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June 17, 2010

Advisory Committee on Judicial Ethics  
c/o Hon. George D. Marlow, Chair  
4 Empire State Plaza, Suite 2001  
Albany, New York 12223-1450

Re: Advisory Opinion 10-38

To the Members of the Advisory Committee:

I write on behalf and with the approval of the Commission on Judicial Conduct, regarding the Advisory Committee's Opinion 10-38.

The Commission does not take issue with the Opinion's advice to the requesting judge as to whether he/she should disqualify himself/herself from a particular case. While it is not the Commission's role to comment publicly on the specific advice rendered by the Advisory Committee to individual judges, I note the disqualification discussion in Opinion 10-38 is consistent with the Commission's own public pronouncements on the subject.

However, in our view, the Opinion's gratuitous criticism of the Commission was unwarranted, particularly where, as here, it was offered without benefit of the facts and circumstances that prompted the Commission's inquiry of the judge in the first place.<sup>1</sup> That the Opinion reached out to attack the Commission for its procedures and retroactively criticized the questions posed to

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<sup>1</sup> Judiciary Law § 212(2)(1)(ii) authorizes the Advisory Committee to request supplementary information from the requesting judge. From my teleconference yesterday with the Chair and both Vice Chairs of the Advisory Committee, I gather this was not done.

the judge is all the more surprising given the limited, prospective issue as to which the inquiring judge sought the Advisory Committee's advice, and the fact that the judge had already answered the questions posed and does not appear to have raised any question about their propriety.

The Commission is very well aware of and deeply devoted to its responsibility to preserve the independence of the judiciary, while meeting its constitutional obligation to promote high standards of judicial conduct and hold judges accountable for their behavior. Conducting investigations and imposing discipline where warranted, dismissing the overwhelming majority of complaints determined to be without merit, and absorbing complainant disappointments that would otherwise be directed at the judiciary, contribute to the Commission's mission, as does the Commission's refusal to be used by a complainant for the purpose of forcing a judge to step down from a case.

There are competing public interests between the Commission's prompt investigation of facially meritorious allegations versus its restraint as to those complaints involving pending court cases, and between early notification to the judge under inquiry versus notification only when a response is deemed necessary.<sup>2</sup> As a general practice, the Commission refrains from communicating with a judge regarding a pending case, precisely to protect the judiciary's independence and to avoid being used by a complainant to force a recusal.

There are, of necessity, exceptions, as even Opinion 10-38 concedes. Obviously, the Commission cannot defer a complaint indefinitely. A judge's recollections may fade, for example, and there are some protracted court cases that last for years, as did the case at issue.

The facts and circumstances of the case at issue posed what the Commission regarded as an exception to the general rule, for reasons that were not articulated or expressed in Opinion 10-38, likely because the Advisory Committee was unaware of them.

While there are significant pertinent facts the Commission cannot disclose due to the confidentiality provisions of Judiciary Law §45, please note the following.

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<sup>2</sup> Indeed, a September 2009 report of the New York County Lawyers' Association recommended early notification to the judge of both the investigation and the source of the complaint, so that the judge may preserve evidence and recollections of the conduct in question.

- The case at issue, a custody matter in Supreme Court, was commenced in 2004, originally before another judge. The father, who had temporary custody of the children, had petitioned for permanent custody.
- In March and April 2009, the Commission received allegations about the inquiring judge's conduct, *inter alia* that the judge was not patient and courteous as required by the Rules Governing Judicial Conduct, and that s/he was at times peremptory or precipitous and did not allow litigants or their lawyers opportunity to be heard, as required by the Rules.
- Between October 2008 and June 2009, there were several hearing dates on the custody issue.
- According to the transcript, in June 2009, after a morning hearing, the judge declared a luncheon recess to 2:15. At 2:28, when the father and his lawyer were 13 minutes late returning from lunch, the judge dismissed the father's petition for permanent custody, for non-prosecution.
- Although the judge subsequently granted the father's written application to restore the matter, no hearings have been conducted in the case since June 2009.

Notwithstanding that there had been no hearings conducted in the case since June 2009, the Commission refrained from communicating with the judge until the transcripts were ordered and reviewed, numerous witnesses were interviewed and the scope of inquiry was narrowed based on the results of our investigation.

The Commission's first communication to the judge was in writing on January 29, 2010, *i.e.* more than seven months after the last hearing date. To our knowledge, at the time of the Commission's inquiry no new hearing dates had been scheduled and as of today, more than a year after the last hearing date, no new hearing dates have been scheduled or held.

Regrettably, Opinion 10-38 describes the timing of the Commission's January 2010 inquiry to the judge as "in the midst of trial." In fact, in a case already six years old, no trial proceeding had been held for seven months, and to our knowledge no additional trial date was scheduled. At the same time, the complaint was nine months old, and the investigation was complete but for

hearing the judge's explanation as to the narrowed scope of his/her alleged misconduct. In those circumstances, the Commission properly chose to inquire of the judge, rather than wait indefinitely.

Although Opinion 10-38 criticizes specific questions asked of the judge by the Commission's letter of January 2010, a fair reading of those questions in light of the foregoing facts and circumstances makes clear that the Commission was not conducting an appellate review but attempting to ascertain relevant facts from the judge regarding the alleged misconduct. As to question 3, for example, it was relevant for the Commission to know whether there was some reason to dismiss the custody petition after a number of days of hearings, other than the fact that a litigant was a few minutes late after the lunch recess.<sup>3</sup> This question was asked not so the Commission could rule on the legal merits of the proffered reason but to determine whether there was a violation of the Judicial Conduct Rules.

The Commission knows there are many judges who would argue that where a complaint involves appealable issues, the Commission should decline to investigate. Of course, as the Court of Appeals has held, legal error and judicial misconduct are not mutually exclusive and indeed may both arise from the same act. *In re Feinberg*, 5 NY3d 206 (2005). It is equally well-settled that acts done in the exercise of judicial discretion may, in some circumstances, also be misconduct. *See In re Restaino*, 10 NY3d 577 (2008); *In re Bauer*, 3 NY3d 158 (2004). Given this body of precedent, questions like those cited in Opinion 10-38 not only are appropriate, but are important to the Commission's determination whether particular conduct has violated the Rules.

I appreciate that Judge Marlow responded to my request yesterday for a discussion of these issues, and that the Advisory Committee Vice Chairs, Justices Betty Weinberg Ellerin and Jerome C. Gorski, joined us in a teleconference. I believe we all agreed that, generally but with appropriate exceptions, the Commission does exercise restraint as to communicating with judges about complaints concerning pending trials. I am sorry that fact was not noted in Opinion 10-38. I also appreciate that we may disagree from time to time, as we did here, on what would constitute an appropriate exception. With all due respect, the judgment as to what constitutes such an exception is the Commission's responsibility, based on information available to it that is likely to be broader than that which is available to the Advisory Committee.

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<sup>3</sup> Question 3, as quoted in Opinion 10-38, reads as follows: "At some point in the case, did you dismiss [ ]'s petition for visitation and/or custody of [the party's children]? If so, please state the reason for your action, including whether the tardiness of [ ] and [his/her] attorney, . . . , was your basis for such dismissal."

In any event, we prefer that future discussions about the Commission's process and procedures occur in a more appropriate forum or fashion, rather than in an individual Opinion, particularly where the Advisory Committee may be limited in its knowledge of all the relevant circumstances.

Very truly yours,

Robert H. Tembeckjian  
Administrator and Counsel