely on "pragmatic reasons and the sake of expediency," because a hearing might "prove messy" or "unpredictable" (Dissent at 2, 6). It is hard

for me to understand the basis for these conclusions, but as best as I can gather, the Dissent appears to believe that the factual averments before us in this case are inherently implausible, since the only reason respondent could possibly have witnessed the "remarkable statement" at issue, under "suspicious circumstances," is that he was somehow part of a broader illegal scheme (Dissent at 7). But *witnessing* a statement entails verifying the authenticity of the attesting party's signature, not the statement's contents. As a general rule, this is something that part-time judges are allowed to do (Advisory Op 12-10; *see also* Advisory Op 94-78 ["there is no ethical objection to a part-time judge continuing to act as a Notary Public"]). The Advisory Committee on Judicial Ethics has found that when a judge acts in this capacity, he or she is "merely attesting to facts within his/her personal knowledge and observation" (Advisory Op 12-10) – that the document has been signed by the individual who purports to be its signatory. The act of witnessing a statement is, in short, "clerical and ministerial" (*see Bernal v Fainter*, 467 US 216, 225 [1984] [discussing the role of a notary public]). I find nothing remotely implausible about the finding, set forth in the Agreed Statement, that respondent restricted himself to that role.

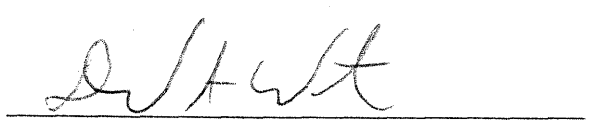
That said, I believe the judge's actions here were improper, for reasons set forth at length in the majority opinion. But the fact that respondent acted wrongly does not mean we must imagine his participation in far-flung cabals and secret plots for which, the Agreed Statement tells us, the investigation has revealed no evidence.

Any consensual resolution to a charge of misconduct entails a compromise. On the one hand, it spares the Commission and the respondent-judge the expense of a

hearing, argument and (potentially) subsequent appellate challenge, and ensures that wrongdoing will receive sanction. On the other hand, it means the Commission must rely on the fact-finding achieved via staff investigation. Like a plea bargain in a criminal case, an agreed statement thus reflects "tactical decisions" by both sides to which the Commission should pay some respect, even as it carefully considers its merits (*see Matter of Ridsdale*, 2012 Annual Report 148, 159 [concurring opinion of Acosta, J.]). This balancing is made difficult by the fact that the Commission must make its decision without direct communication with the staff, which has full access to the entire investigative record. But that is due to the division of functions in the Commission between the members' adjudicatory responsibility and the staff's prosecutorial role (*see id.* at 160). That structure requires that we exercise some level of deference to the staff, and not make unfounded assumptions that there are endless untrodden investigatory paths that it has simply neglected to pursue.

For these reasons, I remain convinced that acceptance of the Agreed Statement, and admonition of respondent, is the best course for the Commission to take in this case, and one fully justified by the record before us.

Dated: March 25, 2014



Honorable David A. Weinstein, Member
New York State
Commission on Judicial Conduct

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COMMISSION ON JUDICIAL CONDUCT

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DISSENTING OPINION
BY MR. EMERY

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The majority's determination, agreeing to accept the stipulated facts and the sanction of admonition, raises more questions than it dispels. I cannot read it and conclude, with any degree of confidence, that we have fulfilled our constitutional obligation to protect the public from judges who endanger those over whom they have power. In this case, maybe we have, or maybe we have not. I do not think the majority's confidence in the outcome in this case is warranted and it is certainly not supported by the Agreed Statement they have accepted in this case. Because of the majority's decision I believe we may not be protecting the public as we should.

What is clear is that the record is not sufficiently developed to conclude whether Judge Lustyik was an unwitting dupe doing a "favor" for someone he knew to be a litigant in his court, whether he was simply oblivious or grossly negligent in inexplicably ignoring the red flags that were waving all around him, or whether, or to what degree, the judge was cooperating in or privy to either a bribery or extortion scheme

that suppressed a material witness' testimony. The stipulated facts leave unanswered the critical questions necessary for me to determine the degree of misconduct and the appropriate sanction. The facts as accepted shed no light on the judge's degree of culpability for his incontrovertible misconduct.

By accepting the Agreed Statement, the majority chooses to ignore the clear possibility of very serious misconduct by deferring to the Staff's adoption – without satisfactory justification – of the most innocent version of events, rather than allow a referee the opportunity to determine the answers to some unresolved critical issues. I would like to believe the Staff's conclusions about what likely occurred are right. But, in good conscience, on this barren record, I cannot do so. Since it is we – the Commission – that are responsible under our constitutional and statutory duty to see that the record is properly developed, I have no choice but to dissent.

Let me say a few words about that duty and then describe why, in this case, we have failed to fulfill it.

Unlike the traditional adversary system to which we are all regularly exposed, where prosecutors have sole discretion to investigate and level charges and judges independently preside over their resolution, either by plea or trial, the Commission on Judicial Conduct is governed by special provisions of the State Constitution and the Judiciary Law. Apropos to the point at issue here, they read as follows:

- "The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a

judge or justice be admonished, censured or removed from office for cause,..." (NY Const art 6, §22[a]; *see also* Jud Law §44[1]);

- "Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit" (Jud Law §44[1]);
- "If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the judge involved..." (Jud Law §44[4]);
- "After a hearing, the commission may determine that a judge be admonished, censured, removed or retired" (Jud Law §44[7]).

The essence of these provisions is that our role is quite different from that which exists between prosecutor and judge where, in my view, deference to a prosecutor's assertion that she does not have the evidence to proceed, or that she believes that a recommended plea bargain is fair, forecloses virtually all review of the prosecutor's decision. By contrast, the Commission is entirely responsible for each and every *investigation and charge* against a judge. We are required to evaluate the information presented to us not just once, but at three stages of the proceedings against judges: in deciding whether to investigate a complaint, deciding whether to authorize formal charges, and determining whether misconduct occurred and the appropriate sanction, if any, to be imposed.

Certainly, we rely on the information the Staff presents to us and consider the Staff's recommendations at each stage of the process. But as we have vibrantly shown over the ten years I have sat on this Commission, we are not potted palms, and clearly our governing constitutional provision, statute and rules do not contemplate that we should defer to the Staff's recommendations at any stage of the process. Indeed, we

often differ with Staff's recommendations at every stage, rejecting proposed investigations, authorizing investigations when Staff recommends that complaints be dismissed, rejecting charges recommended by Staff and directing that charges be served when Staff recommends otherwise.

This is, as I see it, very healthy and probably to be expected when a full-time, zealous professional staff may appropriately at times want to lead prosecutions into undeveloped areas of the law, or, at other times, decide not to push forward for strategic, practical reasons. The point is that our system of adjudicating complaints against judges is qualitatively different from a criminal adjudication process and should never be confused with a pure adversary system.

Proposed Agreed Statements, where Staff counsel and the judge's attorney make a joint recommendation to the Commission, are always intensely reviewed, and they are frequently rejected, either because the recommended sanction seems too harsh or too lenient to us on the facts presented, or because more information is needed – either in the Statement itself or in a fact hearing to determine whether misconduct has occurred and, if so, what sanction is appropriate. Therefore, especially in the instances where we review proposed Agreed Statements, the relationship between Staff and the Commission, unlike the relationship between prosecutor and judge, is one in which the Constitution and Judiciary Law require the Commission to take full responsibility for the outcome of what is only in part an adversarial process.

As the Court of Appeals has repeatedly said, the Commission's mission and responsibility in conducting judicial disciplinary proceedings is for "the imposition

of sanctions where necessary to safeguard the Bench from unfit incumbents" (*see, e.g., Matter of Restaino*, 10 NY3d 577, 589 [2008]; *Matter of Duckman*, 92 NY2d 141, 152 [1998]; and *Matter of Esworthy*, 77 NY2d 280, 283 [1991] [internal quotation marks and citation omitted]). We do not, and never have, delegated our authority over such decisions to Staff.

In this case, I believe the majority has lost sight of this core value and our constitutional and statutory responsibility by acceding to a flawed joint recommendation. The Commission authorized an investigation and, based on the investigative findings reported to us, voted to charge misconduct alleging that "respondent lent the prestige of his office to advance private interests...." Generally, we have viewed this category of violation as among the most serious violations, akin to bribery and ticket fixing. *See, e.g., Matter of Schilling*, 2013 NYSCJC Annual Report 286 (judge intervened in the disposition of a Speeding ticket issued to a judge's wife, and accepted special consideration with respect to her own Speeding ticket) (removal); *Matter of Maney*, 2011 NYSCJC Annual Report 106 (judge repeatedly asserted his judicial office in connection with his arrest for Driving While Intoxicated) (censure); and dozens of other cases.

Here, based on the Staff's apparent view that the proof it could present at a fact hearing might be inconclusive or uncertain, we have been asked to accept an Agreed Statement with a stipulated sanction – without a fact hearing – which adopts an interpretation of the facts that warrants only the lowest level of public discipline. But those same facts – at the time we authorized the charges, after the investigation was complete – appeared to constitute a basis serious enough to proceed to full development

at a fact hearing that could support public discipline and perhaps the far more serious sanction of removal. Indeed, a rationale for authorizing formal charges in most instances, and certainly in this case, was that the unresolved factual issues at the conclusion of the investigation required full development at a hearing.

In dissenting, I am not presuming that the Staff's investigation was "inadequate" or suggesting that the hearing would be a fishing expedition to explore "untrodden investigatory paths that [the Staff] has simply neglected to pursue" (Concurrence at 2, 4). Rather, I view a hearing as the appropriate mandated means under our statutory framework to uncover the truth and determine the judge's degree of culpability for admitted misconduct by requiring all the participants to give sworn testimony, subject to cross-examination, so that we can be confident that our findings and conclusions and determination as to sanction are supported by a fully developed record.

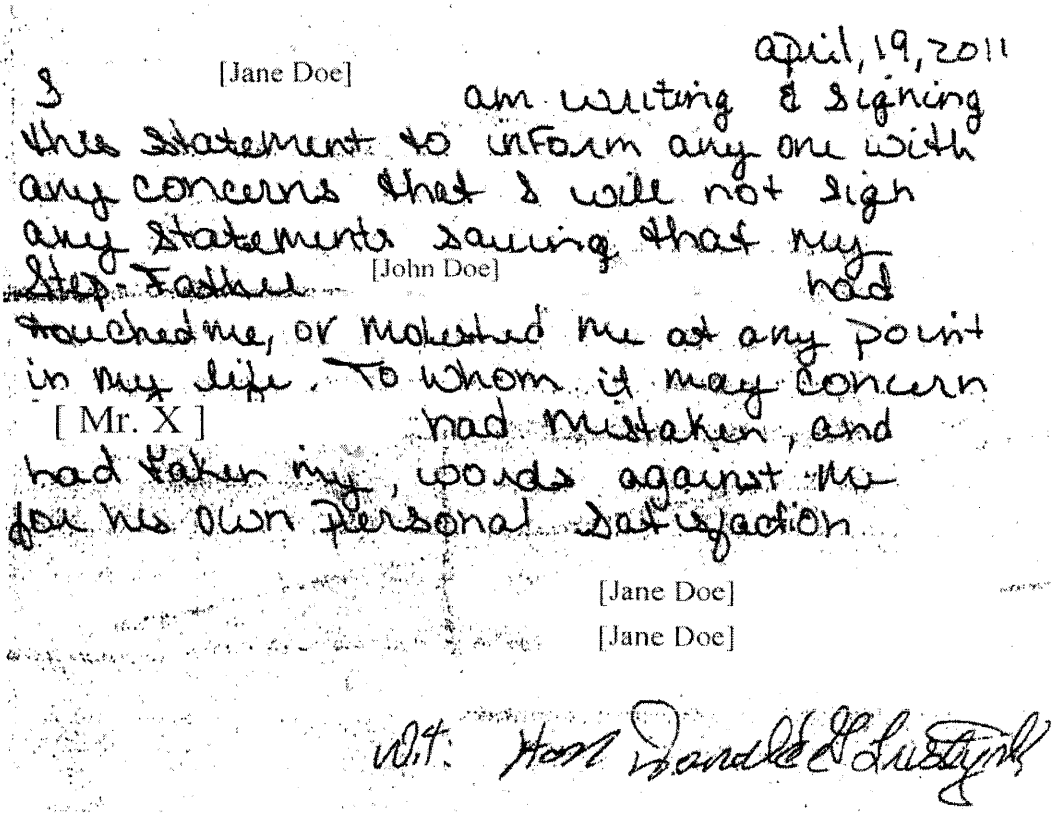
As an inadequate alternative, having authorized formal charges, we are now presented with a sparse, conclusory version of the facts, which resolves none of the unanswered questions that a hearing was supposed to explore. While I fully understand why both sides, for pragmatic reasons and the sake of expediency, would prefer this result to a hearing, which might prove messy and whose outcome is unpredictable, as a Commission member I cannot accept such a result.

In the abstract, certain cases may warrant this approach when an investigation the Commission has authorized results in a judgment that serious misconduct cannot be proved or that, whatever misconduct is found, a lenient outcome is appropriate. In such cases we often enter into Agreed Statements, the *sine qua non* of

which is a written determination which fully explains the facts supporting the finding of misconduct and, more importantly, the sanction that has been accepted by the judge.

But here the situation is quite different. This Agreed Statement fails to resolve questions central to this case. Here is why.

Ms. Doe's statement in her handwriting reads:



Instead of explaining how this remarkable statement and the suspicious circumstances that resulted in respondent witnessing it lead to the conclusion that the judge innocently witnessed it, the Commission's Determination and the underlying Agreed Statement simply accept the judge's claim that he did not know or inquire about its contents – that he simply innocently agreed to witness the statement "as a favor" to John Doe. This is an unexplained leap of faith. Instead of requiring the respondent to

explain what was going through his mind in order to determine his degree of culpability – and instead of determining exactly what was said and known by each of the individuals present when respondent witnessed Ms. Doe's execution of the statement – the Commission opts to assume – without a hearing to assess his credibility under oath – that respondent is telling the truth when he protests that he saw, heard and spoke no evil.[1]

According to the Determination, respondent did not know and did not ask why he was being asked to sign this statement or what the statement would be used for. He did not ask Jane Doe whether she was making the statement willingly or why she was, in this document, stating that she "will not sign any statements" accusing her stepfather of sexual abuse and that Mr. X. "had taken my words against me." But the record reveals that John Doe was paying Ms. Doe for the statement and that John Doe and Mr. X. were adversaries in a custody dispute. Was this a bribe? Or was Jane Doe extorting her stepfather since she needed money to pay her lawyer in an unrelated matter?

The Agreed Statement says that "there is no evidence" (¶ 4,5,11,12) that respondent was aware of the troubling underlying facts, including: (i) that Ms. Doe had previously accused her stepfather of sexually molesting her (though her written statement would seem on its face to make that clear), (ii) that her stepfather was involved in a pending custody dispute with Mr. X., his grandchild's father (who is maligned in Ms. Doe's statement), or (iii) that, as blandly described in the Determination (¶ 11), the Does

[1] Parenthetically I do not necessarily agree with the view, implicit in the Determination, that if respondent acted out of ignorance of his role as a judge, his conduct is less egregious than if he did it with the knowledge that John Doe was trying to short-circuit a criminal investigation. Perhaps we are overlooking – or ignoring – that respondent might be too incompetent to serve as a judge. At this stage, without more information, I cannot say.

had made "financial arrangements" in that after the statement was executed, John Doe's secretary made "certain financial payments" to Jane Doe.[2]

Presumably respondent has denied knowing those facts. But that cannot end our inquiry in the face of the plain words of the statement that respondent witnessed. If he was not aware of those troublesome issues, then he ignored the red flags in the statement and chose not to inquire further. But his protestations of ignorance should not, without more proof, be accepted or mitigate his responsibility. His failure to ask the questions that any reasonable person would ask – let alone a judge with 25 years of experience whose integrity is on the line – is totally unexplained in the record before us. Nor is there any explanation whatsoever for why the judge believed that it was appropriate to witness such a bizarre statement as a "favor" for a litigant.[3]

At a minimum, the circumstances from which one (we, the Commission) could reasonably conclude that his professed ignorance makes sense should be explored under oath at a hearing and tested by cross-examination. At a minimum, a neutral

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[2] The Formal Written Complaint (¶ 13) alleges that after signing the statement, Jane Doe received $5,500 from her stepfather's secretary (his sister) that same day and $3,000 a few weeks later. The charge also declares that Ms. Doe, who was involved in an unrelated custody dispute, immediately gave these payments to her lawyer in the custody matter.

[3] I am unpersuaded by Judge Weinstein's reliance on Advisory Opinion 12-10, advising that it was permissible for a judge to witness a signature since the judge was "merely attesting to facts within his/her personal knowledge and observation," *i.e.*, that the document was signed by the individual who purports to be its signatory (Concurrence at 3). That opinion addressed a particular situation in which a judge inquired if it was appropriate to witness a relative's signature on a foreign pension document that expressly required a witness who was either an embassy official, a municipal or regional official or a judge (and not a notary public) and that expressly stated that the witness was simply authenticating the signature. That is a far cry from respondent's unauthorized, gratuitous witnessing, for unclear purposes, of a bizarre, do-it-yourself document recanting allegations of sexual abuse.

hearing examiner should make a credibility finding. Instead, the version of the facts in the Agreed Statement requires us to conclude, counterintuitively, that respondent did not even have, what I consider to be, plain common sense.[4]

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[4] This is what hearings are for:. to find out whether the judge is a danger to the public and is fit to hold his exalted office. Left unanswered by the Determination are, at least, the following questions:

1. Did respondent read the two-sentence statement before he signed it? Is it plausible that a judge would sign a document presented to him by an "acquaintance" without even glancing at it?
2. How does respondent explain his failure to inquire about the reference to "molest[ation]," which jumps off the page, or about the oblique reference to Jane Doe's earlier statements that she now disavows? Did he consider that Ms. Doe might have complained about those acts to the police or DA? Was he suspicious of why she was making the statement, or whether she was doing so willingly? Did it enter his mind that she might be paid for her statement?
3. Did respondent wonder about the purpose of the statement? Did John Doe tell him *anything* about the purpose of the statement? Did respondent consider that there might be pending litigation in which the statement with his signature affixed might be offered, or that his involvement might be advancing Mr. Doe's personal agenda or that he might be interfering in a private dispute and placing himself in the middle of a matter with significant legal consequences?
4. What was respondent's relationship with Mr. Doe, who is described as "an acquaintance"? What does it mean that he witnessed the statement "as a favor" to Mr. Doe (a fact that is in the stipulated facts [¶ 16])? Had he and Mr. Doe previously done favors for each other? Did he lend his judicial imprimatur to the statement because he owed Mr. Doe a favor? Would he have done the same thing – witnessing such a document without questioning it – for a stranger? Did the fact that he was doing a favor for Mr. Doe influence his decision not to inquire into the details? How can we possibly accept the justification for respondent's conduct that he did it as a "favor" for Mr. Doe without understanding more about why he felt obliged to do Mr. Doe a "favor"?
5. What went through respondent's mind in deciding to engage in this highly unorthodox action? Why did he think that witnessing a statement related to a private dispute, and unrelated to any proceeding in his court, was part of his role as a judge? Had he ever done anything similar in his 25 years as a judge? Would he agree to witness any statement under any circumstances? Why did he think it was appropriate to note his judicial office (by signing as "Hon.") on the statement? Did he consider contacting the Advisory Committee on Judicial Ethics or the City, Town and Village Resource Center to ask for advice during the unspecified time period between Mr. Doe's initial request and Ms. Doe's execution of the statement?
6. What was the nature of the custody proceeding that Mr. Doe was involved in? Was Ms. Doe's statement ever used in that proceeding, or in any other manner?
7. What did the police do when Ms. Doe previously accused her stepfather of molesting

Unfortunately, these questions, and more, remain unanswered. To my fellow Commissioners, I simply ask: if we do not know the answers to these questions, how can we possibly avoid holding a hearing? Why should we not, consistent with our constitutional and statutory obligations, direct that a hearing be held so that we can make our decision on the fullest possible record?

Perhaps some of the questions I have posed cannot be answered. But we are duty bound not to accept an Agreed Statement that does not, at least, describe why these questions cannot be answered, and provide a justification for adopting the judge's version of events that casts his misconduct in the most innocent light. This Agreed Statement does not do that. In particular it wholly fails to explain or convince how the judge could possibly ignore the obvious red flags when an apparent scofflaw in his court – John Doe – asked him to witness a statement by Mr. Doe's stepdaughter that included recantations of his sexual abuse of her.

Consequently, the central question for the Commission remains unanswered: what was respondent's culpability for what we all agree was misconduct? How severe should our sanction be? There is no question that respondent's misconduct

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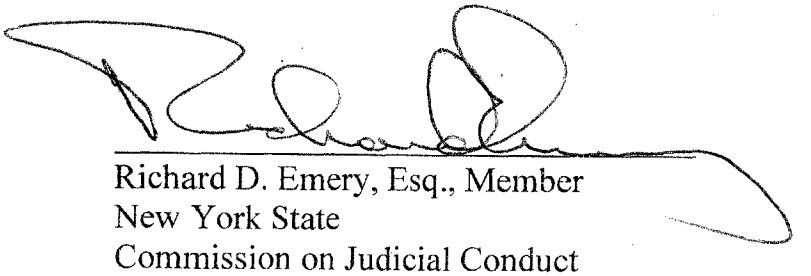
her? Was that matter still pending? Did the police get the statement that respondent witnessed? Did it influence the police to end their investigation? Are prosecuting authorities aware of the payments she received after she signed the statement? If an allegation of serious criminal conduct was withdrawn because the victim was paid off, does the matter warrant referral?

8. What is the significance – if any – of the fact that Mr. Doe had six tickets that had been "long pending" in respondent's court and that the tickets were subsequently disposed of, in some cases, by a reduction of the charge (Agreed Statement, ¶ 15)? How long had the tickets been pending? Should the traffic tickets have been "scofflawed" under the Vehicle and Traffic Law (§§514.3[a], 510.4-a)? Should we infer that there was an appearance of favoritism in respondent's handling of the tickets? Was this another "favor" respondent did for Mr. Doe?

as set forth in the Agreed Statement of Facts is improper and warrants public discipline, but I do not believe that we are now in a position to determine an appropriate sanction. If the Commission had the answers to my questions in the record, we would be in a far better position to determine whether an admonition is too lenient.

This case cries out for a hearing and cross-examination of the judge to assess his state of mind. For me, swallowing the pre-digested result of this case, as presented to us in the Agreed Statement, triggers a gag reflex. Obviously, my fellow commissioners have stronger stomachs for such fare than I do. The Agreed Statement should be rejected and a hearing to develop a full record scheduled forthwith.[5]

Dated: March 25, 2014



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[5] Judge Weinstein, in his concurrence, rightly concedes that respondent's "actions were improper, for reasons set forth at length in the majority opinion" (Concurrence at 3). In this regard he and I agree. Our disagreement is whether we need to know *why* respondent did not further inquire. It appears that Judge Weinstein does not think any further exploration into that issue is relevant or appropriate since it is "not referenced in the charges" (*Id.* at p 1). This is an obvious distortion of our mandated function. The judge's intent or state of mind when the misconduct occurred is *always* relevant in determining the appropriate sanction, and it is the central issue here. Every question I have asked relates to exploring that more fully and is thus at the center of properly disposing of the charge. The Commission's determinations – whether based on stipulated facts or the record developed at a hearing – are rarely limited to the bare facts recited in a Formal Written Complaint, but generally include additional information, reasonably related to the allegations, that gives context to the events at issue and enables us to determine the degree of culpability for the misconduct. This is the core responsibility of our Commission; it should not be lightly delegated to the staff. It is why we are the appointed constitutional authority to protect the public from judges who engage in misconduct. Judge Weinstein would acquiesce to the Agreed Statement's counterfactual and counterintuitive conclusions. Though plainly in good faith, I believe that nullifies the Commission's primary function.