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

DETERMINATION

MICHAEL R. AMBRECHT,

a Judge of the Court of Claims and
Acting Justice of the Supreme Court,
New York County.

- -

THE COMMISSION:

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

APPEARANCES:

Robert H. Tembeckjian (Edward Lindner and Brenda Correa, Of Counsel) for the Commission

Martin & Obermaier LLC (by John S. Martin, Jr.), Olshan Grundman Frome Rosenzweig & Wolosky LLP (by Jeffrey A. Udell), and Joseph W. Bellacosa for the Respondent

The respondent, Michael R. Ambrecht, a Judge of the Court of Claims and an Acting Justice of the Supreme Court, New York County, was served with a Formal Written Complaint dated February 12, 2007, containing two charges. The Formal Written Complaint alleged that respondent initiated an investigation and issued an opinion which were or appeared to be motivated by political purposes (Charge I), and that he presided over two cases in which his personal attorney appeared (Charge II). Respondent filed a Verified Answer dated April 24, 2007.

By Order dated April 27, 2007, the Commission designated Honorable Richard D. Simons as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 13, 14, 15 and 16 and December 5, 2007, in New York City. The referee filed a report on January 18, 2008.

The parties submitted briefs with respect to the referee's report. On June 19, 2008, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the Court of Claims since 2002 and is assigned to the criminal term of the Supreme Court in New York County.

As to Charge I of the Formal Written Complaint:

2. The charge is not sustained and therefore is dismissed.

As to Charge II of the Formal Written Complaint:

3. Respondent and Paul Shechtman, Esq., worked for the New York

County district attorney's office when Mr. Shechtman was counsel to the district attorney and respondent was an assistant district attorney. After leaving the district attorney's office in 1995, respondent and Mr. Shechtman both worked for Governor Pataki in Albany.

4. In February 2006 respondent retained Mr. Shechtman to represent him in connection with an investigation by the Commission. Mr. Shechtman charged respondent his reduced rate for public employees, $250 per hour, as opposed to his usual fee of $600 per hour.

5. Mr. Shechtman represented the defendant in *People v. Numark.* Mr. Shechtman and assistant district attorney Brenda Fisher negotiated a plea agreement in which the defendant would waive prosecution by indictment, would plead guilty to a felony charge of offering a false instrument for filing and would pay a fine and/or restitution in lieu of serving jail time.

6. On June 15, 2006, Mr. Shechtman and Ms. Fisher appeared before respondent on the plea agreement in *Numark.* Shortly before the appearance, Mr. Shechtman told respondent that he had a matter before him on an agreed upon plea and asked respondent whether he felt comfortable presiding over it. Respondent said he felt he could keep the matter and would make a disclosure.

7. At the outset of the proceeding on June 15, 2006, respondent stated on the record:

> "in the interest of full disclosure I want to put on the record that Mr. Shechtman and I have known each other for over 15

> years, during which time we've had a professional and personal relationship which continues until today. Does anyone have any objection to that?"

Ms. Fisher responded, "No, your honor." Respondent then accepted the plea agreement.

8. On its face, respondent's disclosure was incomplete and deceptive in that respondent did not disclose that he had recently retained Mr. Shechtman to represent him and was paying him for his services.

9. In June 2006 Mr. Shechtman also appeared before respondent in *People v. Kurland*, in connection with a violation of probation. The Department of Probation was seeking a Declaration of Delinquency based on allegations that the defendant, who had pleaded guilty in 2005 to Criminal Possession of Marijuana in the Second Degree and had been sentenced by respondent to five years' probation, had traveled outside the United States and did not provide his itinerary, in violation of restrictions imposed at sentencing. On June 19, 2006, the day before the scheduled appearance, Mr. Shechtman telephoned respondent's chambers, spoke to respondent and requested a one-week adjournment because he was out of town. The next day, Mr. Shechtman sent a letter to respondent confirming the request for an adjournment and stating that he had advised the defendant that his appearance was not required on June 20th. Mr. Shechtman's letter was not copied to the prosecution or the Department of Probation.

10. On June 20, 2006, respondent ordered a bench warrant for the defendant based on his non-appearance, and a Declaration of Delinquency was issued.

11. On June 23, 2006, respondent, represented by Mr. Shechtman, gave testimony at the Commission office.

12. On June 27, 2006, Mr. Shechtman and the defendant appeared before respondent in *Kurland.* Assistant district attorney Lisa Zito urged that the defendant be incarcerated and reminded respondent that at sentencing respondent had told the defendant that he faced incarceration if he violated the terms of his probation. Mr. Shechtman argued against incarceration.

13. Respondent vacated the bench warrant, stating that Mr. Shechtman had contacted the Court prior to the June 20th scheduled appearance and had requested that the defendant's appearance be excused. Respondent adjourned the matter to September 19, 2006, imposed additional travel restrictions and directed that the defendant be monitored by the Department of Probation.

14. Respondent did not disclose that Mr. Shechtman was then representing him or make any mention of his relationship with Mr. Shechtman.

15. Mr. Shechtman was paid $25,000 for his representation of the defendant in *Numark* and $15,000 for his representation of the defendant in *Kurland.*

16. On June 28, 2006, respondent received a mass e-mail from the Advisory Committee on Judicial Ethics that included a recent advisory opinion (Op. 06-22), stating that a judge's recusal was required on all matters involving his or her attorney until two years after the termination of the representation. Respondent sent the e-mail to Mr. Shechtman on July 17, 2006.

17. Respondent testified that before he received this e-mail he believed that his disqualification was not required when his personal attorney appeared before him if the relationship was disclosed and the conflict was waived.

18. From July 17 to September 19, 2006, respondent took no action on *Kurland*, did not disqualify himself from the case, and made no disclosure that Mr. Shechtman was his attorney. The defendant remained at liberty during this period.

19. On September 19, 2006, respondent transferred the *Kurland* case to Acting Supreme Court Justice William A. Wetzel. Mr. Shechtman contacted Ms. Zito after the proceeding and told her that the matter had been transferred since he represented respondent on "a small civil matter."

20. In proceedings before the Commission, respondent testified that at the time he made his disclosure in *Numark*, he believed the disclosure was sufficient, but that he now recognizes that it was inadequate and that, even with full disclosure, he was prohibited from sitting on his attorney's cases. As to the *Kurland* case, respondent claimed that he did not disclose his relationship with Mr. Shechtman in June 2006 because he confused the case with *Numark* and mistakenly believed he had already made a disclosure.

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)(a) and 100.3(E)(1) 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 II of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established. Charge I is not sustained and therefore is dismissed.

A judge's disqualification is required in any matter in which 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 during the period of representation and thereafter for two years (*see, e.g.*, Adv. Op. 92-54, 93-09, 97-135, 99-67). *See also, Matter of Merrill*, 2008 Annual Report 181 (Comm on Judicial Conduct); *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 in two cases in which the defendants were represented by an attorney who was contemporaneously representing respondent in connection with a Commission investigation.

A few months after he had retained Mr. Shechtman to represent him, respondent accepted a plea from the defendant in *People v. Numark*, with Mr. Shechtman standing before him. Although respondent has testified that a judge's role with respect to such pleas is "almost ministerial," convicting and sentencing a defendant indisputably requires the exercise of judicial power and discretion. More to the point, it is manifestly improper for a judge to sit on a case in which the judge's personal attorney appears,

regardless of the nature of the case. Here, the impropriety was exacerbated by respondent's misleading disclosure on the record that he and Mr. Shechtman "have had a professional and personal relationship which continues until today." By not stating that Mr. Shechtman was then representing him, respondent's disclosure was not just incomplete but deceptive, since it could be viewed as referring solely to a relationship arising out of their previous public employment.

While respondent now acknowledges the impropriety of sitting on his attorney's cases, he testified that when Mr. Shechtman appeared before him, he believed that the conflict was waivable and that he could hear Mr. Shechtman's cases if disclosure of the relationship was made. It is difficult to understand how any judge – particularly a judge with respondent's experience and talents – could fail to recognize, even without the guidance provided by the Advisory Opinions, that such a conflict required prompt recusal or, at the very least, presented a significant issue that warranted exploration. Even a telephone call to the Advisory Committee would likely have provided appropriate guidance. Moreover, in light of respondent's proffered rationale, his inadequate disclosure was particularly serious. By failing to disclose that Mr. Shechtman was his attorney, respondent appeared to be concealing the most significant aspect of their relationship and thus deprived the district attorney of a meaningful opportunity to object to the judge's participation.

A short time later, respondent handled *People v. Kurland*, in which the defendant represented by Mr. Shechtman was accused of a probation violation. Mr.

Shechtman initially contacted respondent *ex parte* to request an adjournment, a contact which should have alerted respondent to the conflict in this case. Respondent ordered a bench warrant when the defendant failed to appear and, a week later, sat on the case when Mr. Shechtman appeared with the defendant. (In the intervening week, respondent testified at the Commission office, with Mr. Shechtman at his side.) Without making any disclosure of his relationship with the defendant's attorney, respondent vacated the bench warrant, noting Mr. Shechtman's earlier request for an adjournment. Respondent then rejected the district attorney's request that the defendant be incarcerated and put the case over for three months.

Respondent claims that he confused the *Kurland* case with *Numark* and, as a result, mistakenly believed he had already placed his relationship with Mr. Shechtman on the record. In any case, disclosure would have been inadequate since respondent should not have sat on Mr. Shechtman's cases even with full disclosure. Moreover, the record reflects that subsequently, after learning that he was prohibited from sitting on his attorney's cases, respondent took no action to recuse himself or otherwise transfer the *Kurland* case until two months later, when the case was again on the court calendar. In the interim, the defendant remained at liberty as a result of respondent's exercise of discretion.

Throughout this period, respondent, who was paying Mr. Shechtman a reduced rate for his services, regularly conferred with the attorney, who was earning substantial fees from the defendants in *Numark* and *Kurland*. Under the circumstances,

respondent's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]), and his actions conveyed the appearance of favoritism. Although respondent maintains that his handling of both cases was routine and did not afford any special treatment to Mr. Shechtman's clients, respondent's insensitivity to his ethical responsibilities created an appearance of impropriety permitting an adverse inference to be drawn. This departure from the high standards of conduct required of judges jeopardizes the public's respect for the judiciary as a whole.

In considering the sanction, we note that respondent has acknowledged his misconduct and pledges that he will not repeat it. In view of these factors, we conclude that censure is appropriate.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Ms. DiPirro, Mr. Harding, Ms. Hubbard and Judge Peters concur, except that Judge Klonick, Ms. DiPirro and Ms. Hubbard dissent as to Charge I and vote to sustain the charge.

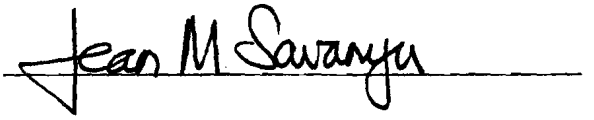
Mr. Emery, Judge Konviser and Judge Ruderman did not participate.

Mr. Jacob was not present.

CERTIFICATION

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

Dated: October 29, 2008



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

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CONCURRING OPINION BY MR. BELLUCK

- -

I write to explain my concurrence in the Commission's vote not to sustain Charge I and to clarify my concurrence in sustaining Charge II.

The chilling effect on judges if the Commission were to sustain Charge I should be intolerable to anyone who believes in a healthy democratic society and a vibrant judiciary free to function without the threat of retaliation.

Judicial independence has been a cornerstone of our American democracy since its founding over 200 years ago. It was recognized by our founding fathers. The Declaration of Independence, in criticizing King George III for making "judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries," testifies to this fact. In 1789, Thomas Jefferson wrote to James Madison: "The judiciary... is a body which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity." The

Constitution protected judicial independence because the founders had firsthand experience being a persecuted minority in courts unfairly controlled by a ruling party. Indeed, the Constitutional safeguards of appointments for life, a difficult impeachment process and non-diminishment of salaries were specifically designed to protect the independence of the judiciary. Throughout our country's history, our greatest legal scholars and jurists have been staunch defenders of this independence. "I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary" (Excerpt from John Marshall, address to the Virginia State Convention of 1829-30, Proceedings and Debates of the Virginia State Convention of 1829-30 at 616 [1830]). In more than 200 years, only 13 attempts have been made to formally impeach federal judges, and only seven judges have been convicted and removed from office—none because Congress disagreed with a judge's judicial philosophy or with a particular decision. Emerging democracies look to our system of an independent judiciary as a model.

Against this backdrop, a charge was brought against Judge Ambrecht for issuing a decision that allegedly was politically motivated.

The history of the United States is paved with judicial opinions that expressed unpopular political viewpoints or that had political facets and impact. *E.g.*, *Plessy v. Ferguson* and *Brown v. Board of Education.* While the facts and issues in the underlying matter handled by respondent may not have great societal import, punishing

the judge for the contents of his opinion most certainly would have. To be sure, a judicial opinion is not so sacrosanct that it can never be the basis for a misconduct finding, *e.g.*, if it was demonstrably motivated by an improper purpose. This case could not be further from such a patently offensive scenario.

At its core, the Formal Written Complaint in this matter alleged that respondent issued a judicial opinion with the intent to influence a political election. After a lengthy hearing, it became clear that the argument for misconduct was based on (i) the contents of the opinion (critical of a public official), (ii) the timing of the opinion (issued six days before a primary election) and (iii) respondent's frank acknowledgment that he was aware that the opinion might have a political impact. Moreover, it was written in response to an application to withdraw a pending motion. A finding of misconduct based on such slender facts would indeed be a grave threat to the independence of the judiciary. Therefore, as to Charge I of the Formal Written Complaint, I concur with the majority that the charge should not be sustained.

The facts underlying this matter are as follows.

From 1993 to 1997, a group of defendants plead guilty and paid restitution in *People v. Alvarez*, a case involving kickbacks to real estate managers. In 1996 Acting Supreme Court Justice Leslie Crocker Snyder appoints a special master to oversee the restitution fund. In 1997 certain records related to the restitution fund are sealed by an Appellate Division justice.

In early 2005, incumbent District Attorney Robert M. Morgenthau

is challenged in a Democratic primary by former Judge Snyder.

In March 2005 the District Attorney begins to investigate the restitution fund. The District Attorney's office is unable to locate the pertinent records in its own files and is told by a court clerk that the *Alvarez* file is sealed. The District Attorney's office then applies *ex parte* to respondent, a former assistant district attorney in Morgenthau's office, to unseal the *Alvarez* records. Respondent refuses to sign an *ex parte* order and requires the District Attorney to file an Order to Show Cause, on notice, to unseal these records.

In a telephone conference on July 14, the parties agree that ADA Dugan can review the *Alvarez* records at the special master's law firm.

On July 21, ADA Dugan goes to the firm and spends several hours reviewing and copying records. Thereafter, Dugan advises the Court that, based on his review, he has determined that most of the documents covered by the unsealing request were not sealed, including Judge Snyder's orders related to the special master's compensation. The ADA states that only eleven requests for compensation appear to be sealed and, therefore, he is narrowing the unsealing request to those documents only. The attorney for the special master vigorously disputes the ADA's representations and argues that the application is politically motivated.

On August 15, a newspaper article appears in the *New York Post* regarding Judge Snyder's role in the *Alvarez* matter. The article contains specific details about eleven Snyder orders approving compensation to the special master.

On August 16, the special master's lawyer asks respondent to take sworn statements regarding the leak of sealed information to the *New York Post*. Respondent, believing that he was being manipulated and that the court's jurisdiction to rule on the unsealing application had been circumvented by whoever had provided the information to the *Post*, orders a hearing on the apparent breach of the sealing order.

On August 19, 2005, respondent holds a hearing at which the attorneys appear. ADA Dugan tells the Court that the Chief of the Investigations Division had asked him in early 2005 to review the file in *Alvarez*, a matter that had concluded some years earlier.

On August 31, 2005, respondent issues 26 written interrogatories to the Chief of the Investigations Division regarding the unsealing request in *Alvarez* and the documents Dugan had obtained from the special master's law firm. Respondent directs a response by September 2, 2005.

On September 2, the District Attorney commences an Article 78 proceeding in the Appellate Division, First Department, challenging respondent's authority to issue the written interrogatories. At an appearance before Justice James M. Catterson, an oral agreement is reached between the District Attorney and the Attorney General's office, appearing on behalf of respondent, calling for respondent to withdraw the interrogatories and for the District Attorney to withdraw the Article 78 proceeding and the unsealing application. The results of this conference are communicated to respondent by telephone.

On September 6, 2005, the District Attorney writes to respondent

withdrawing the application to unseal documents in *Alvarez*.

On September 7, 2005, respondent issues a six-page decision which grants the application to withdraw the unsealing request and criticizes the District Attorney for an "apparent misuse of a public office for inappropriate political purposes."

On September 13, 2005, the primary election for the Democratic nomination for District Attorney is held.

The issue is whether the proof established that respondent issued a decision that was motivated by political considerations. As the record here reveals, such proof on balance was conspicuously absent.

There is no persuasive evidence in the record to disprove respondent's claim that he acted consistently to protect the integrity of his court. It is clear that respondent felt he was being manipulated by the District Attorney's office. It is undisputed that he believed that the District Attorney's office had misused its office for political purposes, leaked sealed court records containing information detrimental to the District Attorney's opponent in the primary election and, subsequently, interfered with the Court's attempt to determine who at the office was responsible for these acts. It is also undisputed that respondent issued written interrogatories to the District Attorney's office in an attempt to resolve unanswered questions about the source of the leaked material, that he had authority to inquire into the apparent leak of sealed material, and that he had authority to issue a decision on the application to withdraw the unsealing request. Respondent's commentary in his six-page decision expresses his views regarding this

sequence of events:

> The Court, while lacking all the necessary facts to determine the source of the leaked information, is compelled to express its concern over the apparent misuse of a public office for inappropriate political purposes. Though ADAs Dugan and Dwyer consistently denied a political facet to the investigation, the Court finds such assertion totally incredible and belied by the People's own actions. Moreover, the Court can only conclude that ADA Castleman's refusal to answer the submitted interrogatories was intended to prevent the Court from completing the fact finding required for it to determine whether and by whom the sealing order had been violated.
>
> The Court further takes issue with the People's completely illogical position, proffered only after the Court had initiated an inquiry regarding the leak, that Mr. Hershmann's compensation applications and Judge Snyder's Orders were never under seal and were thus available to the New York Post and the public in general and the unsealing order which they sought was unnecessary. It is undisputed that the entire purpose of the Order to Show Cause was to determine which documents were encompassed by the sealing order. For the People to now make a unilateral determination that the subject Orders were not sealed is presumptuous and denigrating to the very Court which the People enlisted to make that determination. (Comm. Ex. 25)

Based on the evidence adduced at the hearing, the attempt to attribute respondent's acts and the above-quoted decision to an improper motivation was no more than speculative and was properly rejected by the Commission.

Far from there being proof that respondent was politically motivated to issue his decision, the record is clear that he was a supporter of Mr. Morgenthau and, indeed, would have voted for him if he lived in Manhattan. For example, respondent testified at the hearing:

"I hold Mr. Morgenthau in high esteem. I worked for him for many, many years, he gave me great opportunities in my career." (Tr. 146)

"Q. [W]ould you compare your relationship with Leslie Crocker Snyder and your relationship with Robert M. Morgenthau?

A. There is no comparison. I knew Leslie simply because she was a colleague and we had brief interactions at judicial functions. I looked upon Mr. Morgenthau as a father figure for many years. Having worked for him while in college, and I was always very grateful for the many opportunities he gave me to be exposed to the practice of law at such an early age ending college, which is what prompted me to pursue a career in law." (Tr. 236-37)

[After testifying that he votes in Nassau County, respondent was asked:]

"Q. If you had been able to vote the primary election in 2005 between Mr. Morgenthau and Justice Snyder, for whom would you have voted?

A. Robert Morgenthau.

Q. And why is that?

MR. FRIEDBERG: Move to strike. It's speculative.

JUDGE SIMONS: Strike it out.

Q. When that election was going on, who did you hope would win that election?

A. Robert Morgenthau.

Q. And why is that?

A. I hold Robert Morgenthau in the highest esteem. He is someone that gave me not just one opportunity, but many opportunities through the course of my education and career to give public service and to learn the practice of law. And I admire and supported him throughout the years.

Q. Did you ever work on any of his campaigns?

A. I did.

Q. Do you recall how many of those campaigns you worked on?

A. Well, I only worked on the 1985 campaign. And I was a college student at the time, and I was on the non-legal staff. So it was permissible at that time to volunteer on your own time to work on Mr. Morgenthau's campaign." (Tr. 813-14)

[Respondent states that subsequently the district attorney "implemented a revised rule that basically barred any assistant district attorney from working voluntarily or otherwise on his future campaigns."]

"...Q. Did you ever contribute to Mr. Morgenthau's campaigns?

A. Well, you were allowed to contribute financially, and I always did that, yes.

Q. Did that continue after you left the office but before you became a judge?

A. Correct. I contributed even while on the Governor's staff." (Tr. 815-16)

Respondent's law clerk was asked:

"Q. During the entire time that the *Alvarez* matter was pending before him, did Justice Ambrecht ever indicate to you what his personal views were regarding the merits of the candidacies of Judge Leslie Crocker Snyder on the one hand and Robert Morgenthau on the other in that primary race?

A. No.

Q. Have you ever heard to this day Justice Ambrecht express the view that he supported the candidacy of Leslie Crocker Snyder for the District Attorney in New York County?

A. Never.

Q. And during the entire time that the matter was pending before you, have you ever heard Justice Ambrecht express any intent whatsoever to assist Justice Snyder in her candidacy or quest to become District Attorney of New York County?

A. No. To the contrary. The gist of any conversation we ever had and not

> even about this election but about -- let me rephrase that. The conversations that I had with Judge Ambrecht would have led me to believe to the contrary, that he would have -- may have been a supporter of Robert Morgenthau. He appreciated several career opportunities that the District Attorney had given him, he had fond feelings for the office, and respected Mr. Morgenthau. And I never had any reason to believe otherwise, until this time." (Tr. 563-65)

No contrary evidence concerning respondent's personal political views, or any supposed bias, was presented.

The dissent argues that respondent issued a decision in a matter that had already been concluded (Dissenting opinion, p. 3). Not so. During the oral argument on this matter, Commission counsel acknowledged that the September 6, 2005 letter from the District Attorney withdrawing the unsealing request was in fact an "application" to withdraw a motion (Oral argument, p. 19). Commission counsel also acknowledged that respondent, and, indeed, any judge, has the authority to issue a decision on an application to withdraw an unsealing request (*Id.* at 18-19).

The fact that the referee concluded that "Circumstances did not require a written decision" (Referee's report, p. 3) does not speak to whether respondent had the right to issue such a decision. Nor did the fact that Justice Catterson had apparently brokered an agreement amongst the parties, and had commented that he wanted the matter to "go away," preclude respondent from writing an opinion. Respondent was not subject to any order by the Appellate Division or any other legal bar that would preclude him from issuing a decision addressing the matters before him.

As to the argument that the timing of the decision (six days before the primary) is conclusive evidence of an improper purpose, a judge might equally be subject to criticism for delaying a decision which might be detrimental to a candidate until after an election. Whenever the opinion was issued, the timing would be perceived by some as politically motivated, regardless of the judge's intent. In that regard, I cannot agree with the dissent's view that since it was unnecessary for respondent to issue such a decision shortly before the election, it must be concluded that he did so for the purpose of influencing the election.

Nor is there merit to Commission counsel's insistence that respondent admitted criticizing the District Attorney's office "without facts to back it up." While the opinion states that the court "lack[s] all the necessary facts to determine the source of the leaked information," respondent has explained that he believed the facts before him pointed to the District Attorney's office as the source of the leak, though he lacked adequate facts to accuse a particular individual. The very fact that a judge has been called upon to explain and justify statements in a judicial opinion, on these facts, graphically demonstrates the impropriety of this unprecedented intrusion into judicial independence.

While I strongly believe that investigation into these matters was unwarranted, it is important to underscore that this decision fulfills the Commission's mandate to promote public confidence in the integrity of the judiciary, which includes not only holding judges accountable for misconduct but, equally important, dismissing meritless complaints.

For these reasons, I concur that Charge I should not be sustained.

With respect to Charge II, I concur in the sanction with some reservation. The majority determination lays out the facts regarding the appearances of Mr. Shechtman before respondent in two cases after respondent had retained Mr. Shechtman to represent him with respect to Charge I.

It is indeed troubling that respondent would allow his own attorney to appear before him. It is not a credible defense to this charge that respondent was not aware of the specific rules or Advisory Opinions prohibiting such conduct. It simply does not pass the smell test for any judge to allow his or her own attorney to appear on a pending matter without, at the very least, making full disclosure of the relationship.

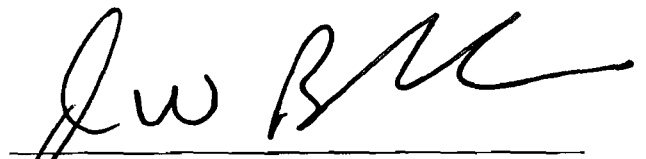
My reservations in sustaining Charge II are as follows.

In my view, the fact that Charge I was even investigated by the Commission was an encroachment into the independence of the judiciary, and since it is clear that Charge II would never have arisen had it not been for the investigation into Charge I, I am troubled by upholding any charges against respondent. While it is often the case that the cover-up is worse than the crime, in this case, the "crime" should never have been charged.

Secondly, I am troubled by the apparent conduct of Mr. Shechtman. While Mr. Shechtman was not subject to the jurisdiction of the Commission and, therefore, had no opportunity to defend his actions, the appearance of what occurred here is not good. Mr. Shechtman, well known as an ethics advisor and indeed a former chair

of the State Ethics Commission, was hired by respondent for the express purpose of representing him with respect to Charge I. Notwithstanding this, it appears that Mr. Shechtman placed respondent in the very situation which gave rise to further charges of wrongdoing. Moreover, Mr. Shechtman profited handsomely from this. Indeed, he earned over $40,000 on the two cases in which he appeared before respondent while serving as respondent's attorney. While it does not alleviate the burden on respondent to avoid any appearance of impropriety, in my view Mr. Shechtman bears a considerable portion of the blame.

Dated: October 29, 2008



Joseph W. Belluck, Esq., Member
New York State
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Pursuant to Section 44, subdivision 4,
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a Judge of the Court of Claims and
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OPINION BY JUDGE KLONICK, DISSENTING AS TO CHARGE I AND CONCURRING AS TO SANCTION

- -

As to Charge I of the Formal Written Complaint, I respectfully dissent.

Specifically, the Complaint alleged that the Respondent, acting or appearing to act for politically motivated reasons, publicly accused the New York County District Attorney's Office of abusing its authority in an effort to embarrass the candidate then running against the incumbent DA in the 2005 Democratic primary. The Referee concluded, following an extensive hearing, that this charge had been sustained and that Respondent's intent was to affect the election. I agree.

A brief recitation of the facts is necessary to put the Respondent's actions into context.

In 2005, incumbent DA Robert M. Morgenthau was challenged in the Democratic primary by former Judge Leslie Crocker Snyder. With respect to a matter which was pending before him involving a fiduciary appointment Judge Snyder had made

to a firm she later joined, the Respondent was obviously disturbed by an alleged leak of information to the media. The resulting media articles portrayed former Judge Snyder in a negative light. The Respondent, in an effort to find the source of this breach of confidentiality, issued interrogatories, on the Court's own motion, directed to the District Attorney's Office.

The District Attorney's Office opposed answering these interrogatories and initiated an Article 78 proceeding before the Appellate Division, First Department, challenging the Respondent's authority to issue such interrogatories. An appearance on Friday, September 2, 2005 before Appellate Division Justice James M. Catterson resulted in a settlement of the matter. The District Attorney's Office agreed to withdraw the Article 78 proceeding immediately and to also withdraw the application to unseal certain documents which was pending before the Respondent. In return, the Attorney General's Office, appearing on behalf of the Respondent, agreed to withdraw the interrogatories. Judge Catterson made it clear to the attorneys the matter was over and that he did not want to see any more publicity about it. The results of the proceeding at the Appellate Division were communicated that day by the Assistant Attorney General to the Respondent's Law Clerk, as well as directly to the Respondent by telephone. The Respondent's Law Clerk even remarked to the Assistant Attorney General after being told of the resolution: "That's fine, I don't have to write an opinion over the weekend" (Referee's Report, Appendix A ¶48; Tr. 689).

The District Attorney's Office then withdrew its application before the

Respondent on September 6, 2005. The next day, September 7, 2005 and six days before the primary election, the Respondent issued a six-page Decision wherein he severely criticized the incumbent District Attorney and his office. The Decision, *inter alia*, criticized the District Attorney's Office for its "apparent misuse of a public office for inappropriate political purposes" (Referee's Report, Appendix A ¶54; Ex. 25, 50).

Based upon testimony and evidence given at the hearing in this matter before Referee Simons, it appears that many of the conclusions in the Respondent's Decision issued on September 7, 2005 are based upon speculation and innuendos, without any basis in fact.

The Referee concluded that: "The circumstances did not require a written decision, let alone one which, based solely on Respondent's speculations, castigated a public officer for abuse of office, or at a minimum, improper conduct. The error was compounded when Respondent knowing the decision would become public issued it a few days before the District Attorney faced an opponent in a primary election" (Referee's Report, p. 3).

It is clear that the matter pending before the Respondent had been concluded by a settlement between the parties before the issuance of the Decision. Information concerning the settlement had been communicated directly to the Judge and his Law Clerk several days before he issued his Decision, a decision which was highly critical of an elected official on the eve of a contested primary election. Since there was no necessity for such a written Decision, one is left with but one conclusion: The

Respondent, by his after-the-fact decision, was attempting to enter the political arena and influence the election.

A judge is required to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules Governing Judicial Conduct, §100.2[A]). In fact, "[t]he ability to be impartial is an indispensable requirement for a judicial officer." *Matter of Sardino*, 58 NY2d 286, 290 (1983).

The Respondent certainly had the authority to inquire into and discipline alleged attorney misconduct after any settlement. He could have held a hearing to determine the source of the alleged leaks of the purportedly sealed documents and then discipline any of the parties appropriately. He chose, instead, to issue a decision in a matter which had already been concluded.

I can only conclude, as the Referee did, that the Respondent's actions were politically motivated and a blatant attempt to influence an election. I vote to sustain Charge I and that the appropriate sanction is censure.

Dated: October 29, 2008

Honorable Thomas A. Klonick, Chair
New York State
Commission on Judicial Conduct