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:

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 (Alan W. Friedberg and Jean Joyce, Of Counsel)
for the Commission

Herzfeld & Rubin, P.C. (by Lawton W. Squires) for the Respondent

The respondent, Duane A. Hart, a Justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated December 1, 2006,

containing six charges. The Formal Written Complaint alleged that respondent, *inter alia*: (i) improperly threatened an attorney with contempt; (ii) presided over a case in which he had a relationship with an attorney; (iii) offered to testify on an attorney's behalf in a disciplinary matter if the attorney would testify on his behalf; (iv) denied an attorney's request to make a record; (v) stayed an eviction without legal basis and granted a lengthy adjournment to punish the bank; and (vi) refused to walk through a courthouse magnetometer. Respondent filed an Answer dated December 19, 2006, which was verified on January 8, 2007.

By Order dated December 27, 2006, the Commission designated Honorable Felice K. Shea as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 17, 18, 22, 23, 24 and 25, 2007, in New York City. The referee filed a report dated October 16, 2007.

The parties submitted briefs with respect to the referee's report. On December 6, 2007, 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 2002. Prior to that, he served for two years as a Judge of the Civil Court of the City of New York.

As to Charge I of the Formal Written Complaint:

2. *Rini v. Blanck*, a medical malpractice case, first came before

respondent in March 2002. The plaintiff was represented by Michael Flomenhaft, Esq.; the defendants were represented by Peter Bower, Esq. A trial before respondent ended in a mistrial on March 21, 2002. After numerous delays and adjournments, respondent scheduled a new trial to commence March 5, 2003.

3. On March 5, 2003, Barry Myrvold, Esq., an associate in Mr. Flomenhaft's firm, appeared before respondent and requested an adjournment because Mr. Flomenhaft was on trial in Suffolk County. Mr. Myrvold told respondent that he was not prepared to try the case and that there were no other attorneys at the firm capable of trying the case at that time. Mr. Myrvold told respondent that he had worked at the firm for only two or three weeks, that he had tried 10 to 15 cases but had never tried a medical malpractice case, and that he was not competent to try the case.

4. Respondent directed Mr. Myrvold to proceed and begin jury selection, and stated that if he did not do so, respondent would hold him in contempt and "fine and/or jail" him. Respondent stated to Mr. Myrvold:

> "You are picking a jury... Have a seat, you can participate or you can not participate. You are picking a jury... Have a seat. Officer Battle, help this gentleman take a seat... Sir, you don't have a choice... Counsel, I am directing you to participate in the jury selection or else I will hold you in contempt and I will fine and/or jail you personally."

5. Respondent was angry and insistent. He ordered a court officer to stand behind Mr. Myrvold so he could not leave the courtroom. Respondent told Mr. Myrvold that if he did not promise as an officer of the court to return after lunch, Mr. Myrvold would "spend lunchtime downstairs in jail." Jury selection began.

6. After lunch the matter was adjourned to the following day. The next day, Mr. Myrvold continued to protest that he was not competent to try the case and said he would not participate. Respondent dismissed the case, with prejudice, and ordered a sanctions hearing. He directed that no motion to vacate the dismissal would be heard until the sanctions hearing was held.

7. The sanctions hearing was repeatedly postponed and was never held. A new trial in the *Rini* case commenced in September 2005.

As to Charge II of the Formal Written Complaint:

8. Beginning in 2004, respondent presided over *Wilkens v. Dillon et al.*, a real estate fraud case involving use of a "straw buyer" to defeat a mortgage foreclosure. While the case was pending, Argent Mortgage Company brought a foreclosure action against the property in question, and plaintiff Wilkens' attorney, Nishani Naidoo, Esq., moved by Order to Show Cause to consolidate the *Wilkens* case with the foreclosure matter.

9. The Order to Show Cause, which contained a stay against Argent, was signed by respondent and was returnable May 4, 2005. Argent was represented by Helmut Borchert, Esq.

10. At the May 4th appearance, which was not on the record, a motion by defendant Dillon to vacate a default was also on the calendar, and Ms. Naidoo submitted opposition papers on behalf of the plaintiff. Upon seeing Mr. Borchert in the audience, respondent said, "Oh, Mr. Borchert, you are in this case too?" Respondent then stated, in

open court, that Mr. Borchert had represented respondent's sister and that he would not recuse himself. No motion was made for his recusal.

11. Helmut Borchert had represented respondent's sister in 2002-03, and respondent paid Mr. Borchert's legal fees of $5,000. Mr. Borchert gave respondent baseball tickets, and they attended some games together in 2003 and 2004. Respondent did not disclose these facts to the attorneys in *Wilkens* and did not place these facts on the record.

12. Prior to the *Wilkens* case, respondent had recused himself in every case in which Mr. Borchert had appeared.

13. Respondent did not ask the attorneys in *Wilkens* whether they consented or objected to his presiding over the case.

14. Mr. Borchert made three appearances in the *Wilkens* case, including the one on May 4, 2005. On June 8, 2005, the matter was settled. The Stipulation of Settlement bore the captions of both actions.

As to Charge III of the Formal Written Complaint:

15. On August 11, 2005, respondent learned that the Commission was investigating his conduct with respect to *Wilkens v. Dillon et al.* He telephoned Ms. Naidoo, the plaintiff's attorney in the *Wilkens* case, and asked whether she was aware that her client had filed a complaint against him with the Commission. Respondent told Ms. Naidoo that he might need her to testify on his behalf before the Commission.

16. Ms. Naidoo told respondent that she was receiving calls "all the

time" from the Grievance Committee and the State Banking Commission because they were investigating the *Wilkens* matter. Respondent told Ms. Naidoo, "If you testify on my behalf, I will testify on your behalf if you get called before the Grievance Committee."

17. Ms. Naidoo did not agree to testify for respondent. There is no evidence in the record that any complaint was pending against Ms. Naidoo with the Grievance Committee.

18. There had been a Stipulation of Settlement in the *Wilkens* case in June 2005, two months before respondent made the call to Ms. Naidoo. In September 2005, a month after respondent asked Ms. Naidoo to testify on his behalf, Ms. Naidoo appeared before respondent in connection with the *Wilkens* case to attempt to collect monies owed by the defendant pursuant to the settlement.

As to Charge IV of the Formal Written Complaint:

19. On September 14, 2005, Ms. Naidoo appeared before respondent in connection with *Wilkens v. Dillon et al.* to attempt to collect for the plaintiff monies owed by defendant Dillon pursuant to the settlement that had been reached. In addition, she was hoping to secure leniency for her client with regard to interest and bank charges.

20. Ms. Naidoo was not able to make her arguments. Respondent appeared only interested in the fact that Ms. Naidoo's client had not applied for a mortgage. When Ms. Naidoo asked to go on the record so that her requests for relief would be preserved, respondent refused to permit her to do so.

As to Charge V of the Formal Written Complaint:

21. On June 17, 2004, City Marshal George Essock went to the residence of Emilio Celestin to execute a "legal possession" following foreclosure by Chase Manhattan Bank. Mr. Celestin's daughter came to the door when the marshal arrived and then telephoned her father, who arrived shortly thereafter.

22. Mr. Celestin told the marshal that he had filed a bankruptcy petition. The marshal showed Mr. Celestin a copy of an order by Bankruptcy Judge Cornelius Blackshear dated May 20, 2004, which directed that there was to be no automatic stay of eviction proceedings upon further bankruptcy filings. Mr. Celestin called his attorney, and the marshal read Judge Blackshear's order to the attorney. Soon thereafter Mr. Celestin and his daughter left the premises.

23. Later that day, respondent signed an Order to Show Cause, supported by an affidavit from Mr. Celestin alleging that the eviction was illegal because a bankruptcy petition filed by him created an automatic stay. The Order to Show Cause, which ordered that "pending a hearing on this motion, the marshal shall reinstate the defendants to the demise[d] premises without the defendants paying any fees," was returnable on July 14, 2004.

24. The allegation that respondent stayed an eviction proceeding without legal basis is not sustained and therefore is dismissed.

25. On the July 14, 2004 return date, Gregory Peirez, Esq. appeared on behalf of Chase Manhattan Bank with papers in opposition to the *Celestin* motion.

Respondent told Mr. Peirez that he had a big problem with the case because "You evicted a sick twelve year old girl." Mr. Peirez argued that he had an affidavit from the marshal stating that the eviction had been conducted appropriately. Mr. Peirez asked respondent the basis of his knowledge concerning "a sick twelve year old," and respondent replied, "I know the daughter." Respondent later testified before the Commission that he knew the Celestins only from their prior court appearances before him and that he understood that Mr. Celestin's daughter was asthmatic and had been put out without her medication.

26. Mr. Peirez tried to explain that according to the marshal no one had been sick at the time of the eviction.

27. Respondent adjourned the case to October 6, 2004. The relatively long adjournment of the case, from July 14 to October 6, 2004, was ordered by respondent to punish the bank. When asked during his investigative testimony, "Was the long date intended to punish the bank?", respondent stated under oath, "Yes, because they put this child out in the street ... I gave them a long day [sic] because I knew Mr. Celestin was going to lose eventually, but I was so – I was angry that they threw this child out in the street."

As to Charge VI of the Formal Written Complaint:

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

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)(2), 100.3(B)(3), 100.3(B)(6), 100.3(B)(7), 100.3(E)(1) and 100.3(F) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through V of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge VI is not sustained and therefore is dismissed.

In a series of incidents over a period of two and a half years, respondent engaged in conduct demonstrating insensitivity to the high ethical standards required of judges.

Every judge is required to be an exemplar of dignity and patience in presiding over disputes (Rules, §100.3[B][3]). At all times, a judge must not only be, but appear to be, a neutral, unbiased arbiter (Rules, §100.2[A]). Respondent violated these standards by his punitive, intemperate behavior in the *Rini* and *Celestin* cases.

In *Rini*, respondent's bullying tactics were directed towards an attorney who had been sent by his firm to request an adjournment. Notwithstanding that Mr. Myrvold advised respondent that he was unprepared to try the case, respondent threatened the attorney with contempt or jail if he did not proceed in the matter. Respondent underscored his threats by directing his court officer to stand near Mr. Myrvold to prevent him from leaving. We agree with the referee that however dilatory Mr. Myrvold's employer may have been, this does not excuse respondent's abusive treatment of an

attorney who had done nothing improper. Respondent had adequate means available to deal with the reluctance of counsel to proceed with the scheduled trial, including the imposition of sanctions (*see* 22 NYCRR §§125.1, 130-2.1). The threat of contempt or jail against Mr. Myrvold was excessive and inappropriate, notwithstanding that respondent did not act on his threat. *See*, *Matter of Waltemade*, 37 NY2d (nn), (iii) (Ct on the Judiciary 1975) (judge engaged in misconduct by angrily and inappropriately threatening lawyers and witnesses with "sanctions" and contempt, even though his threats were never followed by a contempt citation or any other disciplinary action).

Respondent also acted improperly in the *Celestin* case when he granted an adjournment of nearly three months in an eviction proceeding for a punitive, retaliatory purpose. Although the evidence was uncontroverted that the eviction had been carried out in a lawful and appropriate manner, respondent granted a purposefully lengthy adjournment because, as he himself testified, he was angry at the bank for supposedly having "put [a] child out in the street" (Ex. 29 at p. 127). Respondent's actions "created the impression that he was using his judicial office to retaliate" and thereby conveyed an appearance of impropriety. *See*, *Matter of Schiff*, 83 NY2d 689, 694 (1994). He compounded this impression by advising counsel that he had personal knowledge that the defendant's child was ill.

It was also improper for respondent to preside over a matter in which he had a relationship with an attorney, Helmut Borchert, without fully disclosing the relationship and giving the parties a meaningful opportunity to seek his recusal. As respondent has

acknowledged, Mr. Borchert had recently represented respondent's sister; respondent had paid his fee; and respondent had been Mr. Borchert's guest at baseball games and received tickets from him. Because of this relationship, respondent had disqualified himself on every other occasion when Mr. Borchert appeared before him. Under those circumstances, respondent's impartiality in the *Wilkens* case "might reasonably be questioned," and thus he could preside in the case only after making full disclosure on the record and with the parties' consent (Rules §§100.3[E][1], 100.3[F]). Respondent's disclosure was plainly inadequate: he stated in an off-hand manner, off the record, that Mr. Borchert had represented his sister, while making it clear to the attorneys that he would not disqualify himself. We are unpersuaded by respondent's argument that his recusal was unnecessary because Mr. Borchert's role in the case was a minor and ministerial one. The record is clear that Mr. Borchert appeared before respondent three times in connection with the matter, and he appeared as an attorney on the Stipulation of Settlement. The circumstances warranted, at the very least, making full disclosure and providing an opportunity for the attorneys either to consent to his participation or to seek his recusal. *See*, *Matter of Merkel*, 1989 Annual Report 111 (Comm on Judicial Conduct); *Matter of Valcich*, 2008 Annual Report ___ (Comm on Judicial Conduct).

Respondent has acknowledged that two months after the settlement in the *Wilkens* case, he contacted the plaintiff's attorney, Nashani Naidoo, and asked her to testify on his behalf in connection with the Commission's investigation of a complaint concerning his actions in the case. The record also establishes that, in the same

conversation, he offered to testify on Ms. Naidoo's behalf in a Grievance Committee proceeding if she would testify for him. It is particularly troubling that respondent personally reached out to Ms. Naidoo at a time when she was still appearing before him in connection with the *Wilkens* case. Although a Stipulation of Settlement had been executed in the case a few months earlier, the record shows that Ms. Naidoo appeared before respondent a month after this incident to attempt to collect monies owed by the defendant pursuant to the settlement. Under these circumstances, respondent's call to Ms. Naidoo, and the message he conveyed, were especially improper. We note, however, with respect to his offer to testify on Ms. Naidoo's behalf, that there is no indication in the record of any pending complaint against the attorney; nor is there any claim that respondent asked the attorney to give untruthful testimony on his behalf.

The record also establishes that, without good cause, respondent denied Ms. Naidoo's legitimate request to make a record of her arguments on behalf on her client. Since that episode occurred a short time after his telephone call to Ms. Naidoo, he conveyed the appearance that he was treating her summarily because she had not accepted his request that she testify on his behalf.

The improprieties depicted in this record represent a significant departure from the proper role of a judge, and thus we conclude, based on the totality of the record, that respondent's conduct warrants censure. In considering the sanction, we note that although respondent was previously censured for improperly holding a litigant in summary contempt (*Matter of Hart*, 7 NY3d 1 [2006]), all of the misconduct in this case

predates the Commission's determination in the earlier matter. Thus, there is no indication that respondent has disregarded a previous disciplinary warning. We trust that respondent now recognizes the necessity for scrupulously observing the relevant judicial standards in the future.

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

The members of the Commission concur with the above findings and conclusions, except as follows:

As to Charge I, Mr. Coffey, Mr. Emery and Mr. Jacob dissent and vote to dismiss the charge. Judge Klonick, Judge Konviser and Judge Ruderman dissent only as to the dismissal of the allegation that respondent threatened to dismiss and then dismissed the *Rini* case in retaliation for a mistrial motion, and vote to sustain the allegation.

As to Charge II, Mr. Emery and Mr. Jacob dissent and vote to dismiss the charge.

As to Charge IV, Mr. Coffey, Mr. Emery, Mr. Harding and Mr. Jacob dissent and vote to dismiss the charge.

As to Charge V, Judge Klonick, Ms. DiPirro and Mr. Jacob dissent and vote to dismiss the charge. Mr. Coffey, Judge Konviser and Judge Ruderman dissent only as to the dismissal of the allegation that respondent stayed an eviction proceeding without legal basis, and vote to sustain the allegation.

As to Charge VI, Judge Klonick, Mr. Coffey, Judge Konviser and Judge Ruderman dissent and vote to sustain the charge.

As to the sanction, Judge Klonick, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Coffey dissents as to the sanction and votes that respondent be removed.

Mr. Felder was not present.

CERTIFICATION

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

Dated: March 7, 2008

Jean M Savanyu

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

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CONCURRING OPINION BY MR. EMERY

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This proceeding presents a fundamental and recurring issue: when does a judge's imperious and arrogant behavior cross the line from judicial independence into the realm of misconduct that requires removal? There are very few anchors for our decisions in this shoal-strewn sea. Here are standards I would apply.

The basic rule that any judicial behavior that personally benefits the judge or his/her family or friends presumptively warrants removal is not at issue in this case. *See Matter of Clark*, 2007 Annual Report 93 (Comm on Judicial Conduct) (Emery Dissent); *Matter of LaClair*, 2006 Annual Report 199 (Comm on Judicial Conduct) (Emery Dissent). No one has alleged, and the evidence does not support, that Judge Hart acted for selfish reasons. From beginning to end, his questionable actions were all in service of his good faith belief that what he was doing was right – even if his beliefs were misguided.

The constellation of charges arising out of his efforts to get the *Rini* case to trial demonstrates extreme measures in service of unassailably proper goals. The judge was seeking to provide a trial to the litigants before him but he faced a counsel for the plaintiff who effectively frustrated the judge's Herculean efforts. This lawyer, in an attempt to undermine a prior proper ruling on the use of an expert witness, persisted in manipulative actions in order to delay the proceedings. The fact that Judge Hart resorted to extreme threats and measures to push the case to trial was probably called for and certainly not misconduct in my view. Any independent, responsible judge would likely make similar efforts, and certainly many federal and state judges take their obligation to move cases to trial similarly seriously. In any event, Judge Hart's actions, including a threat of contempt and direction that a stand-in counsel pick a jury, did not cross the line.

But for two ill-advised acts in the remaining cases before us, I reach similar conclusions.

The record demonstrates that when attorney Helmut Borchert appeared in the *Wilkens* case to deliver a payoff letter from the bank, Judge Hart disclosed that Borchert had represented his sister, and the judge gave counsel an opportunity to object to his hearing the matter. The fact that the judge handled this disclosure in a summary fashion is a function of the fact that he determined that Borchert's role in the case was a ministerial one that would not pose a conflict. Borchert's peripheral role in the case is undisputed in this record, notwithstanding that he made three appearances in connection with the matter. If other parties had a basis to question the judge's bias, they had every opportunity to do so but never raised an objection after disclosure was made. Moreover,

there is not the slightest indication that the judge's decisions favored, or could have favored, Borchert in any way. Under these circumstances, I cannot find misconduct.

Similarly, the allegation that the judge engaged in misconduct by refusing to allow counsel for the plaintiff, Nishani Naidoo, to make a record is meritless. A judge is not required to interrupt proceedings to allow counsel to make a record at any point that counsel demands. Significantly, Commission counsel cited no authority for arguing that proposition. When Judge Hart declined to allow her to make a record regarding her informal application, it was in the course of his attempt to resolve the issues she raised. In the judge's view, a record was unnecessary since Ms. Naidoo had in fact extracted the very relief she sought. While some details of this proceeding are unclear, the record supports the judge's testimony as to the favorable outcome on behalf of her client. It appears that Ms. Naidoo got what she wanted. This is a non-issue.

By contrast, Judge Hart's unseemly phone call to Ms. Naidoo requesting that she testify for him in this Commission's proceedings – in the course of which he offered to testify for her in bar proceedings that apparently never were initiated – *is* misconduct. This call and offer were improper, though it should be noted that *counsel* for Judge Hart could have called Ms. Naidoo and sought her testimony, and that Judge Hart never asked or appeared to ask for untruthful testimony. However, his call was improper. A judge cannot call counsel for an active litigant before him/her and seek assistance of any type, let alone in a collateral judicial disciplinary matter. *See*, *Matter of Spargo*, 2007 Annual Report 127 (Comm on Judicial Conduct) (judge directly and indirectly solicited funds for his personal benefit from attorneys who had pending matters before

him); *Matter of Katz*, 1985 Annual Report 157 (Comm on Judicial Conduct) (judge solicited a loan from an attorney who appeared before him).

In the *Celestin* case, as the majority has found, the judge's refusal to allow a speedy eviction in the wake of a foreclosure of a *pro se* homeowner who he believed had a sick child is not misconduct. His issuance of an order to show cause on behalf of the homeowner was indisputably not improper at the time it was issued. At a minimum there was substantial confusion as to the effect of the automatic stay in the parallel bankruptcy proceeding. This confusion and the fact that clarification occurred after the judge issued his order, in my view, insulate the judge from any misconduct. He had no obligation to alter his order on his own motion. In any event his exercise of discretion here was appealable and does not present any ethical issues.

On the other hand, it *was* misconduct a month later in *Celestin* for the judge, in retaliation for the legitimate eviction claims of the bank, to grant a lengthy adjournment to the tenants. The judge forthrightly admitted that he was doing just that (Determination, p. 8, par. 27). His exercise of discretion for an admittedly punitive purpose is clear misconduct. Even though this ruling was appealable, the judge's imperious and arrogant abuse of discretion in service of his anger against the bank is opprobrious.

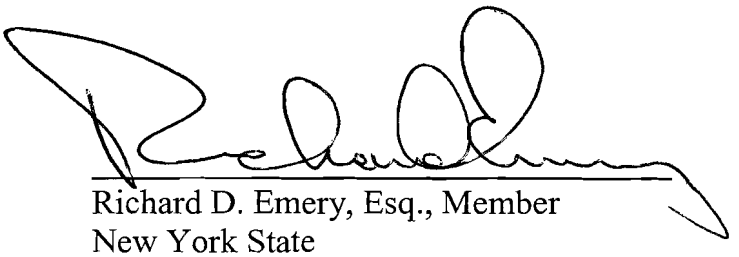
Judge Hart presents the picture of a thorough, conscientious, well-prepared and empathic jurist who is stubbornly convinced of the rectitude of his judgments and self-righteous about their implementation. The varied and multiple events comprising the

allegations before us now, as well as his prior discipline before this Commission (*see Matter of Hart*, 7 NY3d 1 [2006]), confirm this conclusion.

Judge Hart has pressed his authority right to the limit. Had he been guilty of more than two instances of misconduct in the panoply of charges before us, I would have voted to remove him even though each of his actions was taken, in his view, in the appropriate exercise of his judicial responsibilities. That is not good enough in our constitutional system of judicial discipline. Judges can and do cross the line even when they believe they are acting appropriately, and even appealable, good faith behavior may be sufficiently aberrant to warrant removal. *E.g.*, *Matter of McGee*, 59 NY2d 870 (1983). Luckily for Judge Hart, his arrogance and impetuousness so far have led to behavior that lurks just below the removal surface. I hope that he will temper himself so that he will not break through.

I concur.

Dated: March 7, 2008



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

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DISSENTING OPINION
BY MR. COFFEY

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The man who appeared before us at oral argument was a far different individual from the one who presented himself at the hearing and investigative appearance. Personally unimpressed and believing that the majority of the charges against respondent were serious and proven, I vote to remove him. I am also deeply troubled by respondent's testimony at the hearing, which was evasive and inconsistent, and I am unpersuaded that he will modify his conduct in the future.

Dated: March 7, 2008

Stephen R. Coffey, Esq., Member
New York State
Commission on Judicial Conduct