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 A. HART,

a Justice of the Supreme Court,
Queens County.

- -

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Vickie Ma, Of Counsel) for the Commission

Donald R. Schechter for Respondent

The respondent, Duane A. Hart, a justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated May 10, 2004, containing

two charges. Respondent filed an answer dated May 30, 2004.

By Order dated June 28, 2004, the Commission designated Hon. John A. Monteleone as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 12, 2004, and February 22 and April 4, 2005, in New York City. The referee filed his report with the Commission dated June 6, 2005.

The parties submitted papers with respect to the referee's report. Counsel to the Commission recommended that Charge I be dismissed, that Charge II be sustained, and that respondent be admonished; respondent recommended that both charges be dismissed. On August 11, 2005, 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 justice of the Supreme Court, Queens County since January 2002; prior to that, he served as a judge of the Civil Court of the City of New York for two years.

As to Charge I of the Formal Written Complaint:

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

As to Charge II of the Formal Written Complaint:

3. *Modica v. Modica*, a civil matter concerning an ownership interest in a building, was assigned to respondent on April 26, 2002. In the next year, respondent presided over three non-jury trials in the matter, all of which resulted in mistrials. On April 16, 2003, the plaintiff's attorneys, Max Goldweber and Leland Greene, moved for

respondent's recusal on the grounds that he had prejudged the case, and asked for a stay of the action in the Appellate Division. Prior to that, the plaintiff's attorneys complained to the administrative judge that respondent had delayed the trial. Respondent held the recusal motion in abeyance pending the trial and directed the parties to be present for trial on April 21, 2003, at 9:30 AM.

4. On April 21, 2003, respondent took the bench at 11:30 AM, and the trial commenced. After about an hour, respondent declared a recess and stated that he was adjourning the case until the next day because he had to fix his tire. The plaintiff, John Modica, requested a one-day adjournment so that he could attend his son's soccer game the next day. Respondent denied the request.

5. A short time later, after court was adjourned, Mr. Modica approached respondent in the courthouse parking lot, hoping to persuade respondent to grant the adjournment he had requested. After Mr. Modica stated, "Excuse me, Your Honor--," respondent called to the court officer on duty, Geralyn Martucci, and told her to arrest Mr. Modica.

6. Officer Martucci called her supervisor, Lieutenant Lawrence Sullivan. Respondent told the officers that Mr. Modica was a litigant who had approached respondent's car. Lieutenant Sullivan asked respondent how he wanted the matter to be handled. At respondent's request, Mr. Modica was released with a warning not to approach the judge at any time. Mr. Modica was never arrested or restrained with handcuffs.

7. The next morning, April 22, 2003, after Mr. Modica advised his attorneys of the parking lot incident, Mr. Greene asked to make a record of the incident. Respondent stated that if Mr. Greene placed the matter on the record, he would hold Mr. Modica in contempt. After conferring with his client, Mr. Greene stated that he had to make a record of the incident to protect himself and his client, and respondent reiterated that if Mr. Greene made a record of the incident, he would hold the plaintiff in contempt.

8. On the record, Mr. Greene stated that Mr. Modica had only intended to ask respondent to reconsider his request for an adjournment so that he could attend his son's soccer game. Respondent held Mr. Modica in contempt and imposed a 30-day jail sentence, stating that Mr. Modica had "tried to intimidate the Court." Respondent said that the sentence was suspended pending the outcome of the trial and stated:

> I find that his act in accosting me in the parking lot contumacious conduct, if there ever was contumacious conduct. He was not supposed to do it. Let the record show I tried to let it go with a warning, but you and your associate decided to put it on the record, and I told you if you wanted to keep the matter going, fine. I will hold him in contempt and therefore I did.

9. As the plaintiff's attorney, Mr. Greene had a right to make a record of his client's version of the parking lot incident, and respondent used the threat of contempt to intimidate the attorney from making that record.

10. Respondent held Mr. Modica in contempt out of pique because the attorney insisted on making a record of his client's version of the incident, contrary to respondent's wishes.

11. Before holding Mr. Modica in contempt, respondent did not give him a warning or an opportunity to make a statement in his defense or in extenuation of his conduct, as required by the Rules of the Appellate Division, Second Department.

12. Later that day, respondent dismissed both the plaintiff's action and the counterclaim, and he vacated his contempt finding. Since respondent did not commit Mr. Modica, respondent did not prepare a written order in support of his contempt ruling.

13. On appeal, the Appellate Division, Second Department affirmed respondent's decision, holding that there was no basis for recusal and no proof of bias.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and 100.3(B)(3) of the Rules Governing Judicial Conduct; Sections 700.5(a), 700.5(e), 701.2(a), 701.2(c) and 701.4 of the Rules of the Appellate Division, Second Department (22 NYCRR §700 *et seq.*) ("Second Department Rules"); and Section 755 of the Judiciary Law, 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 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 is therefore dismissed.

The enormous power of summary contempt may be exercised "only in exceptional and necessitous circumstances" where the offending conduct "disrupts or threatens to disrupt" the proceedings or "tends seriously to destroy or undermine the

dignity and authority of the court" (22 NYCRR §701.2[a]). Such exercise also requires strict compliance with mandated safeguards, including giving the accused a warning and opportunity to desist from the contumacious conduct and a reasonable opportunity to make a statement in his defense (22 NYCRR §§701.2[c], 701.4). Respondent did not comply with these well-established safeguards on April 22, 2003, when he held a litigant in summary contempt because his attorney insisted on making a record of an out-of court encounter between respondent and the litigant.

On the previous day, the first day of the non-jury trial, respondent adjourned for the day at 1:00 PM, stating that he had to fix a tire, while denying the request of the plaintiff, John Modica, for a one-day adjournment. Mr. Modica, a single parent of a 12-year-old son, had asked for the adjournment so that he could attend his son's soccer tournament the next day. (At the hearing, respondent candidly stated that he would have granted the request if Mr. Modica's attorneys had not earlier complained about respondent to the administrative judge.) Shortly after the case was recessed, Mr. Modica politely approached respondent in the courthouse parking lot with the intent of asking him to reconsider his denial of the requested adjournment. At respondent's request, Mr. Modica was briefly detained by court officers, then released with a warning.

The next morning, when Mr. Modica's attorney, Leland Greene, indicated that he wanted to place the parking lot incident on the record, respondent explicitly warned that if he did so, respondent would hold Mr. Modica in contempt. The attorney had an absolute right to assert his client's interests by placing his version of the incident

on the record, and it was improper for respondent to use the threat of contempt as a weapon to try to prevent him from doing so. There was certainly no lawful basis for summary contempt: the litigant's conduct in the parking lot, even if improper, was not "disruptive" of the proceedings or a significant threat to the court's dignity and authority. As the referee stated, even using the word contempt to intimidate a lawyer "is wrong since it has a chilling and fearful effect." Respondent's heavy-handed effort to dictate what the attorney placed on the record was highly injudicious.

When the attorney insisted on making a record of the incident, in defiance of respondent's express warning, respondent carried out his threat and announced that he was holding Mr. Modica in contempt, thus punishing the litigant for his attorney's lawful, appropriate advocacy. Without giving Mr. Modica an opportunity to make a statement in his defense or in extenuation of his conduct, as required by the Second Department Rules, respondent held the litigant in contempt and imposed a 30-day jail sentence. Respondent's intemperate, ill-considered actions were a totally inappropriate response to Mr. Greene's lawful advocacy and constituted an abuse of the summary contempt power, warranting public discipline. *See Matter of Mills*, 2005 Annual Report 185 (Comm on Judicial Conduct); *Matter of Teresi*, 2002 Annual Report 163 (Comm on Judicial Conduct); *Matter of Recant*, 2002 Annual Report 139 (Comm on Judicial Conduct); *see also*, *Matter of Lawrence* (decision issued today).

It seems apparent that in the context of a particularly contentious proceeding (in which there had been three mistrials, a complaint by Mr. Modica's

attorneys about respondent to the administrative judge and a motion for respondent's recusal on the grounds of bias), respondent overreacted to the attorney's zealous, appropriate effort to defend his client's interests. Despite respondent's insistence at the oral argument that he simply wanted Mr. Modica to apologize for the parking lot incident, it is clear that respondent never told the litigant on the record, directly or through his attorney, that a simple apology would have sufficed to avoid a holding of contempt. Incredibly, when respondent was asked at the oral argument why he had failed to convey that message to Mr. Modica, respondent asserted that he could not properly do so since Mr. Modica was represented by counsel.

We find respondent's misconduct particularly troubling notwithstanding that later that same day, at the conclusion of the trial, he corrected his injudicious decision by vacating the contempt finding. Several factors have persuaded us that a severe sanction is appropriate in this case.

First, respondent continues to insist that his actions were appropriate and, indeed, asserts that in similar circumstances he would do the same thing again.[1] Such intransigence suggests that respondent still fails to recognize that the awesome contempt power should be exercised only with appropriate restraint and within the carefully mandated safeguards. A judge's "fail[ure] to recognize the inappropriateness of his actions or attitudes" is a significant aggravating factor on the issue of sanctions. *See,*

[1] When asked at the oral argument, "[I]f the same events happen again today, you would do the same thing today?" his response was: "Absolutely" (Oral argument, p. 49).

Matter of Aldrich, 58 NY2d 279, 283 (1983).

Second, we note with concern respondent's conflicting testimony as to certain matters (for example, the various reasons he gave for leaving early on April 21 and his varying testimony as to whether Mr. Modica "tapped" him in the parking lot) as well as his tendency to accuse others of misdeeds in order to justify his own misbehavior. Respondent's claim that he tried to prevent the attorney from making a record because he knew the attorney wanted to make a "phony" record (Tr. 225-27, 264) is entirely unsupported.

In sum, we find that respondent's conduct constitutes a significant departure from the role of a judge, who is required to be the "the exemplar of dignity and impartiality" and to exercise the considerable powers of judicial office within the bounds of the law (Section 100.2[A] of the Rules; Section 700.5[a] of the Second Department Rules). We trust that respondent will learn from this episode and that, in light of this decision, he will modify his behavior appropriately.

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

Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Peters and Judge Ruderman concur. Mr. Emery and Mr. Felder file concurring opinions.

Mr. Goldman, Mr. Coffey and Mr. Pope dissent only as to the sanction and vote that the appropriate disposition is admonition.

Judge Luciano was not present.

CERTIFICATION

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

Dated: October 20, 2005

Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct

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CONCURRING OPINION
BY MR. EMERY

There can be no doubt that a judge must maintain control of, enforce decorum in, and require respect for his or her court. Among the tools to fulfill this responsibility is summary contempt; however, this power – to deprive a lawyer or litigant of liberty or impose a fine – is the "nuclear option" for judges faced with unruly behavior.

The Judiciary Law and the Rules of the Appellate Division, Second Judicial Department specifically delineate both the criteria and the procedure for imposing this extreme judicial sanction: they require, *inter alia,* that it be exercised "only in exceptional and necessitous circumstances" and that prior to such adjudication, the accused be given an opportunity to desist from the conduct and to make a statement explaining the conduct (22 NYCRR §§701.2[a],[c], 701.4; Jud Law §755).

Too often this Commission confronts abuse of the summary contempt

power (*e.g.*, *Matter of Mills*, 2005 Annual Report 185; *Matter of Recant*, 2002 Annual Report 139; *Matter of Teresi*, 2002 Annual Report 163; *Matter of Sharpe*, 1984 Annual Report 134; the Commission has also cautioned judges for less serious abuses of this kind). Some judges repeatedly ignore both the basis and, even more frequently, the procedures on which any such finding and sanction may be legally premised. It is the essence of the statute, case law and rules that the potential contemnor must be warned and permitted to refrain from the behavior before the contempt sanction is imposed. Given the frequency of our public discipline for this unique abuse of judicial power, it is a mystery to me how any judge in New York could ignore the well-established rules that are fashioned to restrict and even defuse imposition of summary punishment.

At a minimum, every judge ought to know when and how she/he may summarily put a person in jail. The rules are clear and not hard to follow. When they are followed, the rules can alleviate the need for the contempt sanction entirely, or permit the contempt to be purged before jail is imposed. If jail is ultimately required, at least the rules assure that due process is provided for the person deprived of liberty.

Respondent's actions in *Modica v. Modica* demonstrate a substantive and procedural lack of respect for the contempt statute (Jud Law §755), the Second Department rules (22 NYCRR §§701.2[a],[c], 701.4) and the case law (cases cited above). Substantively, respondent had no basis to hold the plaintiff in contempt: the plaintiff did nothing which "disrupt[ted] or threaten[ed] to disrupt the proceedings, or which "tend[ed] seriously to destroy or undermine the dignity and authority of the court" (22 NYCRR §701.2[a]). The behavior respondent found contemptuous was plaintiff's approach to the

judge in the courthouse parking lot to request an adjournment to see his son play soccer. This out-of-court conduct the day before the contempt citation, no matter how threatened the judge may have felt, was simply not a substantive basis for imposition of summary contempt. *See, People v. Jeter*, 116 AD2d 558 (2d Dept. 1986). Moreover, respondent's unjustified anger at plaintiff's counsel for making a record of the parking lot incident plainly was the trigger for respondent to pervert the contempt sanction as a reprisal against plaintiff and his attorney.

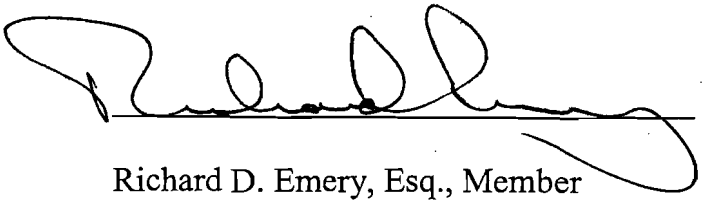
Procedurally, respondent failed to abide by the most basic tenets for imposing summary contempt. He did not give the plaintiff an opportunity to explain his behavior; in fact, respondent punished him for his lawyer's attempt to do so. He gave no opportunity for the plaintiff to desist, which, of course, he could not for conduct that had occurred a day earlier outside of court. Finally, respondent's "warning" prior to the imposition of contempt was, in fact, a threat to improperly intimidate plaintiff's counsel from making a record. Under these circumstances respondent's procedural failures flowed inevitably from his myopic insistence on pursuing a course not legally available to him.

Perhaps even more troubling is respondent's combative approach to this entire incident as well as to the proceedings before this Commission. Respondent's misconduct in *Modica* seems to have been a response to the plaintiff's attorneys' complaints to the administrative judge during that litigation. Similarly, our majority decision today documents that, far from vigorously and appropriately defending himself, respondent has chosen to obfuscate, deny and provide retrofitted, *post hoc*

rationalizations for misconduct he insists he would repeat. Ordinarily, this would be grounds for removal in a case as serious as this one. But because respondent vacated his ill-conceived contempt finding before the plaintiff suffered more than the court's improper opprobrium, I conclude censure is appropriate.

I do fear that, as respondent seems to predict, he will engage in this type of misconduct again. Because I hope my fears are unfounded, I concur.

Dated: October 20, 2005



Richard D. Emery, Esq., Member
New York State
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CONCURRING OPINION
BY MR. FELDER

The Court of Appeals has indicated its approval of the proposition that legal error and misconduct are not mutually exclusive.[1] We deal here with legal error and more. Conduct that is not legal error *or* misconduct can still be especially hurtful and wrong, just as wounding words can inflict pain and embarrassment and yet fail to be actionable as defamation. Such conduct, although beneath the radar screen of actionable misconduct, can nevertheless help in arriving at a determination as to whether or not misconduct has occurred in an otherwise ambiguous scenario. It can be the music that helps define the lyrics. Truth is often as elusive as it is fragile, so that it needs all the help that is available to a searcher. Moreover, respondent's unjustifiably-hostile attitude in this proceeding helps us determine some of the disputed facts.

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[1] *Matter of Feinberg*, 5 NY3d 206, 215 (2005). Approving the observation in the referee's report, the Court stated that legal error and judicial misconduct "are not necessarily mutually exclusive (*see Matter of Reeves*, 63 NY2d 105, 110 [1984])."

The inferences that may fairly be drawn from the facts here are of assistance in examining this troubling record. The events that created the present complaint arose over two partial days of court appearances in the *Modica* case, which commenced on April 21, 2003. Prior to that date, the attorney for the plaintiff, John Modica, had lodged a complaint with respondent's Administrative Judge. On April 21st, Mr. Modica asked respondent for a one-day adjournment of the next day's proceedings for a legitimate, even compelling reason: he was a single parent and his 12-year old son was scheduled to play in a soccer tournament. Respondent denied the request for a modest adjournment and, in testimony during the investigation, candidly linked his refusal to the attorney's prior complaint: "In fact, if they hadn't complaint [sic] to the Administrative Judge, I'd have let [Mr. Modica] see the soccer match. I didn't care. It was a non-jury trial. I got things to -- I had other things to do" (Comm. Ex. 3, p. 81).

After little more than an hour of testimony (although the parties had arrived as directed at 9:30 AM, respondent took the bench around 11:30 AM), respondent cancelled the remainder of the court day. At the proceeding, and in his testimony, respondent gave various reasons for his early departure. He told the attorneys it was because he had "car trouble" (Tr. 38, 103). At the hearing, he testified it was because he had to visit his father (Tr. 223). He then testified that he "may have" told the attorneys the reason was "to fix a tire" (Tr. 234), but if he did, that was accurate because he got his tire fixed *and* saw his father (Tr. 237). At any rate, according to the record

(uncontradicted by respondent), he adjourned the trial around 1:00 PM.

After court adjourned, as respondent, whose car was near the entrance of the judges' parking lot, began to drive out of the lot, Mr. Modica recognized him and approached the car, presumably to discuss the adjournment. At this point, respondent called over the guard, Geralyn Martucci, and told her to arrest Mr. Modica ("Could you arrest this man?" [Tr. 169]). She in turn called her lieutenant, and when the lieutenant arrived, respondent withdrew his demand for Mr. Modica's arrest. Respondent denies telling anyone to arrest Mr. Modica; he maintains that he asked the guard to "secure" Mr. Modica and then told the lieutenant who arrived on the scene, "Don't arrest him. Just scare the blank out of him and let me go on my way" (Tr. 224). If respondent did not initially give the order for Mr. Modica's arrest, there seems to be little reason why he would tell the lieutenant not to "arrest him." Further, at the argument before the Commission, respondent said, "I know Geri [Martucci], I knew Geri's father" (Oral argument, p. 34), which only underscores that Officer Martucci would have little motivation to give testimony that would be unhelpful to respondent.

Towards the end of the Commission hearing, for the first time, respondent said, "[Mr. Modica] tapped me on the back" (Tr. 245). Then he stated, "He could've tapped me. I don't remember if he tapped me," but acknowledged that prior to the date of the hearing he did not think he had ever told anyone about being tapped on the back (Tr. 246-47). Later he said that Mr. Modica "may have tapped me on the shoulder to get my

attention" or "may not have tapped me," and then indicated that Mr. Modica may or may not have asked him for an adjournment in the parking lot (Tr. 255, 256-57).

Into this maze of conflicting facts and uncertain testimony, two troubling elements are added to the mix.

First, at the argument before the Commission, respondent for the first time mentioned[2] spending some hours dealing with the situation in chambers *prior to* court convening on April 22nd, and respondent insisted that he wanted to keep Mr. Modica's attorney from making a "phony record."

Respondent's new assertion that on April 22nd there were as much as two hours of conferences on the subject of contempt *prior to* his taking the bench is, to say the least, surprising. Such conferences were never previously mentioned by respondent, nor is there any indication on the record that they occurred. The unavoidable conclusion is that his description of a lengthy meeting in chambers, from which he deduced that the plaintiff's attorney wanted to make a "phony record," was a sheer invention by respondent to create a predicate event in order to explain the inexplicable: namely, holding the *litigant* in contempt because his *lawyer* had the temerity to insist on placing his client's position on the record.

The second troubling aspect is respondent's attitude and deportment both at the hearing and at the argument before the Commission. Respondent has said he believes

[2] Although accompanied by counsel at the argument before the Commission, respondent chose to argue and plead his own case.

he was unfairly treated by the Commission. While he is entitled to that view, his own words and demeanor, as depicted in this record, are revealing.

Typical of the atmosphere engendered by respondent at the Commission hearing was the following colloquy between Commission counsel and respondent:

> "Q. Is it true today?
>
> A. That – sir, you're asking me a hypothetical – no, sir, you're not that good to ask me a hypothetical."
>
> (Tr. 239)

In the argument before the Commission, Commission counsel at least three times referred to respondent as "a bully." While this would not normally be in my lexicon to be used in describing a jurist -- any jurist -- respondent's own actions, the record of the hearing and even respondent's angry, confrontational deportment before the Commission breathe life into such an appellation:

> "Q. That's because you had nothing to do the next day?
>
> A. Sir, but what does this have to do with contempt?"
>
> (Tr. 241)

After this colloquy at the hearing, respondent was admonished by the Referee. Respondent then testified:

> "A. I an– excuse me– they were inappropriate questions that called for a "Yes" or "No" answer. Ms. Ma got angry because I answered her questions that demanded a "Yes" or "No" answer, "Yes" or "No." Excuse me, and since you want to refer to the record, I would implore the Commission to go

back and check Ms. Ma's reason that I'm down here because she didn't like the fact that I answered "Yes" or "No" questions, "Yes" or "No.""

(Tr. 248)

In this maelstrom of respondent's contradictions and confrontational behavior, there are detours leading to absolute illogic.

At the hearing, respondent was asked:

"Q. Were they trying to set up an appeal based upon what their activities were, in your opinion?"

He responded:

"A. I have no idea, but based on Mr. Goldweber's reputation, I could only believe he had something in his mind."

(Tr. 220-21)

For a judge to believe an attorney had something in his mind based on what he believed to be his reputation is beyond comment.

At the Commission argument, respondent also offered the novel, if not illogical, assertion that he never held Mr. Modica in contempt at all since after holding Mr. Modica in contempt, he vacated the contempt:

"MR. GOLDMAN: So, you think because you vacated essentially it was proper. Had you held him in contempt and not vacated, would you have acted improperly, procedurally?

THE RESPONDENT: ..But, again, as a matter of law because I vacated, I didn't hold him in contempt. That's the problem. I mean, I'm charged with holding somebody in contempt when I vacated the contempt."

(Oral argument, pp. 45-46)

Instead of punishing the *litigant* for something the *lawyer* said, an attempt could have been made to give the litigant a chance to address respondent's pervasive theme: "Is he sorry for what happened the prior day in the parking lot?" Respondent has indicated that if Mr. Modica had merely said he was "sorry" for what occurred, he would not have held him in contempt, yet when asked to explain why he never said that to the litigant, his response was merely that it would have been wrong to speak to a litigant who was represented by counsel:

> "MS. DIPIRRO: Why didn't you go right to the defendant, Mr. Modica, and say –
>
> JUDGE KLONICK: – Right.
>
> MS. DIPIRRO: – just tell me you're sorry? It could have been over.
>
> THE RESPONDENT: You know, I had a discussion like that with one of my colleagues. He was represented by counsel. Last time I checked, once he was represented by counsel – was supposed to go through the counsel.
>
> MS. DIPIRRO: Well, it could have made it so much easier if you just said, "Are you sorry?"
>
> THE RESPONDENT: But, ma'am, he was represented by counsel."
>
> (Oral argument, p. 56)

However, it was pointed out to him that his reasoning was inconsistent:

> "MR. FELDER: But didn't you also say to him that you're going to have 30 days at the expense of the city of New York?

THE RESPONDENT: Yes, if he did anything else."

(Oral argument, p. 56)

It is clear that respondent never told the litigant on the record, directly or through his attorney, that a simple apology would have sufficed to avoid a holding of contempt.

Of particular significance is the fact that when respondent was specifically asked:

"MR. FELDER: And if the same events happen again today, you would do the same thing today?"

his response was:

"THE RESPONDENT: Absolutely."

(Oral argument, p. 49)

At the center of what occurred was that respondent initially punished a litigant by denying him a reasonable adjournment simply because the litigant's attorney had made a complaint about respondent. While a request for an adjournment is within a judge's discretion, here the denial was retaliatory and all the more unreasonable in the face of respondent's own decision to cut short the day for personal reasons. Then, respondent reacted to a trivial incident *outside* the courtroom, in the parking lot, by blowing the incident all out of proportion the next day. He held the *litigant* in contempt because his *lawyer* merely tried to do what it was his obligation as a lawyer to do: make a record and present his client's position. Any disruption in the courtroom caused by the

prior day's incident in the parking lot was because of respondent's own actions.

Section 755 of the Judiciary Law provides as to contempt that "Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily." The Second Department Rule Section 701.2 reads as follows:

> (a) The power of the court to punish summarily any contempt committed in its immediate view and presence shall be exercised only in exceptional and necessitous circumstances, as follows: (1) where the offending conduct disrupts or threatens to disrupt proceedings actually in progress; or (2) where the offending conduct destroys or undermines or tends seriously to destroy or undermine the dignity and authority of the court in a manner and to the extent that it appears unlikely that the court will be able to continue to conduct its normal business in an appropriate way, provided that in either case the court reasonably believes that a prompt summary adjudication of contempt may aid in maintaining or restoring and maintaining proper order and decorum.
>
> (b) Wherever practical, punishment should be determined and imposed at the time of the adjudication of contempt. However, where the court deems it advisable the determination and imposition of punishment may be deferred following a prompt summary adjudication of contempt which satisfies the necessity for immediate judicial corrective or disciplinary action.
>
> (c) Before any summary adjudication of contempt the accused shall be given a reasonable opportunity to make a statement in his defense or in extenuation of his conduct." (Emphasis added.)

Respondent's misconduct cascaded. Initially, in retaliation for making a

complaint to his superiors, respondent penalized the litigant. He then punished the litigant because his attorney sought to make a record and, indeed, he tried to dictate what the attorney should place on the record. Worse yet, the finding of contempt was itself patently without merit. Compounding this misconduct are respondent's conflicting testimony and his complete lack of contrition, or even recognition of his misconduct, which are aggravating factors in considering an appropriate sanction. *See, Matter of Bauer*, 3 NY3d 158, 165 (2004); *Matter of Shilling*, 51 NY2d 397, 404 (1980).

For these reasons, I concur that censure is the appropriate remedy.

It should not go unnoticed that the referee, Judge Monteleone, performed his services admirably in a proceeding that was obviously – and unnecessarily – confrontational and nasty due to respondent's pronounced hostility.

Dated: October 20, 2005

Raoul Lionel Felder, Esq., Member
New York State
Commission on Judicial Conduct