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

DUANE R. MERRILL,

a Justice of the Hamden Town Court,
Delaware County.

- -

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn J. Blake, Of Counsel) for the Commission

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC (by Kevin M. Young) for the Respondent

The respondent, Duane R. Merrill, a Justice of the Hamden Town Court, Delaware County, was served with a Formal Written Complaint dated January 12, 2006,

containing four charges. The charges alleged that in two matters respondent engaged in prohibited *ex parte* communications and made biased statements about the parties, notwithstanding that he had previously been admonished for similar conduct, and that in seven cases when his personal attorney appeared before him respondent failed either to disqualify himself or to disclose the relationship. Respondent filed a Verified Answer dated February 24, 2006.

On May 25, 2006, respondent filed a motion for summary determination. Commission counsel opposed the motion in papers dated June 12, 2006. On January 10, 2007, 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 and providing for written and oral argument on the issue of sanctions. The Commission accepted the Agreed Statement on January 29, 2007, determined that the motion for summary determination was moot, and scheduled briefs and oral argument on the issue of sanctions.

Each side submitted memoranda as to sanction. Commission counsel recommended removal, and respondent's counsel recommended a sanction no greater than censure. On March 8, 2007, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been a Justice of the Hamden Town Court, Delaware County, since 1989. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about September 1, 2004, Wayne Sparling and William Sprague engaged in an argument at Mr. Sprague's premises regarding $2,919 Mr. Sprague had charged Mr. Sparling for auto-body repair work he had done on two cars owned by Mr. Sparling. Mr. Sprague refused to release one of the vehicles to Mr. Sparling until the outstanding balance was paid in full. During the dispute, Mr. Sprague telephoned Frederick Neroni, his attorney, and Mr. Sparling allegedly shoved Mr. Sprague and ripped the telephone from the wall. Sheriff's Deputy Jon Bowie was called to the scene and issued Mr. Sparling an appearance ticket charging him with Assault in the Third Degree and returnable in the Hamden Town Court. Mr. Sprague required medical attention for his injuries.

3. Respondent and Mr. Sparling own farms that are adjacent to each other. The sheriff's office informed Mr. Sparling to contact respondent in relation to getting access to his vehicle. On or about September 1, 2004, shortly after the foregoing incident, Mr. Sparling visited respondent at his hayfield and told him about the incident, stating that a dispute over the payment he owed to Mr. Sprague for car repairs ended in a fight, and mentioning that Mr. Sprague had been on the phone with Mr. Neroni at the time of the altercation. Respondent told Mr. Sparling, who was very agitated and upset, that he did not want to discuss the matter. After Mr. Sparling persisted, respondent

replied that he would speak with Mr. Neroni.

4. That afternoon, respondent telephoned Mr. Neroni and discussed an interim resolution in which Mr. Sprague would accept $800 in payment and release the car to Mr. Sparling, and Mr. Sprague could pursue the remainder of his claim in small claims court. Respondent recognizes in retrospect that he should not have contacted Mr. Neroni, and that by doing so he created the impression that he was using his judicial position on behalf of Mr. Sparling in order to bring about a prompt resolution of the matter.

5. Respondent next telephoned the sheriff's office so that they would be aware of the proposed agreement, and so that an officer would convey the information to the parties. He told Deputy Bowie, who had responded to the scene of the altercation earlier that day, that he had spoken to both Mr. Sparling and Mr. Neroni (Mr. Sprague's attorney), that he had recommended that Mr. Sprague accept $800 and release Mr. Sparling's car, and that he suggested Mr. Sprague could go to small claims court to attempt to recover the remainder of the disputed amount. Respondent expressed concern that the two parties would have a second altercation when Mr. Sparling paid the $800 and picked up his car.

6. During his conversation with Deputy Bowie, respondent *inter alia* called both Sprague and Sparling "hot heads" and said they "don't have brains enough to pour piss out of a boot with instructions on the heel and a hole in the toe." Respondent states that his purpose in making these remarks was to ensure that Deputy Bowie was aware of the potential for a second altercation.

7. Later, on the afternoon of September 1, 2004, Mr. Sprague spoke to a sheriff's deputy, who informed him that respondent had called the sheriff's office and had recommended that Mr. Sprague should accept $800 for the repairs and release the vehicle to Mr. Sparling, and that he could pursue his claim for damages in small claims court. Mr. Sprague agreed to release the vehicle in exchange for $800 because he believed that he could be arrested if he did not do so. He later commenced a civil proceeding in another court to recover the unpaid balance due for the automotive repairs, as well as for damage to his property and reimbursement of his medical bills.

8. Prior to September 1, 2004, respondent had disqualified himself from presiding over at least two other matters in which Mr. Sparling had appeared. On or about September 6, 2004, Mr. Sparling appeared before respondent for arraignment on the Assault charge, waived counsel and was released on his own recognizance by respondent. Respondent offered to disqualify himself from the matter, as he had previously in matters involving Mr. Sparling, and because he had knowledge of the civil dispute between the parties. However, both the defendant and the Assistant District Attorney declined the offer.

9. Mr. Sparling again appeared before respondent on or about October 11, 2004. Respondent dismissed the Assault charge in the interest of justice at the request of Mr. Sparling and upon the consent of the Assistant District Attorney, who indicated that he did not have a viable case due to conflicting accounts of the incident from the parties. Respondent did not set forth on the record or in an order the basis for the dismissal in the interest of justice, as required by Section 170.40 of the Criminal

Procedure Law.

As to Charge II of the Formal Written Complaint:

10. On or about April 1, 2005, Ronald Panzica was arrested and charged with Assault in the Third Degree and Trespass for allegedly injuring his neighbor, Raymond Iris, during an argument over their property boundaries. The arresting officer issued an appearance ticket requiring the defendant to appear on April 11, 2005.

11. On or about April 2, 2005, Mr. Iris telephoned respondent at his residence and asked respondent to issue a protective order against his neighbor, Ronald Panzica. Respondent told Mr. Iris that he could not issue a protective order because he had not yet received any paperwork from the sheriff. Mr. Iris was very persistent, frustrated and frequently interrupted respondent in his attempt to explain the process. Respondent had no prior contact or relationship with either Mr. Iris or Mr. Panzica.

12. After his conversation with Mr. Iris, respondent telephoned the sheriff's department and spoke to Karen Parsons, a dispatcher. Respondent indicated that he had just received a telephone call from Mr. Iris about an incident the previous evening and asked when he would receive the paperwork. Ms. Parsons said that the matter was returnable April 11, 2005, and respondent asked if he could nevertheless have the paperwork by April 4, 2005.

13. On or about April 4, 2005, respondent telephoned Mr. Iris and told him to appear in court that evening regarding the order of protection. Respondent then telephoned the sheriff's department and spoke to Ms. Parsons. Respondent said that he

had not yet received the paperwork for *People v. Ronald Panzica*, that Mr. Iris was scheduled to appear that evening to request an order of protection and that he needed the paperwork as soon as possible. Ms. Parsons indicated that Mr. Iris had just contacted the sheriff's office and complained about the sheriff's handling of his case, and she expressed her disdain for Mr. Iris. In response to Ms. Parsons' comments, respondent commented that he needed the paperwork so he would "have something more to base my refusal to give him an order of protection on." Respondent now recognizes that he should not have made such a statement, which created the impression that he had predetermined he would not issue the order of protection.

14. When Mr. Iris appeared in court on April 4, 2005, respondent told him that he could not grant the order of protection because he still had not received the paperwork from the sheriff. When Mr. Iris attempted to describe the altercation, respondent told Mr. Iris that he had seen many disputes between neighbors and usually both were at fault.

15. While Mr. Iris was still in court on April 4, 2005, respondent again telephoned the sheriff's department and spoke to a deputy, who informed him that the papers were in the mail. Respondent told the deputy that he had not yet received the paperwork and that "one of the parties is here and starting to get irritated with me and everybody else."

16. When respondent completed his calendar on the evening of April 4, 2005, he again telephoned the sheriff's department and spoke to another dispatcher, Joanne Mills. Respondent told her he had been frustrated when he telephoned earlier that

night, and he said he wanted assurance from the sheriff's department that a deputy had told the defendant "that his ass will be in jail the next time" he went near Mr. Iris, even without an order of protection.

17. On or about April 5, 2005, respondent telephoned Mr. Iris and informed him that he had issued a temporary protective order. Several days after respondent issued the order of protection, respondent received a telephone call from District Attorney Richard Northrup, informing him that the temporary order of protection was defective because the form was not properly completed due to an incorrect name inserted into the order. DA Northrup informed respondent that the temporary order of protection would not be enforced by his office.

18. On or about April 11, 2005, Mr. Panzica was scheduled to be arraigned at 6:30 P.M. Mr. Panzica and his attorney, Terence P. O'Leary, arrived at approximately 6:15 P.M., prior to the arrival of the Assistant District Attorney.

19. Respondent conducted the arraignment at approximately 6:15 P.M., prior to the arrival of the Assistant District Attorney. At the arraignment, respondent did not offer to disqualify himself from the matter and failed to disclose that Mr. O'Leary had previously represented respondent.

20. Prior to the arrival of the Assistant District Attorney, respondent informed Mr. Iris that he had rescinded the temporary order of protection because it was defective and that he would not issue another order. Instead, respondent "orally" ordered Mr. Iris and Mr. Panzica to stay away from each other. Respondent acknowledges that he should have waited until Assistant District Attorney Francis Wood appeared before

conducting the arraignment, that he should have disclosed on the record that Mr. O'Leary had previously represented him and that he should have inquired as to whether Mr. Wood objected to respondent's presiding over the matter.

21. When ADA Wood arrived at 6:30 P.M., Mr. Panzica was leaving the courthouse. Respondent notified ADA Wood about the arraignment, and ADA Wood advised that he was recusing himself from the matter because he realized, in passing Mr. Panzica, that they both attended the same church.

22. At the next court appearance, on or about May 16, 2005, respondent requested that the *Panzica* case be transferred to another Town Court because he had "too much contact" with Mr. Iris and because the defendant's attorney, Mr. O'Leary, had represented respondent. By order dated May 27, 2005, Delaware County Court Judge Carl F. Becker transferred the *Panzica* case to another Town Court for all further proceedings.

As to Charge III of the Formal Written Complaint:

23. Respondent engaged in the conduct set forth in Charges I and II herein, notwithstanding having been admonished by the Commission in a determination dated March 17, 1998, for *inter alia* engaging in improper *ex parte* communications with both parties in a landlord/tenant dispute, acting as an advocate for one of the parties in that dispute, using the prestige of his judicial office to advance that party's position, telling the tenants they would be evicted if legal proceedings were commenced, and thereafter presiding over the matter when eviction proceedings were commenced.

Respondent was represented in that proceeding by Terence P. O'Leary.

As to Charge IV of the Formal Written Complaint:

24. From in or about October 1997 through in or about January 1998, attorney Terence P. O'Leary represented respondent in proceedings before the Commission, which resulted in a determination of admonition dated March 17, 1998.

25. Respondent retained Terence P. O'Leary to represent him in this proceeding before the Commission. Mr. O'Leary represented respondent from on or about May 25, 2005, until Mr. O'Leary withdrew as counsel in January 2006.

26. From in or about June 1997 through in or about May 2005, attorney Terence P. O'Leary represented individuals before respondent in the six cases set forth in Exhibit E to the Agreed Statement of Facts and in *People v. Panzica*, as set forth in Charge II. Respondent either failed to disqualify himself and/or failed to disclose to the parties that Mr. O'Leary was representing him or had previously represented him.

27. Respondent acknowledges and agrees that he will disqualify himself from any case in which Mr. O'Leary appears for a period of two years following Mr. O'Leary's representation of respondent, and that upon the expiration of the two-year period he will notify all parties in any matter in which Mr. O'Leary appears of the relationship and provide an opportunity to request respondent's recusal.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1),

100.3(B)(6)[1], 100.3(E)(1) and 100.3(F) 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 through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established.

In two impending matters involving individuals who were scheduled to appear in his court, respondent engaged in prohibited *ex parte* communications and made statements that compromised his impartiality, notwithstanding that he had previously been disciplined for similar misconduct.

In the *Sparling* matter, respondent's efforts to resolve a dispute involving his neighbor overstepped the boundaries of his judicial authority. After his neighbor, Mr. Sparling, had been issued an appearance ticket on a charge of Assault in connection with a dispute over payment for car repairs, respondent made a series of *ex parte* calls to the alleged victim's attorney and to the sheriff's office, proposing an interim settlement that would enable his neighbor to retrieve his car. In speaking to the deputy, ostensibly to warn him of the possibility of a second altercation between the parties, respondent made disparaging comments about the individuals involved. Such conduct compromised respondent's impartiality and conveyed the appearance that he had prejudged the matter and that he was acting as an advocate for his neighbor (Rules, §§100.1 and 100.2[A]). It is the proper role of a judge to preside in court proceedings, not to mediate disputes out of

[1] The Formal Written Complaint is deemed amended to include this provision, which was cited in the Agreed Statement of Facts.

court. *Matter of Glover*, 2006 Annual Report 165 (Comm. on Judicial Conduct).

We note that respondent had previously disqualified himself in matters in which his neighbor Mr. Sparling had appeared, that he properly offered to disqualify himself when the Sparling-Sprague case came before him, and that he presided with the consent of both sides. Nevertheless, even if he anticipated that his recusal would likely be required because of his relationship with Mr. Sparling, respondent's conduct was improper. With two decades of experience as a judge, respondent should have recognized that out-of-court misconduct is not cured by an offer to recuse and that he should avoid any involvement in impending matters that might compromise his impartiality as a judge. Moreover, respondent's deprecating comments cannot be excused by any suggestion that he was simply attempting to warn the deputy that the individuals might be involved in a future altercation. If respondent believed that such a warning was necessary, the warning could have been conveyed by more appropriate language.

Several months later, in the *Panzica* matter, respondent again conveyed the appearance of bias in a series of *ex parte* communications. After the complaining witness in a pending Assault case contacted respondent to request an order of protection, respondent made a series of calls to the sheriff's office in order to obtain the necessary paperwork as soon as possible. While these calls may have had a proper, even commendable, purpose, respondent's comments during these conversations were inappropriate and conveyed the appearance that he had prejudged the merits of the case. Respondent also conveyed the appearance of prejudgment by telling the alleged victim,

who had requested the protective order, that in disputes between neighbors "usually both were at fault." Notably, respondent, who had no prior relationship with either party, eventually issued the requested order, notwithstanding his earlier comments suggesting that he would not do so. Thus, despite conveying the appearance of prejudgment, the record suggests that respondent made a decision that was based on the merits.

When the parties appeared before him at the arraignment a few days later, the defendant was represented by an attorney, Terence O'Leary, who had represented respondent several years earlier. Compounding the appearance of partiality, respondent refused to re-issue the order of protection and he arraigned and released the defendant fifteen minutes before the scheduled arrival of the assistant district attorney, thereby depriving the prosecution of the right to be heard. At the next court appearance in the case, respondent properly disqualified himself because of Mr. O'Leary's involvement and because of his contacts with the alleged victim. Notwithstanding his disqualification, respondent's handling of the case showed insensitivity to the appearance of bias conveyed by his conduct.

A judge's disqualification is required in any matter where the judge's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]). Under guidelines provided in numerous opinions of the Advisory Committee on Judicial Ethics, disqualification in matters involving the judge's personal attorney is required if the representation occurred within the past two years; thereafter, at the very least, disclosure is required for a significant period (Adv. Op. 92-54, 93-09, 97-135, 99-67). *See also, Matter of Ross*, 1990 Annual Report 153 (Comm. on Judicial Conduct); *Matter of*

Phillips, 1990 Annual Report 145 (Comm. on Judicial Conduct). Respondent violated these standards by failing to disqualify himself from a case handled by Mr. O'Leary, who was representing respondent at the time, and thereafter by failing to disclose the relationship when the attorney appeared before him in subsequent matters.

In 1997, while Mr. O'Leary was representing respondent in a proceeding before the Commission, respondent dismissed a charge against a defendant represented by Mr. O'Leary. Significantly, however, the disposition had been negotiated before Mr. O'Leary began to represent respondent. Thereafter, starting in 2002, Mr. O'Leary appeared before respondent in six matters, including *Panzica*, before briefly representing him again in this proceeding. In those cases – four criminal cases and two civil cases – respondent failed to disclose his prior relationship with Mr. O'Leary. Although the attorney-client relationship had ended more than four years earlier, disclosure was required under the ethical guidelines. It is no excuse that in a small community, the district attorney and others may have been aware of the relationship. There can be no substitute for making full disclosure on the record in order to ensure that the parties are fully aware of the pertinent facts and have an opportunity to consider whether to seek the judge's recusal.

In considering an appropriate sanction, we note that respondent was admonished in 1998 for engaging in *ex parte* conduct in connection with a landlord-tenant dispute. *Matter of Merrill*, 1999 Annual Report 127 (Comm. on Judicial Conduct). Failure to heed a prior disciplinary sanction is a significant aggravating factor that militates in favor of a strict sanction. *Matter of Rater*, 69 NY2d 208, 209 (1987).

We note, however, that whereas in the earlier matter respondent did not offer to disqualify himself when the case came before him, in *Sparling* he offered to recuse at the arraignment and presided with the consent of the parties, and in *Panzica* he eventually disqualified himself because of Mr. O'Leary's involvement and because of his contacts with the alleged victim. These actions suggest that respondent has learned from his earlier experience to be more sensitive about the need for recusal when his impartiality can reasonably be questioned. We note further that respondent has been cooperative and has acknowledged his misconduct, that there was no charge of favoritism in any of the cases Mr. O'Leary handled before him, and that respondent has agreed to make appropriate disclosure in the future if Mr. O'Leary appears in his court. In view of these factors, we have concluded that censure is appropriate.

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

Mr. Felder, Judge Klonick, Mr. Emery, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Harding dissent as to the sanction and vote that respondent be admonished.

Ms. DiPirro was not present.

CERTIFICATION

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

Dated: May 14, 2007

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