

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

ROBERT M. RESTAINO,

a Judge of the Niagara Falls City Court,
Niagara County.

CONCURRING OPINION
BY MR. EMERY

Commissioner Felder's dissent argues that this case is not controlled by the Court of Appeals' decision in *Matter of Blackburne*. Though I dissented from the Commission's decision to remove Justice Blackburne, which was affirmed by the Court of Appeals, it is plain to me that the *Blackburne* precedent squarely controls this case. In fact the "aberrant" behavior of Judge Restaino was more egregious than that of Justice Blackburne.

Justice Blackburne, in an aberrant and arrogant fit of pique, asserting that a police officer had misrepresented facts to her, prevented the arrest of a defendant in her drug treatment court after being warned by a court officer and an assistant district attorney that she should allow the arrest to go forward. Judge Restaino, in an aberrant fit of pique, over the course of several hours, wrongfully jailed 46 defendants for up to seven hours because no one of them would admit that his or her cell phone rang in court.

Several of these defendants warned Judge Restaino as he was remanding them that what he was doing was unfair and seriously harmful to them.

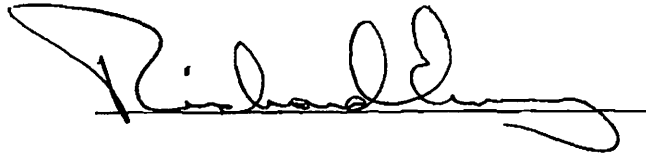
To my mind the cases are indistinguishable except perhaps with respect to the persistent and sustained nature of Judge Restaino's misconduct and the much shorter duration of Justice Blackburne's. Both judges presided in a specialty court and testified that trust and responsibility were a key component in the success of those programs. In both cases they perverted justice and their role as judges in a very similar way, in a thoroughly misguided belief that the integrity of their respective courts required them to thwart normal procedure. Justice Blackburne erred on the side of liberty; Judge Restaino, on the side of captivity.

In both cases the judges realized their errors shortly after they completed their misconduct – Judge Restaino when he learned the press was interested, Justice Blackburne when she learned that people in the courthouse were discussing her actions. In both cases a parade of distinguished character witnesses convincingly testified about each judge's impressive career of public service and blemishless record and underscored that the conduct was aberrant. Both judges expressed remorse. It seems clear in both cases that the conduct was unlikely to be repeated.

Commissioner Felder's legerdemain in characterizing the cases as warranting a distinction in favor of Judge Restaino is breathtaking, especially in light of his vote to remove Justice Blackburne. In my view he must either admit his mistake in *Blackburne* and argue that it should be overturned, or vote to remove Judge Restaino.

Instead, he chooses to mischaracterize the precedential effect of *Blackburne* in order to reach his desired result. Because I am bound by the *Blackburne* decision, with which I do not agree, I concur with the majority.

Dated: November 13, 2007

A handwritten signature in black ink, appearing to read "Richard D. Emery", written over a horizontal line. The signature is stylized and cursive.

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