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

ALAN L. HONOROF,

a Judge of the Court of Claims and an
Acting Justice of the Supreme Court,
Nassau 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 (Jean Joyce, Of Counsel) for the Commission

William S. Petrillo for the Respondent

The respondent, Alan L. Honorof, a Judge of the Court of Claims and an Acting Justice of the Supreme Court, Nassau County, was served with a Formal Written

Complaint dated December 6, 2006, containing one charge.

On March 6, 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 that respondent be admonished, and waiving further submissions and oral argument.

On March 8, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Court of Claims since 1996. He was designated an Acting Justice of the Supreme Court in 1996 and has since served in that position continuously. Respondent is an attorney.

2. On January 10, 2006, respondent appeared at the Commission's New York City office and gave sworn testimony before a referee concerning the matters herein.

3. In 1996, prior to being appointed to the Court of Claims, respondent was a practicing attorney and represented Peter Beck and Dominic Sergi, defendants in a corporate dissolution proceeding involving their corporation, ASF Glass ("ASF").

4. In 1998, Mr. Beck and Mr. Sergi commenced an action against respondent, the basis of which was that respondent advised Mr. Beck and Mr. Sergi to purchase shares from a shareholder in ASF under the Business Corporation Law without advising them that the election to purchase the shares was irrevocable, or of their

potential personal liability if they elected to purchase the shares in their personal capacities.

5. In or about April 2000, the parties reached an agreement and respondent signed a stipulation of settlement (hereinafter "settlement") and confession of judgment, agreeing to pay a total of $55,000. Specifically, respondent agreed to pay a lump sum of $25,000 followed by 60 monthly installments of $500.

6. The settlement further provided that the confession of judgment was to be held in escrow by counsel for Mr. Beck and Mr. Sergi pending full and satisfactory performance by respondent and thereafter was to be returned to respondent, provided that, should respondent default, Mr. Beck and Mr. Sergi would be entitled to cause the confession of judgment to be released from escrow and entered in the County Clerk's Office and to pursue all legal remedies to enforce and collect the judgment.

7. The settlement further provided that the parties acknowledged that they had been advised by competent legal counsel in connection with the execution of the settlement, and that they entered into the settlement freely, voluntarily and without coercion.

8. The settlement further provided that any modifications to the settlement were to be in writing, signed by the party to be charged, and that any oral representation or modification would have no force and effect.

9. In accord with the terms of the settlement, respondent paid $25,000

on the debt and commenced paying monthly installments.

10. In or about May 2001, respondent sought to negotiate a discounted buyout of the settlement, using his and ASF's mutual accountant, Fred Moss, as mediator. Thereafter, respondent learned that Mr. Beck had become the sole assignee of respondent's obligation under the settlement.

11. In November 2001, respondent made a $3,500 payment in satisfaction of seven months of monthly payments owed under the settlement. Respondent directed former ASF counsel to hold said sum in escrow to be disbursed by the sole holder of the note, Mr. Beck. Thereafter, respondent ceased making the payments required by the settlement.

12. In March 2003, Lawrence Kenney, Esq., as attorney for Mr. Beck, informed respondent by demand letter that:

> [t]he last payment which you made pursuant to the terms of the Agreement was $3,500 on November 20, 2001. . . . No payments have been received since that date. The current unpaid balance of the debt is $21,000. You are seriously in arrears.
>
> In order to avoid our taking action on your default, please forward a check to the undersigned immediately for $8,000 drawn to the order of Peter Beck. This wo[u]ld cover the payments due from December 9, 2001 to March 9, 2003. All future payments must be kept current and forwarded to the undersigned.

13. In July 2003, Mr. Kenney informed counsel for respondent, Bee, Eiseman & Ready, by letter that, "your client, Alan L. Honorof, and Alan L. Honorof, P.C., are in default under the Settlement Agreement."

14. Shortly thereafter, respondent telephoned Mr. Kenney and stated that Bee, Eiseman & Ready no longer represented him and that Andrew P. Cooper, Esq., was his new attorney. Respondent offered to make a $500 installment payment. Mr. Kenney told respondent to defer this particular $500 installment until Mr. Kenney had an opportunity to speak about the matter with Mr. Cooper.

15. By letter dated January 21, 2004, Mr. Cooper memorialized a telephone conversation with Mr. Kenney in which it was offered that respondent would pay $2,500 immediately and then make $500 monthly payments until the balance was paid.

16. By letter dated February 6, 2004, Mr. Kenney proposed a tentative arrangement whereby respondent would pay $2,500 immediately, then make $500 monthly payments until the end of the original term of the settlement, of May 31, 2005, and then make one lump sum payment of $10,500.

17. As noted by Mr. Kenney's letter to respondent dated April 19, 2004, respondent never executed the arrangement. Negotiations broke down over the addition of the lump-sum payment and ceased after April 2004.

18. In or about July 2004, Mr. Beck filed a summons and complaint demanding judgment in accord with the terms of the settlement.

19. In or about September 2004, acting on advice of counsel, respondent verified an answer denying the allegations and stating that the settlement and confession of judgment arising from the suit were procured by "fraud and duress."

20. Respondent testified that the basis for his "fraud" defense was a statement by Mr. Sergi, made some time after the summer of 2003, that he and Mr. Beck had filed their original action against respondent because "the manner in which [respondent] answered the original complaint [in the corporate dissolution proceeding] rendered us liable to personal judgments in the funding of the agreement with the departing shareholder . . . and if [respondent] had answered in a different way, and protected us from individual liability, it was our intention to close the corporation, bankrupt it and leave [the shareholder] out in the cold, so we didn't have to pay him anymore."

21. Respondent testified that, based on Mr. Sergi's statement, he:

> ...realized that [Mr. Beck and Mr. Sergi] didn't have an intention of following through on their own obligations, and that they were using me to defeat somebody else's lawful position and that's not a position that I would have allowed. This new knowledge, which I didn't have when I signed the original stipulation, now left me with a very sour taste in my mouth and I no longer felt obliged. That's what I meant when we used the term "fraud." I didn't think the agreement was fair to me, based on that.

22. Respondent testified that with respect to his defense of "duress," "the only coercion was defrauding me while I was representing that company into believing that what I was doing was legally above board, that whatever action on behalf of that client was a legal, valid position to take in an effort to settle that case." Respondent acknowledged that no one "forced" him to do anything.

23. Respondent acknowledges that, though he believed, based in part

on conversations with his attorney and Mr. Beck, that there was a period during which payments were suspended, he was incorrect in that belief.

24. Respondent acknowledges that his asserted defenses of fraud and duress were invalid and that, as a judge and officer of the court, he was especially obliged not to verify such assertions, despite the advice of counsel, unless he was reasonably certain, after due diligence, that such assertions were accurate.

25. Respondent acknowledges that he owes the remaining debt under the settlement and has made the following arrangements with respect to repayment: Respondent will pay $22,000 by May 15, 2007 in full satisfaction of the debt owed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.2(A) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

By failing to abide by a confession of judgment and by asserting invalid claims in a verified pleading, respondent engaged in conduct that tends to undermine public confidence in the judiciary as a whole.

The record establishes that respondent failed to make payments he owed

under a confession of judgment[1] and settlement of a claim related to his former law practice. The settlement required respondent to make monthly payments of $500, which would have paid off the debt by May 2005. Respondent stopped making payments while attempting, unsuccessfully, to renegotiate the payment terms, and he made no payments after November 2001. As a result of his non-payment, the creditor was forced to commence litigation to collect the $21,000 respondent still owed. In connection with the litigation, respondent verified an answer containing defenses that he now acknowledges were invalid.

A judge, who is sworn to uphold the law and seek the truth, has a duty to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (Rules, §100.2). As the Court of Appeals has stated:

> Judges personify the justice system upon which the public relies to resolve all manner of controversy, civil and criminal. A society that empowers judges to decide the fate of human beings and the disposition of property has the right to insist upon the highest level of judicial honesty and integrity. A judge's conduct that departs from this high standard erodes the public confidence in our justice system so vital to its effective functioning.

Matter of Mazzei, 81 NY2d 568, 571-72 (1993). As a judge and officer of the court, respondent was especially obliged to be candid in the litigation process and not to verify assertions in a pleading unless he was reasonably certain, after due diligence, that such

[1] A confession of judgment can be filed within three years with the county clerk, who is authorized to enter a judgment for the amount confessed (CPLR §3218).

assertions were accurate.

Judges are held to stricter standards than "'the morals of the market place'" and are required to observe "[s]tandards of conduct on a plane much higher than for those of society as whole...so that the integrity and independence of the judiciary will be preserved." *Matter of Spector,* 47 NY2d 462, 468 (1979), *quoting Meinhard v Salmon*, 249 NY 458, 464; *Matter of Kuehnel*, 49 NY2d 465, 469 (1980). *See also, Matter of Esposito*, 2004 Annual Report 100 (Comm. on Judicial Conduct) (judge filed an answer in litigation that was "deceptive" in significant respects). Respondent has acknowledged that his conduct violated the high ethical standards required of judges, both on and off the bench.

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

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

Mr. Emery dissents and votes to reject the Agreed Statement of Facts and to dismiss the charge.

Ms. DiPirro was not present

CERTIFICATION

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

Dated: April 18, 2007

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

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DISSENTING OPINION
BY MR. EMERY

- -

INTRODUCTION

I respectfully dissent and vote to dismiss the charges and reject the stipulation as to misconduct and discipline. The Agreed Statement of Facts does not state a case that constitutes misconduct. There are no facts that demonstrate that Judge Honorof used the prestige of judicial office to avoid his financial obligations or that his dilatory behavior in repaying a personal debt compromised the integrity of the judiciary.

Most importantly, I wholeheartedly agree that it would be misconduct for a judge to pose a frivolous defense to avoid paying a debt; however, the record before us does not support a finding that respondent, at the time he raised the defenses, knew that his defenses were "invalid" or frivolous. As presented, the Agreed Statement simply states that he failed to make payments pursuant to a settlement and confession of judgment and that he asserted "invalid" defenses in connection with the ensuing

litigation. Respondent's intent and knowledge at the time he asserted his defenses are critical, and as to this important issue the record is incomplete. The judge's explanation of his legal position at the time supports the view that he only recognized retrospectively that his defenses were invalid. As discussed below, for this reason, he deserves the benefit of the doubt.

DISCUSSION

Respondent allegedly tried to avoid paying a debt arising out of a settlement, negotiated while he was an attorney in private practice, that required him to pay installments after he became a judge. He has stipulated in the record before us that he signed a confession of judgment in connection with this settlement and that, in defense of a lawsuit filed by his creditors years after the settlement, he asserted claims that were "invalid." To explain the "invalid" claims, the judge asserts, according to the Agreed Statement, that information he learned after the settlement caused him to believe that his former clients -- his creditors -- had attempted to use his representation for fraudulent purposes. Thus, in the judge's mind, the ensuing lawsuit against him to enforce the settlement had a potential vulnerability to a charge of wrongdoing by the plaintiffs that had not come to light at the time of the original settlement. On the basis of this record, as more fully set forth in the Agreed Statement, the judge has accepted the sanction of admonition for purportedly engaging in "conduct that tends to undermine public confidence in the judiciary."

I dissent notwithstanding the judge's acquiescence to the charges. It is unprecedented for this Commission to find misconduct, and to act as debt collector for private litigants against a judge, when the judge's alleged misbehavior is limited to failing to pay a private debt and defending a collection lawsuit. All prior cases in which judges in debt have been found to have engaged in misconduct have significant aggravating and independent bases for discipline. *See, Matter of Mason*, 100 NY2d 56 (2003) (after giving his rent-stabilized apartment to his relative and depositing the rent he collected into his attorney escrow account, judge used funds from the account for personal purposes, did not remit the rent payments to the landlord, and failed to cooperate in the investigation); *Matter of George*, 2003 Annual Report 115 (Comm. on Judicial Conduct) (after converting a client's funds, judge was held in contempt for failing to pay a judgment, disregarded an information subpoena, repaid the funds only after being warned he could be incarcerated, and testified falsely about the matter). In *George*, the Commission dismissed outright a charge that the judge had 20 judgments entered against him for unpaid debts, seven of which were unsatisfied at the time of the hearing. As stated by the referee in that case: "[T]he failure to pay debts is essentially private conduct,...[and it is an] undeniable fact that people of the highest moral and ethical standards in the course of their lives may encounter financial difficulty, even to the point of having judgments entered against them" (Report of A. Vincent Buzard, pp. 5-6).

Here, of course, no judgment has been entered. Although respondent's creditors could have collected the debt simply by filing the confession of judgment in a

timely manner and executing on it,[1] it appears that they chose not to do so, but rather to commence the litigation that is pending and file a complaint with the Commission. Certainly, a finding of judicial misconduct should not hinge on the strategic choice of a judge's creditor.

The closer question in this case is whether it is aggravating conduct and, therefore, misconduct for respondent to defend a personal lawsuit with verified defenses that he now admits are "invalid." If it were clear that the judge, as a litigant, knew *at the time* he filed them that the defenses were invalid, I would agree that even though he was not in any way using his judicial office in defending the private litigation, such conduct, which would be sanctionable for an attorney, would warrant a finding of judicial impropriety because it would in fact "tend to undermine public confidence in the judiciary."

In this case, however, I have to give the benefit of the doubt to the judge. According to the Agreed Statement, after the settlement, he claims he learned that his former clients had attempted to use his representation fraudulently. While it is legally questionable whether the new information supports defenses of fraud and duress, because he claims that the newly discovered information caused him and his attorney to assert the defenses, it cannot be determined from the record as circumscribed by the Agreed Statement whether the judge was acting in bad faith at the time he asserted these defenses. This point is reinforced by the failure of the Agreed Statement to resolve the

[1] Under CPLR §3218, a confession of judgment can be filed within three years with the county clerk, who is authorized to enter a judgment for the amount confessed.

critical open question of when the judge knew his defenses were "invalid." Although the charges assert that he "falsely alleged" those defenses, all we know now on this record is that the defenses proffered were subsequently conceded to be "invalid." As a basis for a finding of misconduct, the stipulated language is inconclusive and oblique. In any event, claims made in good faith in the course of personal litigation that are subsequently conceded to be "invalid" cannot support a finding of misconduct.

Once again, the Commission has been asked to determine an appropriate sanction based on an incomplete record. *See, Matter of Clark*, 2007 Annual Report ___ (Emery Dissent); *Matter of Carter*, 2007 Annual Report ___ (Emery Concurrence). When an agreed statement is viewed as an appropriate vehicle to discipline a judge, it should answer all relevant questions so that we can determine whether there has been misconduct and what sanction if any should be rendered. One of the great virtues of hearings is that the judge's intent and knowledge, both at the time of the alleged incidents and when the judge is facing discipline, are fully explored. Here, as in *Clark* and *Carter*, the stipulated facts leave gaps that make it difficult to render an appropriate sanction. While the parties to the agreement may be satisfied, the Commission members inherit the product of negotiation instead of a referee's findings and a fully developed record, including the testimony of the judge and others. In imposing disciplinary sanctions on judges, we ought not to be uncertain of the judge's intent, knowledge and good faith at the time the judge engaged in the prohibited conduct.

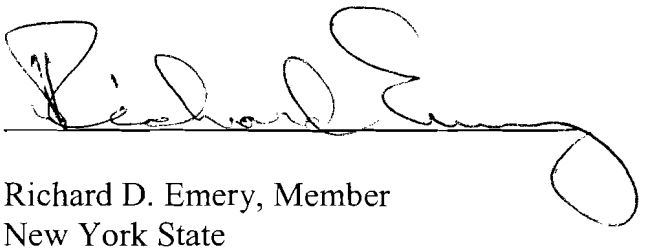
The judge's acquiescence to the misconduct charges and public discipline does not, in my view, override the serious problems presented by the agreed-upon result.

In light of the obvious overwhelming financial pressure on the judge, not only to pay off the debt, but to pay counsel to defend the Commission charges and the pending litigation, it is hard to conceive of a judge – unless the judge has independent wealth and need not rely on the plainly inadequate judicial salary the State provides[2] – resisting any sanction short of removal under these circumstances.

But my primary concern is an institutional one -- that the Commission is being manipulated. It would seem that the judge's creditors are using the Commission as a parallel track to litigation in order to exert pressure on a judge who appears to be in financial distress. We are apparently playing along with this stratagem, including extracting a promise from the judge that he will be subject to further discipline if he fails to pay by May 15 (Agreed Statement, par. 26). This unseemly pressure applied by us, even with the best of intent, is outside the proper function of this Commission. In my view, this flawed result not only creates an unsound precedent that may be used to charge misconduct whenever a judge fails to pay a debt, or even is merely dilatory in debt repayment, but also ensnares the Commission in the muck and mire of the debt-collection process. Because I believe that we should recognize that the appropriate limits of our jurisdiction do not include disciplining a judge who is defending, even if aggressively, against private debt collection in a civil matter, I am constrained to dissent.

[2] It is ironic that this case should come before the Commission at a time when judges have been denied raises, not to mention cost of living increases, for eight years, resulting in salaries that do not even remotely reflect their contributions and that fail to provide adequate economic security befitting their status and accomplishment in the legal profession.

Dated: April 18, 2007



Richard D. Emery, Member
New York State
Commission on Judicial Conduct