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

CATHRYN M. DOYLE,

a Judge of the Surrogate's Court,
Albany County.

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission

Dreyer Boyajian LLP (by William J. Dreyer) for the Respondent

The respondent, Cathryn M. Doyle, a Judge of the Surrogate's Court, Albany County, was served with a Formal Written Complaint dated September 17, 2012, containing three charges. The Formal Written Complaint alleged that respondent

presided over matters involving a lawyer who was her close friend and personal attorney (Charge I), a lawyer who was or had been her campaign manager (Charge II), and a lawyer who was her former attorney (Charge III). Respondent filed a verified answer dated October 11, 2012.

By Order dated January 17, 2013, the Commission designated H. Wayne Judge, Esq., as referee to hear and report to the Commission with respect to the charges. A hearing was held on March 19, 20 and 28, 2013, in Albany. The referee filed a report dated June 25, 2013.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel's brief recommended the sanction of removal, and respondent's brief argued that removal was too harsh.

On September 19, 2013, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the Surrogate's Court, Albany County, since January 2001. At times, she has been designated an Acting Supreme Court Justice and Acting County Court Judge. From 1980 through December 2000, respondent served as Chief Clerk of the Albany County Surrogate's Court. She was admitted to the practice of law in New York in 1979. Her current term expires on December 31, 2020.

2. Respondent was an adjunct professor at Albany Law School, where she taught courses on Trusts and Estates and Surrogate's Court Practice. She has been a

frequent lecturer for the New York State Bar Association, the Surrogate Judges Association, and the Office of Court Administration. Respondent testified that she reviews all the published opinions of the Advisory Committee on Judicial Ethics and the latest court decisions on a regular basis.

3. From 2007 through 2010, the Albany County Surrogate's Court processed an average of approximately 3,500 proceedings per year.

As to Charge I of the Formal Written Complaint:

4. From in or about February 2008 through December 2009, respondent did not disqualify herself from, and took judicial action in, four matters in which Thomas J. Spargo represented the petitioners, notwithstanding that Mr. Spargo was respondent's close personal friend and that, beginning in March 2008, he was also acting as her lawyer.

5. Respondent and Mr. Spargo have been close friends for almost 40 years. Respondent described her relationship with Mr. Spargo as "as close as a friend can get" and testified that their relationship was "well known to everybody in Albany."

6. By Determination dated February 26, 2007, respondent was censured for giving "inconsistent, misleading and evasive" testimony during disciplinary proceedings concerning her alleged involvement in raising funds for a legal defense trust fund for Mr. Spargo, who was then a Supreme Court Justice facing disciplinary proceedings before the Commission.

7. On March 20, 2008, Mr. Spargo filed a summons and complaint on

respondent's behalf in Supreme Court, Albany County, in *Cathryn M. Doyle v. Windsor Properties*, a personal injury action. The case was still pending when Mr. Spargo was disbarred in December 2009. It was discontinued in November 2012.

8. On July 29, 2008, Mr. Spargo filed a notice of petition, verified petition and request for judicial intervention on behalf of respondent and her husband in *Matter of the Application of Cathryn M. Doyle and Timothy Doyle v. Town of New Scotland, Board of Assessment Review and Julie Nooney, Assessor*, in Supreme Court, Albany County. Prior to filing the petition, Mr. Spargo had met informally with the assessor and later, in May 2008, Mr. Spargo appeared on behalf of respondent and her husband before the town board of assessment review. Mr. Spargo represented respondent and her husband in the matter through settlement in October 2009.

Matters Handled by Mr. Spargo in Surrogate's Court

9. On February 20, 2008, a year after respondent's censure by the Commission, Mr. Spargo filed a petition for letters of administration c.t.a. after probate on behalf of Vernon Wagoner regarding the will of William S. Wagoner. On the same date, respondent signed the decree granting administration c.t.a. after probate.

10. Mr. Spargo filed the papers in person. Respondent handed the petition to court staffer Kelli Bonaquisti and told her that it was okay to issue the decree and letters; Ms. Bonaquisti wrote "Okay per CMD" in the court file to indicate respondent's approval. This was a departure from the usual procedure, which was for the papers to be filed by mail or in person with the record room, where they would be entered and given to the Chief Clerk to review.

11. The proceeding for administration c.t.a. was uncontested. All interested persons joined the petitioner and requested that Vernon Wagoner be appointed administrator c.t.a. Surrogate's Court Procedure Act ("SCPA") section 1418 provides that "upon the application of any person who may petition for the probate of the will under 1402 the court must issue letters of administration" according to the specified priority.

12. On February 29, 2008, Mr. Spargo filed two petitions on behalf of Garry L. Porter for letters of administration for the estates of Robert Porter and Esther May Porter. On the same date, respondent signed a decree granting letters of administration to Garry L. Porter for each estate.

13. Both proceedings were uncontested. The petitioner was the only party to the proceeding, and no interested party filed a responsive pleading. All interested persons joined the petitioner and requested that Garry L. Porter be appointed administrator of both estates, and all interested persons signed duly executed waivers of citation and consents to the relief requested in the petition. Pursuant to SCPA Article 10, the appointment of an administrator is a "must" and the priority of appointment is non-discretionary.

14. On or about April 23, 2008, Mr. Spargo filed a petition on behalf of Mark C. Pangburn for probate of the will of Mildred J. Johansson, and on the same date, respondent signed a decree admitting the will to probate.

15. In January 2009 Mr. Spargo wrote to the Surrogate's Court requesting a six-month extension of time in which to file the inventory of assets in

Johansson, and respondent granted the request. On or about May 20, 2009, Mr. Spargo filed the inventory of assets in Surrogate's Court.

16. In presiding over the *Wagoner*, *Porter* and *Johansson* estates, respondent did not disclose that Mr. Spargo was her close friend or (in *Johansson*), that he was contemporaneously acting as her attorney.

17. Respondent testified that she regularly disqualified herself in Mr. Spargo's cases in Supreme Court. She testified that she did not do so in Surrogate's Court matters since the matters were uncontested and her role was "ministerial," and that she did not give his cases any preferential treatment. She testified that she "kind of forgot" about the personal injury lawsuit since no action was taken in the matter after it was filed.

As to Charge II of the Formal Written Complaint:

18. From in or about 2007 through 2011, respondent did not disqualify herself from, and took judicial action in, four matters in which Matthew J. Kelly represented the petitioners notwithstanding that, as set forth below, Mr. Kelly had a leadership role in respondent's campaign for nomination as Supreme Court Justice in 2007 and was manager of her 2010 campaign for re-election as Surrogate.

Mr. Kelly's Role in Respondent's Campaigns

19. On June 19, 2007, respondent publicly announced her candidacy for Supreme Court Justice. Mr. Kelly attended the announcement. At or around the same time, respondent met with Bernard Brown, her personal accountant, and asked him to

serve as her campaign treasurer. Respondent told Mr. Brown, who had no experience as a campaign treasurer, that if he had questions he could talk to Mr. Kelly and that Lisa Buccini, her court attorney, could help Mr. Brown file appropriate reports with the Board of Elections. Mr. Brown's notes of that conversation contain the phrase, "JIM KELLY CAMPAIGN MGR," along with Mr. Kelly's phone number and Ms. Buccini's name, home address and phone number.

20. On July 18, 2007, respondent signed a Board of Elections form CF-16 affirming that she was a candidate for election to the office of Supreme Court Justice and authorizing the "Friends of Judge Cathryn Doyle" to file all campaign disclosure statements on her behalf. On August 9, 2007, Mr. Brown filed with the Board of Elections the CF-16 form, a CF-02 form registering the "Friends of Judge Cathryn Doyle" as a political committee and a CF-03 form indicating that respondent had authorized the committee to take part in her election.

21. After Mr. Brown's initial meeting with respondent, he had no communications with her regarding the campaign. In the ensuing months, he spoke to Ms. Buccini only once relative to the campaign. In contrast, Mr. Brown had numerous communications with Mr. Kelly about the campaign's funds and expenses.

22. Mr. Kelly personally arranged and ran a fundraiser for respondent's campaign at Crossgates Restaurant on August 14, 2007. Mr. Kelly placed an advertisement for the fundraiser in the *Times Union*, which recorded Mr. Kelly's name as the advertiser. Mr. Kelly paid up front for the advertisement, and respondent's campaign reimbursed him for his costs. Mr. Kelly ordered the printing of 2,000 invitations for the

fundraiser and organized the mailing of the invitations, and his law firm paid the postage for the mailings. Mr. Kelly sent the invitations to lawyers, law firms and others included on a mailing list he had previously compiled while managing other campaigns.

23. Mr. Kelly also ordered 2,500 lawn signs for respondent's campaign. The bills for the invitations and lawn signs were addressed to respondent's campaign committee, "Friends of Judge Cathryn Doyle," at Mr. Kelly's office address. Mr. Kelly sent the bill for the lawn signs to Mr. Brown for payment.

24. Mr. Kelly instructed an individual who had arranged a second campaign fundraiser for respondent to send the bill to him. Mr. Kelly forwarded all the invoices for respondent's campaign expenditures to Mr. Brown. Mr. Brown did not attend any campaign events and had no personal knowledge of any of the campaign's expenditures other than from the documents supplied to him by Mr. Kelly.

25. The Democratic Party's Judicial Nominating Convention was held in late September 2007. Respondent did not get the Party's nomination for Supreme Court and did not run in the general election.

26. After respondent failed to receive the nomination, Mr. Kelly advised Mr. Brown that unspent campaign contributions had to be refunded. At Mr. Kelly's direction, Mr. Brown prepared the refund checks and delivered them to Mr. Kelly. Mr. Kelly signed the cover letters enclosing the refund checks and sent them to the contributors. When Mr. Brown discovered that his office had made a clerical error and had calculated incorrect refund amounts for some contributors, he asked Mr. Kelly how to proceed. Mr. Kelly advised him to write to the contributors who received the incorrect

amounts and request that the overpayments be returned; the letters went out under Mr. Kelly's name. Mr. Kelly's supervision of the refunding process continued through at least October 2008.

27. In September 2008 Mr. Kelly approved Mr. Brown's fee for acting as campaign treasurer.

28. At the hearing in this proceeding, respondent testified that in 2007, "I was in charge of the campaign and it wasn't a campaign"; she was only "testing the waters" and "you don't have a campaign until you have a nomination." Respondent testified that she asked Mr. Kelly "if he would be interested in being a manager, if I had a campaign, but I never had a campaign"; that he declined but said he would help run a fundraiser for her; that he was "a volunteer" in 2007; and that she was not aware of his activities on her behalf except for the mailing and advertising for the fundraiser. She testified that she was familiar with the guidelines of the Advisory Committee on Judicial Ethics that a judge's campaign manager should not appear before the judge during the campaign and for a period of time thereafter.

29. In 2010 respondent ran in a contested primary and general election and was re-elected to a ten-year term as Surrogate. Mr. Kelly had a leadership role in and served as manager of respondent's 2010 campaign.

30. On March 17, 2010, respondent publicly announced her candidacy for re-election as Surrogate and a fundraiser for her campaign was held on that date. Mr. Kelly's firm mailed the invitations to the fundraiser, and the public announcement for the fundraiser named Mr. Kelly as the contact person and provided Mr. Kelly's phone

number.

Matters Handled by Mr. Kelly in Surrogate's Court

31. In the *Estate of William J. Smith*, Mr. Kelly filed a petition for probate and letters testamentary on behalf of Jerold Nadel in 2003, and respondent admitted the will to probate in 2006. In May 2007 Mr. Kelly filed a petition and in October 2007 he filed an amended petition for judicial settlement of the account of the executor. On October 4, 2007, respondent issued an order (signed a citation) for service upon all persons interested in the estate, requiring them to show cause on November 20, 2007, why a decree should not be issued settling the account of the executor and allowing commissions and attorneys' fees.

32. On November 20, 2007, Mr. Kelly appeared before respondent in Surrogate's Court. Mr. Kelly thereafter filed the affidavits of service. On November 30, 2007, respondent issued an order appointing a guardian ad litem for the infant distributees.

33. In September 2008, the guardian ad litem filed a report. On January 12, 2009, respondent issued a decision, determining that 14 infants were the intended trust beneficiaries of the decedent's will and directing Mr. Kelly to submit a decree in accordance with the ruling. On January 21, 2009, respondent signed the submitted decree.

34. By letter dated September 1, 2009, Mr. Kelly wrote to the court requesting that distributions be made directly to the beneficiaries in lieu of a trust. In November 2009 respondent's law clerk advised Mr. Kelly that he would need to bring a

petition to terminate the trust.

35. In January 2010 Mr. Kelly filed on behalf of the executor a petition to terminate the trust, and in June 2010 he filed an amended petition to terminate the trust. By email dated June 7, 2010, respondent advised the court clerk that she had "referred the case to Judge Walsh for any further proceedings."

36. In the *Estate of Maxcy J. Kelly*, in July 2005 Mr. Kelly filed in Surrogate's Court a petition for appointment of himself and his brother as successor trustees for his grandfather's testamentary trust for the benefit of their disabled aunt. On July 20, 2005, respondent issued an order appointing them successor trustees.

37. On or about March 28, 2007, Mr. Kelly and his co-trustee petitioned to invade the corpus of the trust. By decision and order dated August 28, 2007, respondent granted the petition. While presiding over Mr. Kelly's petition, respondent knew that Mr. Kelly was active in her 2007 campaign for nomination to Supreme Court. Respondent issued her decision and order two weeks after the campaign fundraiser at the Crossgates Restaurant, which Mr. Kelly had arranged.

38. In the *Estate of Evelyn G. Redick*, in April 2006 Mr. Kelly filed in Surrogate's Court a petition for probate and letters testamentary on behalf of the petitioner, Shirley Smith. Mr. Kelly was a witness to the will, which was executed in 2001. Mr. Kelly filed an amended petition on September 25, 2006.

39. On September 25, 2006, respondent issued a citation in *Redick*, returnable on October 17, 2006. On the return date, respondent signed an order appointing James P. Milstein, Esq., as guardian ad litem for one of the distributees.

40. On April 9, 2007, the guardian ad litem filed a report, indicating, *inter alia*, that Shirley Smith may have exerted undue influence over the decedent and recommending that a proceeding pursuant to SCPA §1404 be conducted to determine the decedent's mental capacity at the time the will was executed.

41. By letter dated April 18, 2007, Mr. Kelly requested respondent's permission to make an application to have the estate pay the decedent's funeral bill. A handwritten notation on the letter indicates, "No estate yet – Ltrs not issued. Should get prelims."

42. By letter dated April 19, 2007, respondent's secretary advised Mr. Kelly and Mr. Milstein that an SCPA §1404 hearing was scheduled for May 21, 2007. On May 21, 2007, respondent presided over the hearing, at which Mr. Kelly testified.

43. On June 15, 2007, Mr. Milstein wrote to respondent requesting that she postpone the requirement for filing objections to the probate of the will and allow him to subpoena the decedent's medical records. On June 27, 2007, respondent's law clerk notified Mr. Milstein that respondent had extended the time for objections to 20 days from receipt of the decedent's medical records.

44. By letter dated December 14, 2007, respondent's secretary advised the attorneys that the court had heard nothing regarding the estate since the June extension was granted, and requested a status report.

45. By letter dated December 17, 2007, Mr. Kelly advised respondent that he was responsible for the delay in providing the requested records and that Mr. Milstein had no objection to the payment of the funeral bill. By order dated January 30,

2008, respondent directed Mr. Kelly's law firm to pay the funeral bill. In February 2008, respondent signed several subpoenas *duces tecum* for the decedent's medical records, returnable on March 28, 2008.

46. On August 13, 2008, respondent held a conference with the attorneys, at which it was determined that Mr. Milstein would file a report. On March 30, 2009, at Mr. Kelly's request, respondent held another conference, at which the attorneys reported that they would discuss settlement and report back to the court.

47. On October 1, 2009, Mr. Kelly filed an application for preliminary letters testamentary on behalf of Shirley Smith. The Chief Clerk notified Mr. Kelly that his papers were insufficient. On April 20, 2010, Mr. Kelly filed a petition for probate and letters testamentary, and by letter dated April 26, 2010, the Chief Clerk advised him how to correct his application. On May 21, 2010, Mr. Kelly filed another application for preliminary letters testamentary, on notice to Mr. Milstein. The Chief Clerk's notes indicate that she sent the file to respondent's chambers for decision.

48. In January 2011 Administrative Judge George B. Ceresia, Jr., assigned the *Redick* estate to Judge Jonathan Nichols after respondent disqualified herself.

49. In the *Estate of Ida M. Tassarotti*, in January 2010 Mr. Kelly filed in Surrogate's Court an amended petition for probate and supporting records with regard to the decedent's will. On January 28, 2010, respondent issued a citation to all interested persons requiring them to show cause on March 2, 2010, why the will should not be admitted to probate and why letters testamentary should not be issued to Anthony G. Tassarotti; respondent also issued a citation to a beneficiary who was in a nursing home.

50. By letter dated February 16, 2010, Mr. Kelly asked respondent for permission to retain a real estate broker to list the decedent's home for sale to take advantage of a tax credit. A handwritten note on the letter indicates, "Will send in appl for prelim letters." Mr. Kelly filed an application for preliminary letters testamentary dated February 22, 2010, on behalf of Anthony G. Tassarotti. On February 24, 2010, respondent issued an order granting preliminary letters with limitations to Mr. Tassarotti.

51. On March 2, 2010, respondent presided over the return of citation. Mr. Kelly appeared in court. Respondent determined that service was complete and assigned Thomas Latin, Esq., as guardian ad litem for a distributee who was a nursing home resident. On March 18, 2010, Mr. Latin filed a report recommending that the will be admitted to probate.

52. On March 19, 2010, two days after respondent's campaign fundraiser, respondent signed a decree admitting the *Tassarotti* will to probate. At the time, Mr. Kelly was actively working on respondent's campaign.

53. In December 2010 Mr. Kelly filed an amended petition for judicial settlement of the account of the executor.

54. By letter dated January 7, 2011, respondent advised Administrative Judge Ceresia that she was recusing herself from the *Tassarotti* matter. A letter dated January 13, 2011, from Judge Ceresia to the Chief Clerk of the Surrogate's Court indicates that respondent had recused herself and that the proceeding was assigned to Judge George Pulver, Jr.

55. In presiding over the *Smith*, *Kelly*, *Redick* and *Tassarotti* matters,

respondent did not disclose Mr. Kelly's role in her 2007 or 2010 campaign.

56. At the hearing in this proceeding, respondent testified that Mr. Kelly was not her campaign manager in 2007 since "it wasn't a campaign" and, as far as she knew, his activities on her behalf were minimal; therefore, her disqualification was not required in 2007 and for the next two years. She also testified that she asked Mr. Kelly to serve as campaign manager of her 2010 campaign for re-election in late March or April of that year and that she disqualified herself and took no action in Mr. Kelly's cases after he agreed to accept that position.

As to Charge III of the Formal Written Complaint:

57. William J. Cade, Esq., represented respondent in the disciplinary proceeding before the Commission which ended in a determination of censure dated February 26, 2007.

58. On or about January 30, 2008, Mr. Cade filed a petition for letters of administration on behalf of Cynthia Gould Becker in the estate of her son, Alexander Raymond Gould. On February 5, 2008, respondent signed a decree granting limited letters of administration to Ms. Becker so that she could bring a wrongful death action on behalf of the estate. Respondent did not disclose that Mr. Cade had represented her in the Commission proceedings that concluded a year earlier.

59. Ms. Becker was the decedent's sole distributee and was the only interested person in this proceeding and the only party to the proceeding. The administration proceeding was uncontested.

60. In July 2008 Mr. Cade filed a petition to compromise and settle the wrongful death action. Respondent disqualified herself and sent the matter to a Family Court Judge who was cross-designated as an acting Surrogate.

61. Respondent testified that she regularly disqualified herself in Mr. Cade's cases in Supreme Court. She testified that she did not do so in *Gould* since the action she took was ministerial and mandated by law, and that she disqualified herself on the petition to settle the wrongful death action, even though it was uncontested, since it would have required her to approve Mr. Cade's legal fees.

Additional Finding

62. Respondent testified that she sees no impropriety in presiding over the matters involving Mr. Spargo, Mr. Kelly and Mr. Cade. She testified that she believed that her impartiality could not reasonably be questioned as to matters that were uncontested, one-party, non-discretionary proceedings, and that since the only actions she took in those matters were "ministerial" and mandated by law, there was no favoritism and could be no appearance of impropriety.

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) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

By presiding over multiple matters involving lawyers with whom she had close personal and professional ties, respondent violated well-established ethical standards requiring disqualification in any proceeding in which a judge's "impartiality might reasonably be questioned" (Rules, §100.3[E][1]). Her failure to recuse in each of these matters, or even to disclose the relationships that cast doubt on her ability to be impartial, created an appearance of impropriety that undermines public confidence in the integrity and independence of the judiciary as a whole (Rules, §100.2). Exacerbating the impropriety, respondent's misconduct began within months after her previous censure by the Commission, demonstrating "an unacceptable degree of insensitivity to the demands of judicial ethics" (*Matter of Conti*, 70 NY2d 416, 419 [1987]) that was underscored by her failure to recognize the impropriety of her actions and by her evasive testimony at the hearing before the referee. Viewed in its entirety, and especially in light of her disciplinary history, respondent's conduct shows an inability or unwillingness to adhere to the high standards of conduct required of judges and thus requires the sanction of removal.

It is well-settled that a judge's disqualification is required in matters involving the judge's close friends and personal attorney in order to avoid even the appearance of impropriety. *Matter of Intemann*, 73 NY2d 580, 582 (1989); *Matter of Conti*, *supra*, 70 NY2d at 418-19. Yet, only a year after respondent was censured by the Commission after proceedings focusing on her actions in support of her close friend Thomas J. Spargo, respondent failed to disqualify herself in three estate matters in which Mr. Spargo represented the petitioners. When Mr. Spargo's petitions came before her in

February 2008 – in one case, after he personally delivered the papers to her – respondent took judicial action in her friend's matters, on the same day the papers were filed, by signing the decrees. Even after Mr. Spargo began representing respondent in a personal injury lawsuit a month later, respondent did not disqualify herself: she signed a decree granting his petition for probate in *Johansson* a month after he had filed the lawsuit on her behalf. Several months later, she granted his request for an adjournment, though by that time he was also representing her in a second legal matter. Respondent never disclosed her close personal ties with Mr. Spargo, and all four estate matters in which he was the attorney of record were still pending in her court when he was disbarred in late 2009. The fact that her relationship with Mr. Spargo was well known to her court staff is irrelevant to her obligations regarding disclosure and disqualification.

In February 2008 – a year after her censure – respondent also failed to disqualify herself when the attorney who had represented her in the earlier disciplinary proceedings filed a petition for letters of administration. Under guidelines provided in numerous opinions of the Advisory Committee on Judicial Ethics ("Advisory Committee"), disqualification in matters involving the judge's personal attorney is required for two years after the representation concludes (*see* Adv Ops 92-54, 93-09, 97-135, 99-67; *see also Matter of Ross*, 1990 NYSCJC Annual Report 153; *Matter of Phillips*, 1990 NYSCJC Annual Report 145). Without disclosing her relationship to the attorney, respondent signed a decree for Mr. Cade's client and did not disqualify herself until several months later when the attorney filed a petition that would have required her to approve his fee.

Finally, between 2007 and 2011 respondent took judicial action in four estate matters involving attorney Matthew J. Kelly without disclosing that he had a significant leadership role in her 2007 campaign for a Supreme Court nomination (he was her *de facto* campaign manager and was so regarded by her staff [*see* Ex 7]) and was manager of her 2010 campaign for re-election as Surrogate. Notably, in May 2007, just three months after her censure and a month before she publicly announced her candidacy for Supreme Court, respondent presided over an SCPA §1404 hearing in *Redick* at which Mr. Kelly testified; in June, ten days after she announced her candidacy, she granted the guardian's request for subpoenas and postponed the requirement for filing objections to the will; and in August 2007, two weeks after a campaign fundraiser Mr. Kelly had personally organized, she granted his petition to invade the corpus of his grandfather's testamentary trust.

Under the Advisory Committee's guidelines, whether disqualification is required in matters involving an attorney who has worked on the judge's campaign depends on the degree of the individual's participation in the campaign, which "may range from very minimal levels of involvement, that do not even require disclosure, to very active conduct in support of a judge's candidacy which warrants disqualification when the attorney appears before the judge" (Adv Op 09-245). For example, as to an attorney who co-hosted a fundraiser and whose participation in the campaign is "more than minimal but not at the formal leadership level," a judge must disqualify during the campaign and then disclose for two years but need not disqualify (*Id.*). For a campaign manager or other individual with a "leadership role" in the campaign, disqualification is

required, subject to remittal, during the judge's campaign and for a period of two years thereafter (*see* Adv Ops 06-54, 94-12, 89-07). Although respondent was familiar with the ethical restrictions – she testified that she scrupulously reviewed the Advisory Committee's opinions – she failed to disqualify herself in Mr. Kelly's cases and never disclosed his role in her campaigns.

In view of her close personal and professional ties with these attorneys that, by any objective standard, cast doubt on her ability to be impartial and thus required her disqualification, respondent should have recognized that her recusal was necessary when the attorneys' cases came before her. While disqualification based on her relationships with the attorneys was subject to remittal (*see* Rule 100.3[F]), remittal was not an available option in one-party matters in which the only attorney appearing before her triggered the need for her recusal (*see* Adv Ops 11-43, 87-08). By failing to disqualify herself or even to disclose the relationships[1], respondent did not act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Rules, §100.1).

We reject respondent's contention that her decision not to disqualify herself was an exercise of discretion that, even if incorrect, cannot constitute misconduct (citing

[1] In several cases the Court of Appeals has inferred a disclosure requirement based on the obligation to avoid the appearance of impropriety and has cited the failure to disclose as a factor in misconduct. *See Matter of Roberts*, 91 NY2d 93, 96 (1997) ("we note particularly the serious failure to inform a litigant of a potential basis for recusal ...which evokes an impermissible appearance of impropriety"); *see also Matter of Young*, 19 NY3d 621, 626 (2012) ("Petitioner neither disqualified himself nor disclosed his relationship to the defendant or complaining witness"); *Matter of La Bombard*, 11 NY3d 294, 298 (2008) ("petitioner neither disqualified himself nor disclosed his relationship with defendant's mother to all interested parties"); *Matter of Fabrizio,* 65 NY2d 275, 277 (1985) (judge handled his dentist's case "without disclosing the relationship or offering to disqualify himself").

People v. Moreno, 70 NY2d 403 [1987]). Notwithstanding the dictum in *Moreno* that a judge "is the sole arbiter of recusal" absent a legal disqualification mandated by Judiciary Law §14 (*id* at 405), the Court of Appeals, in numerous disciplinary cases in the 26 years since *Moreno*, has found misconduct for failing to disqualify under the general ethical standard in Rule 100.3(E)(1) ("impartiality might reasonably be questioned") and/or Rule 100.2(A) (the appearance of impropriety) notwithstanding that the judge believed he or she could be impartial.[2] When a judge's failure to disqualify is inconsistent with clear standards established by case law and ethical guidelines interpreting Rule 100.3(E)(1), a finding of misconduct is appropriate.

We are also unpersuaded by respondent's contention that misconduct should not be found because she reasonably believed that her conduct was consistent with the ethical rules. In rejecting respondent's argument, we need not determine whether it reflects a good faith determination that her conduct was consistent with the rules or a convenient, after-the fact rationalization for her decision to accommodate attorneys who had done favors for her. If, as she maintains, she analyzed the applicable mandates and determined that her actions were permissible, her conduct shows exceedingly poor

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[2] *See* M*atter of Conti*, 70 NY2d 416 (1987) (Speeding case in which defendant was judge's personal attorney); *Matter of VonderHeide*, 72 NY2d 658 (1988) (judge was a witness to the events underlying the criminal charges); *Matter of Intemann*, 73 NY2d 580 (1989) (cases involving a lawyer who was judge's close friend, business associate and personal attorney); *Matter of Robert*, 89 NY2d 745 (1997) (cases prosecuted by law enforcement personnel who were judge's close friends); *Matter of Roberts*, 91 NY2d 93 (1997) (civil claim filed by judge's dentist); *Matter of Assini*, 94 NY2d 26 [1999) (cases involving a lawyer with whom judge shared office space); *Matter of LaBombard*, 11 NY3d 294 (2008) (cases involving judge's stepgrandchildren and arraignment of a former co-worker's son); *Matter of Young*, 19 NY3d 621 (2012) (cases of judge's girlfriend's relatives). In several cases, the Court emphasized the judge's failure to disclose the conflict (*see* fn 1, *supra*).

judgment and an inability to recognize impropriety.

While respondent readily acknowledges that Mr. Spargo and Mr. Cade could not appear before her and notes that she disqualified herself from their cases when she sat in Supreme Court, she argues that her disqualification was not required in the cases here since they were uncontested, one-party matters and her acts were non-discretionary and "ministerial"; thus, she maintains, since she only did what the law required her to do, there could be no appearance of impropriety. By law, acts such as admitting a will to probate and issuing letters of administration require the exercise of judicial authority, which necessarily includes resolving "fundamental and highly significant" issues (Adv Op 11-43) – the quintessential exercise of judicial discretion. Even if such matters often are or appear to be routine, the standards for disqualification do not distinguish between "ministerial" proceedings and others, and provide no exception for uncontested or one-party matters; "it is manifestly improper for a judge to sit on a case in which the judge's personal attorney appears, regardless of the nature of the case" (*Matter of Ambrecht*, 2009 NYSCJC Annual Report 60). If respondent's disqualification was required in these attorneys' cases in Supreme Court, where she routinely recused herself, it was equally required in Surrogate's Court (*see* Adv Ops 94-12, 11-43; *see also Matter of Intemann*, 73 NY2d 580 [1989] [finding misconduct for failing to disqualify in numerous matters in Surrogate's Court involving the judge's close friend, business associate and personal attorney]). Moreover, it can be argued that the duty to observe the most exacting ethical standards and to avoid even the appearance of impropriety is especially important in one-party, uncontested matters, when no one is

present to object to or inhibit the judge's conduct.

As to Mr. Kelly's cases, respondent concedes that at least some of her actions were not "ministerial" but argues that her disqualification was not required because he was not her campaign manager in 2007 and that she took no action in any of his cases after he agreed to become her campaign manager in late March or April 2010. As the referee found and as our factual findings demonstrate, her argument is refuted by the testimonial and documentary proof. As the evidence of Mr. Kelly's extensive activities on respondent's behalf in 2007 conclusively establishes, he had a significant leadership role in her 2007 campaign, even without a formal title, requiring her disqualification in his cases in 2007 and for two years thereafter under the Advisory Committee's guidelines. The evidence also establishes that Mr. Kelly was already playing a leadership role in respondent's campaign in 2010 when she signed a decree on March 19 admitting the *Tassarotti* will to probate (his firm had mailed invitations to a fundraiser held two days earlier, for which he was the contact person).

In the face of persuasive evidence to the contrary, respondent attempted to minimize Mr. Kelly's role in her 2007 campaign, insisted that he was not her campaign manager, testified that she had little knowledge of his extensive activities on her behalf, and even maintained that her seven-week effort to seek the Supreme Court nomination "wasn't a campaign" at all (though it included two fundraisers, one of which she attended) since she was only "testing the waters" and ended her effort before the convention. While we give due deference to the referee's finding that respondent was "a credible and candid witness" (Rep 13), we find that her evasive and misleading hearing

testimony, as in her prior disciplinary proceeding, violated her obligation to be forthright and candid.

Based upon the foregoing, we conclude that respondent's failure to disqualify herself requires a severe sanction, reflecting the seriousness with which we view such conduct. Under the circumstances, we are constrained to view respondent's misconduct with particular severity since, in view of her censure in 2007, she should have been especially sensitive to her ethical obligations, including the duty to avoid even the appearance of impropriety. If not for her disciplinary history, respondent may have had a more credible argument to retain her judgeship. Pursuant to our mandate to enforce the ethical rules for judges and, where necessary, to impose the ultimate sanction of removal to protect the bench from unfit incumbents, we conclude that respondent should be removed from office.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Ms. Corngold, Mr. Emery and Mr. Stoloff concur.

Mr. Harding and Judge Weinstein dissent only as to the sanction and vote that respondent be censured. Mr. Harding files an opinion, in which Judge Weinstein concurs.

CERTIFICATION

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

Dated: November 12, 2013

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

CATHRYN M. DOYLE,

a Judge of the Surrogate's Court,
Albany County.

OPINION BY MR. HARDING, WHICH JUDGE WEINSTEIN JOINS, DISSENTING AS TO THE SANCTION

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Having carefully considered the entire record, I respectfully dissent from the sanction of removal. As a general proposition, I do not think the sum of respondent's actions justify the extreme sanction of removal, even in light of her prior censure. While she should not have handled these attorneys' cases, it is important to note that for the most part, these Surrogate's Court proceedings were not adversarial, contested matters. There is no allegation or finding that these attorneys or their clients received any special treatment or pecuniary benefit because of her relationships with the attorneys. Her close friend Mr. Spargo and former attorney Mr. Cade would have achieved the same results before any Surrogate, and although Mr. Kelly played a role in her two campaigns, respondent did not believe that his role necessarily disqualified her. Her analysis of the law was wrong, but I credit her explanation that she made that determination in good faith.

It is also significant to me that the referee who heard and saw respondent

testify at the hearing found her to be "a credible and candid witness" who "told the truth" (Rep 13). I do not believe that respondent should be penalized because we reject her testimony about her perspective on Mr. Kelly's role and her own actions in her 2007 campaign. In my opinion, the credibility issues here are not sufficiently compelling to establish that she compounded her misconduct.

Finally, while respondent's disciplinary history should be considered, I do not believe that it elevates the sanction to removal on these facts, especially since the earlier discipline was not related to the misconduct here.

The line between two sanctions is often blurred and very subjective. Even the Court of Appeals has stated that its disciplinary decisions are "essentially institutional and collective judgment calls based on assessment of their individual facts" (*Matter of Roberts*, 91 NY2d 93, 97 [1997]). The Court has often stated that the sanction of removal requires a showing of "truly egregious circumstances" (*e.g.*, *Matter of Mazzei*, 81 NY2d 568, 572 [1993]). My position is simple: if the findings of misconduct do not firmly place the judge over the line into the removal realm of "truly egregious circumstances," I think we must censure.

Dated: November 12, 2013

Paul B. Harding, Esq., Member
New York State
Commission on Judicial Conduct