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

PAUL J. HERRMANN,

DETERMINATION

a Justice of the Saranac Lake Village Court,
Franklin County.

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Charles F. Farcher and Thea Hoeth, Of Counsel)
for the Commission

Corrigan, McCoy & Bush, PLLC (by Scott W. Bush) for the Respondent

The respondent, Paul J. Herrmann, a Justice of the Saranac Lake Village Court, Franklin County, was served with a Formal Written Complaint dated September

15, 2008, containing two charges. The Formal Written Complaint alleged that respondent attempted to dispose of a case in a manner intended to raise funds for the Village and that he engaged in improper political activity. Respondent filed an answer dated October 3, 2008.

By Order dated January 22, 2009, the Commission designated David M. Garber, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 18 and 20, 2009, in Albany. The referee filed a report dated September 15, 2009.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended that the judge be censured, and the judge's attorney recommended that the charges be dismissed. On November 5, 2009, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a Justice of the Saranac Lake Village Court and has served in that capacity since April 2006. He previously served in that position in 1990 to 1991. He is an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about October 15, 2004, the Saranac Lake Village Police Department charged Chad Amell with Driving While Intoxicated ("DWI"), a misdemeanor; Open Container, a traffic infraction; and Unlawful Possession of

Marijuana ("UPM"), a violation.

3. In December 2004 Mr. Amell's then-attorney, Gregory D. LaDuke, and Chief Assistant District Attorney John D. Delehanty negotiated a plea arrangement whereby Mr. Amell agreed to plead guilty to a reduced charge of Driving While Ability Impaired ("DWAI") in satisfaction of all the charges. Under the plea arrangement, Mr. LaDuke and ADA Delehanty agreed that Mr. Amell would be sentenced to a conditional discharge and the fine amount would be determined by then-Saranac Lake Village Justice Thomas Glover.

4. The proposed plea arrangement was never presented to Judge Glover for approval. The *Amell* case remained pending until respondent, who had succeeded Judge Glover as Village Justice, calendared it for September 6, 2006.

5. On that date, Mr. Amell appeared before respondent with his new counsel, Virginia Morrow. Ms. Morrow advised respondent of the plea arrangement and Mr. Amell's desire to plead guilty to DWAI in satisfaction of the original charges as well as a subsequent Open Container charge.

6. Respondent refused to accept the plea arrangement because, under applicable law, none of the fines imposed for a DWAI conviction are paid to the Village, and respondent believed that the Village should receive some money for its work in the *Amell* proceeding. Respondent stated, in substance, "We get no money back from DWI cases" and "someone has to generate money for the Village to support the expensive police department" because otherwise, taxes would go up. Respondent informed Ms.

Morrow and ADA Delehanty that he would accept Mr. Amell's guilty plea to DWAI only if accompanied by a plea to the Open Container charge and the imposition of a maximum fine which, under applicable law, would be paid to the Village.

7. The Saranac Lake Village Board had previously advised respondent that the Village Court had a revenue-generating function and must be self-sustaining through the imposition and collection of fines. The Board occasionally had chastised respondent when, in its view, he failed to carry out the court's revenue-generating function. On occasion, pressured by the Board to generate monies for the Village, respondent supported his requests to the Board for supplies and equipment by emphasizing the court's revenue-generating function.

8. Ms. Morrow and ADA Delehanty objected to respondent's rationale for rejecting the plea arrangement and argued that the Village Court should not be a revenue-generating arm of the Village. Respondent was unpersuaded by their arguments and granted Ms. Morrow's request for an adjournment in order to discuss respondent's proposed plea with the defendant.

9. On the adjourned date, September 20, 2006, Mr. Amell and his attorney again appeared before respondent. Prior to ADA Delehanty's arrival, Ms. Morrow advised respondent that the defendant would accept respondent's proposed plea by pleading guilty to DWAI and the Open Container charge. Respondent mentioned that Mr. Amell had been charged with a new Open Container violation and told the attorney, "Why would the cop take the time to write the ticket [for the Open Container] if it

weren't true?" and "the time for 'allegedly' is gone." These statements were inconsistent with the presumption of innocence to which the defendant was entitled.

10. Upon ADA Delehanty's arrival, respondent proposed a revised plea arrangement that would include a guilty plea not only to DWAI and Open Container but also to the UPM charge, with the maximum fines permitted by law; in the alternative, respondent stated, Mr. Amell could plead guilty to DWAI alone and, if he did so, respondent would sentence him to a 15-day term of incarceration.

11. Explaining his new proposed plea arrangement, respondent said that the Village of Saranac Lake would derive revenue from fines imposed for Mr. Amell's pleas to the Open Container and UPM charges and that, because the Village would not receive any money from a fine for a DWAI charge, incarceration would replace a fine as a penalty if the defendant pleaded to that charge alone. Respondent again referred to the "expensive police department" and said that he "wanted to be able to have some money go to the village rather than have it all go to the state."

12. Ms. Morrow and ADA Delehanty reiterated their objections to respondent's statements about generating revenue for the Village and said that that "should not be the primary concern of the court."

13. On September 20, 2006, Mr. Amell pleaded guilty to DWAI only, and, as promised, respondent sentenced him to a 15-day term of incarceration in the Franklin County Correctional Facility.

14. On September 21, 2006, Mr. Amell's attorney filed a Notice of

Appeal from respondent's Judgment of Conviction and Sentencing Order. On the same date, ADA Delehanty applied to Supreme Court Justice David Demarest for an Order releasing Mr. Amell pending his appeal, and the application was granted, staying Mr. Amell's sentence pending appeal and directing his release from custody.

15. In his Answer dated September 22, 2006, to the ADA's application, respondent stated that the Village received no money from fines for DWI or DWAI and that "[t]he Village should receive some money for its work" in the *Amell* case. Respondent's Answer commented upon his disagreement with Ms. Morrow and ADA Delehanty over the plea arrangement, insisted that Mr. Amell "would have to plead guilty to the Marijuana violation and the Open Container infraction if he wanted to plea[d] to DWAI," and stated that "given the time that had past [sic] between [Amell's] arrest and plea, he should pay the maximum fines" on the DWAI, UPM and Open Container charges.

16. Following the filing of the Notice of Appeal, radio station WNBZ News Director Christopher Knight sent respondent a copy of the ADA's application to release Mr. Amell and asked to interview respondent about the *Amell* case. Respondent agreed to be interviewed and sent Mr. Knight a copy of his Answer to the ADA's application.

17. In his interview with Mr. Knight on or about September 25, 2006, respondent defended his conduct in the *Amell* case, stating, "I don't have to take a plea proposal…I think [Ms. Morrow and Mr. Delehanty are] used to having their plea

proposals rubber stamped by the court." According to the article posted on the WNBZ website, respondent told Mr. Knight that "he wanted to collect more fine money from Amell because of the amount of work police had to do in the case."

18. Respondent was also interviewed about the *Amell* case by Jacob Resnick, a reporter for the *Adirondack Daily Enterprise*. As reported in an article published on September 26, 2006, respondent told Mr. Resnick that Chad "got quite a deal, quite a break," and "[a]fter negotiating a misdemeanor down to an infraction, I think Mr. Amell should have to pay the fines." Respondent also informed Mr. Resnick, in substance, that the Saranac Lake Village Court had to pay for itself and should not be supported by Village taxpayers, that the court had a revenue-generating function, and that respondent did not want to incarcerate Mr. Amell but only wanted him to pay fines that would be paid to the Village.

19. On September 26, 2006, respondent wrote a letter to the editor of the *Adirondack Daily Enterprise* responding to statements attributed to Mr. Amell's grandfather in the Resnick article. Respondent's letter, *inter alia*, corrected the article's description of the amount of the maximum fine that could have been imposed and the distribution between the State and Village of the fine amounts.

20. When respondent agreed to be interviewed by Mr. Knight and Mr. Resnick, he knew or should have known that Mr. Amell had filed a Notice of Appeal of respondent's Judgment of Conviction and Sentencing Order.

21. By Decision and Order dated June 1, 2009, County Court Judge

Robert G. Main, Jr. dismissed the appeal on the basis that it was not perfected.

22. At the Commission hearing before the referee, respondent acknowledged that in exercising his judicial discretion with respect to the proposed December 27, 2004 plea arrangement, he considered whether the fines would be paid to the Village, and that he should not have done so.

As to Charge II of the Formal Written Complaint:

23. On January 29, 2008, respondent attended and participated in the Village of Saranac Lake Democratic Party caucus. At the caucus, respondent nominated John Sweeney as the Party's candidate for the Saranac Lake Village Board of Trustees, and he asked Mr. Sweeney and another candidate to speak about themselves.

24. At the time he nominated Mr. Sweeney at the Democratic Party caucus, respondent was generally aware of the Rules prohibiting a judge from engaging in partisan political activity other than the judge's own campaign for judicial office.

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)(8) and 100.5(A)(1)(c), (d), (e) and (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 and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is

established.

The record establishes that in *People v. Amell* respondent refused to accept a plea agreement and attempted to coerce a plea to additional charges because he wanted a disposition that would bring revenue to the Village. By so doing, respondent misused his judicial discretion and impaired the independence of his court, conveying the impression that its primary function is to generate revenue rather than "to apply the law in each case in a fair and impartial manner" (*Matter of Tracy*, 2002 Annual Report 167 [Comm on Judicial Conduct]).

Presented with a negotiated agreement that included a plea to DWAI alone, respondent expressed concern that the Village derives no revenue from such charges. At the very least, respondent's statements in rejecting the proposed plea – including, "Someone has to generate money for the Village to support the expensive police department" – created the appearance that his primary if not sole consideration in the disposition was the resulting revenue for the locality. While that in itself would be highly inappropriate, the judge's emphasis on supporting "the expensive police department" compounded the impropriety and the appearance of bias. Ignoring the attorneys' protests that such concerns were inconsistent with an independent judiciary, respondent proposed a plea to an additional charge of an Open Container violation with a maximum fine, which would be returned to the Village; the alternative, respondent made clear, was a plea to DWAI alone with a 15-day jail sentence. Two weeks later, when the defendant was prepared to accept respondent's plea proposal, respondent insisted on including an

additional plea to marijuana possession, with an additional fine, and he reiterated his interest in having some money go to the Village. Rejecting respondent's plea proposal, the defendant pleaded guilty to DWAI only, and, accordingly, respondent sentenced him to 15 days in jail. The assistant district attorney, who testified that he believed the plea had been coerced, immediately filed an application for the defendant's release pending the appeal.

Respondent has acknowledged that he considered the revenue implications of the proposed plea in *Amell* and that it was improper to do so. While there is some indication that respondent felt pressure from the Village with respect to the amount of revenues produced by the court, no judge should permit such considerations to influence the decision or sentence in a particular case, as respondent did here. "Defendants and the public should never have to wonder if a high fine was imposed, even in part, to increase local revenues" (*Matter of Tauscher*, 2008 Annual Report 217 [Comm on Judicial Conduct][judge admonished for suggesting he could exercise his authority in imposing fines to raise revenue to pay for a salary increase]).

It is striking here that respondent, in an attempt to impose the maximum possible fine that would benefit the Village, essentially offered the defendant the alternatives of a large fine ($1,000+) or a 15-day jail sentence, and that the defendant's refusal to accede to the large fine under these circumstances cost him his liberty. Respondent's repeated insistence that he did not want to send Mr. Amell to jail only underscores his intransigence and bewildering insensitivity to the impropriety of his

actions. It is also noteworthy that in defending his position, respondent cited the amount of time that had passed from the start of the proceedings to the defendant's plea of guilty. It is improper for a judge to consider that as a factor in imposing a fine and determining that the amount collected should enure to the benefit of the judge's municipality.

Significantly, respondent persisted in his efforts to obtain the disposition he wanted despite the vehement protests, both at the initial appearance and again two weeks later, of both the prosecutor and the defendant's attorney, who told respondent that his stated purpose of generating revenue for the Village was inconsistent with a judge's proper role. Instead of availing himself of the opportunity to reconsider his position, respondent ignored the attorneys' objections and rationalized that the attorneys were simply unused to having a judge reject a negotiated plea. He maintained that position even in the face of the district attorney's successful attempt to obtain the defendant's release. Respondent's persistence in misconduct even after the attorneys' warnings compounds the impropriety. *See, Matter of Blackburne*, 7 NY3d 213, 221 (2006); *see also, Matter of Restaino*, 10 NY3d 577 (2008).

Respondent's public comments about the *Amell* case while the appeal was pending were also improper. *See, Matter of McGrath*, 2005 Annual Report 181 (Comm on Judicial Conduct) (judge admonished for discussing in the press a case in which he had just imposed sentence, since he knew or should have known that an appeal was likely). A judge may not make "any public comment about a pending or impending proceeding" (Rules, §100.3[B][8]). The prohibition against such comments is clear and

makes no exception for responding to criticism about the judge's actions in a particular case or explaining the judge's "decision-making process" (*Matter of O'Brien*, 2000 Annual Report 135 [Comm on Judicial Conduct]; Adv. Op. 94-22, 96-142).

In addition, respondent engaged in prohibited political activity by nominating a candidate for Village Trustee at a local party caucus. "Judges must hold themselves aloof and refrain from political activity, except to the extent necessary to pursue their candidacies during the public election campaigns" (*Matter of Maney*, 70 NY2d 27, 30 [1987][removing a town justice who knowingly violated the restrictions on political activity by taking an active role in an effort to oust the local party chairman and nominating the temporary chairman at a party caucus]; Rules, §§100.5[A][1], [2]). Among other requirements, a judge may not participate in the campaign of another candidate, endorse a candidate or make a speech on behalf of a candidate (Rules, §100.5[A][1][c], [d], [e], [f]). By nominating a candidate at the caucus, respondent violated these prohibitions.

We reject respondent's argument that nominating a candidate does not constitute an endorsement, which is specifically barred by the rules (§100.5[A][1][e]). While a judge is permitted to attend and vote publicly at a caucus (*see* Adv. Op. 09-180), a nomination represents a much higher degree of political involvement than a vote and squarely places the judge's prestige behind the candidacy of another, which *a fortiori* constitutes a prohibited endorsement. Since judges are also barred from making a speech on behalf of a candidate and participating in another's candidacy, respondent certainly

should have recognized the impropriety of such conduct.

We also reject the argument that this conduct was a proper exercise of constitutional rights. The political activities of judges are significantly circumscribed in order to maintain public confidence in the integrity and impartiality of the judicial system. These restrictions, including the specific rules cited here, have been upheld by the Court of Appeals, which found that the rules are "narrowly constructed to address the interests at stake, including the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary." *Matter of Raab*, 100 NY2d 305, 316 (2003).

In considering the sanction, we note that respondent states that as a result of these disciplinary proceedings, he will refrain from such political activity and improper public comments in the future and that he is more sensitive to the proper role of a judge.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur, except that Mr. Coffey, Mr. Belluck and Mr. Emery dissent as to Charge II and vote to dismiss the charge. Mr. Emery files an opinion, in which Mr. Belluck joins.

CERTIFICATION

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

Dated: December 15, 2009

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

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

PAUL J. HERRMANN,

a Justice of the Saranac Lake Village Court,
Franklin County.

OPINION BY MR. EMERY DISSENTING AS TO CHARGE II, IN WHICH MR. BELLUCK JOINS

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An explanation is required for my dissent from the majority's determination of misconduct for Judge Herrmann's nomination of a candidate for the Saranac Lake Village Board of Trustees.

Judge Herrmann is indisputably permitted to attend a political caucus, as the majority concedes, citing Advisory Opinion 09-180, at p.12 *supra*. The majority further concedes that the judge may publicly vote at such a political caucus. *Id.* Therefore, the particular facts of this case – the nomination of a candidate, apparently unadorned by any speech, endorsement or campaign support (*see* par. 23, Determination) – compels the conclusion that the judge's conduct is not materially different from the activities that the majority concedes are proper.

The majority's explanation for its leap to a misconduct finding is that "a nomination represents a much higher degree of political involvement than a vote and squarely places the judge's prestige behind the candidacy of another, which *a fortiori*

constitutes a prohibited endorsement" (Determination, p. 12).

I would say that, *a fortiori*, in this case the opposite is just as likely true. The "nomination" in this case, as cryptically described by the record we have – the Determination, par. 23 – appears to have been much less "political involvement" than the judge's *public* vote which "place[d] the judge's prestige behind the candida[te]." A public vote is an overt, meaningful expression of political support, whereas a nomination, and no more, could be far less politically overt than a public vote. It seems just as likely as not, on this anemic record, that Judge Herrmann nominated this candidate without throwing his prestige behind him. We do not even know whether the judge voted for the candidate he nominated. As anyone knows who has ever attended any sort of meeting where nominations are offered, participants often nominate people they do not support for a variety of reasons. Among them are respect, a request from the candidate, tactical maneuverings and more. By contrast, irrefutable evidence of *political* support is a public vote. Yet, the majority concedes that the Rules allow that. A vote, especially a public one, is a quintessential political act and really all that matters. Talk is cheap; a vote is precious.

The majority's finding on this charge once again highlights the folly of this Commission's myopic attempts to regulate judges who have no choice but to engage in political activities in a system that requires them to run for office and raise campaign funds from the lawyers and their clients who appear before them. I will not recite all the times that I have railed, apparently in the wilderness, about this stupidity. But I will continue to do so because this Commission is forced to decide whether to punish judges

who, through no fault of their own, face specious misconduct charges that often have no factual support (*see Matter of Chan*, dissent), such as those Judge Herrmann confronts here.

Were it only specious, I might be less vehement. Under any circumstance, a charge of misconduct is profoundly destabilizing to any serious jurist. But to level *misconduct* charges in political cases is a grave insult to honest, principled and dedicated public servants who work too hard and are paid too little in pursuit of a most idealistic profession that mandates them to stoop to be political to get and keep their jobs. Worse, the charge in this case, as with the many I have previously criticized, is a perpetration of a continuing violation of this judge's First Amendment right not to be punished for speech that is no less corrosive to the judicial function than other expressive activities that the Rules clearly authorize. This paradox of disciplining jurists on an *ad hoc* basis of underinclusive, haphazard, arcane political regulations, such as the endorsement rule at issue in this case, while, in the same breath, authorizing and even encouraging truly unethical conduct – *e.g.*, receiving contributions from the lawyers and parties who appear before the judge – is intolerable.

This case also illustrates the patchwork enforcement tableau that has been painted by the Advisory Committee. We are not bound by that Committee's rulings except insofar as a judge asks the Committee for a ruling in advance and follows it. As should be the case, under such circumstances, we may not discipline the judge even if we disagree with the Advisory Committee (Jud Law §212[2][l][iv]). As a result, a parallel body of decisions exists that we often cite and respect, especially when judges have

followed or known about them.

The problem is that, in the field of judicial political activity, the Advisory Committee has carved numerous exceptions to the basic rule that a judge should remain free of politics. The Committee frequently recognizes, as it must, that the realities of judicial elections require judges to be political. Its rulings, as well as a number of explicit regulatory exceptions created by the Rules of the Chief Administrator of the Courts, purportedly regulate the separation of judges from politics. But the patchwork approach has created a byzantine scheme that, inevitably, triggers underinclusiveness analysis. (It violates the First Amendment to prohibit expression less harmful to a public policy, if other forms of speech that are more harmful to that policy are permitted. *See Republican Party of Minnesota v. White*, 536 US 765 [2002].) How could a judge be allowed attend a caucus and publicly vote and yet be forbidden from endorsing? What if the judge simply announced his/her vote before casting it? What if the vote were secret and the judge announced his/her vote? Don't these hypotheticals clearly reveal a judge lending prestige to the candidate? Other examples of underinclusive political prohibitions abound and I have written about several of them. *See*, *Matter of Yacknin*, 2009 Annual Report 176 (Emery Dissent), noting that judicial candidates are prohibited from "personally solicit[ing] or accept[ing] campaign contributions" (§100.5[A][5]) but are permitted to seek "support" (whatever that means) from attorneys who appear before the judge, to ask lawyers to serve on the judge's campaign committee (Adv. Op. 92-19) and, most importantly, to preside over cases in which a lawyer appears who openly supported the judge's candidacy (Adv. Op. 90-182, 90-196, 03-64, 03-77), even if the judge knows

that the lawyer contributed to the judge's campaign (Adv. Op. 04-106); and noting further that judicial candidates are *advised* that they must be shielded from knowing the identity of their contributors (Adv. Op. 02-06; *Judicial Campaign Ethics Handbook*, p. 8), but they are permitted to attend their own fund-raising events (§100.5[A][2][i]; Adv. Op. 07-88, 97-41) where they can readily glean who is contributing. *See also*, *Matter of Farrell*, 2005 Annual Report 159 (Emery Concurrence), noting that the judge was prohibited from making phone calls on behalf of a local party leader (§100.5[A][1][c], [d]), but was not prohibited from soliciting and accepting (through an appropriate campaign committee) non-anonymous campaign contributions *from the very party leader the Commission admonished the judge for assisting* (§100.5[A][5]).

The upshot is confusion, *ad hoc* results and unintended, yet staunchly defended, hypocrisy. *See Matter of Raab*, 100 NY2d 305 (2003), and *Matter of Watson*, 100 NY2d 290 (2003). In these cases, the Court of Appeals struggled to make sense of the non-sensical. When judges cannot even figure out what political activity is misconduct, how can a realistic scheme be enforced? The distinctions the Rules and their interpretations rely on are so fine that they are, at best, meaningless. At worst they suffer from the looming reality of the pervasive fact of life that judges have to generate campaign contributions from the very people they judge. As long as this profoundly unethical activity resides at the heart of judicial elections, all other "political" activity pales by comparison. As previously noted, no rule forbids judges from benefitting from such contributions and no rule prevents them from attending their own fund-raising events and knowing who contributed to them (§100.5[A][2][i]; Adv. Op. 07-88). Given

this, the palliatives offered by the Rules and the Advisory Committee will inevitably raise serious constitutional questions.

New York's judiciary is in a state of extremis. Judges are as cynical about their exalted work as are the litigants who are judged. Feeding this cynicism by engaging in official hypocrisy over so-called "political activity" misconduct is a joke. Regrettably, the situation does not call for humor.

We have compelling issues of misconduct that need this Commission's attention. This is not one of them.

Dated: December 15, 2009

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