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.

OPINION
BY MR. FELDER,
DISSENTING AS TO
SANCTION

In the four years that I have served as a member, Vice Chair and, ultimately, as now, its Chairman, this has been the most difficult decision for me to make.

The record establishes that respondent, after a long period of personal stress, while presiding in a domestic violence part,[1] simply "snapped" when he heard a cell phone go off in his courtroom and engaged in what can only be described as two hours of inexplicable madness. The record also establishes that his conduct over those

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[1] Chief Judge Mark Violante of the Niagara Falls City Court, who set up the Domestic Violence Part in 1997, describes it as "a standard criminal part ... ." "[In] some cases, as conditions while the case is continuing to be pending, a condition of their bail is that they were involved or are involved in some anger management programs or batterer's programs" (Tr. 453).

Judge Richard Kloch, the Supervising Judge for the Criminal Courts for the Eighth Judicial District, described the caseload in the court as "crushing" (Tr. 542).

In addition to his responsibilities as a Niagara Falls City Court judge, the testimony indicated that respondent has served as an acting County Court judge, Family Court judge and Buffalo City Court judge as needed and that he has an impeccable reputation as a dedicated, fair, hard-working jurist with great integrity.

two hours was a total aberration from his character and demeanor as a judge for eleven years (and previously as public defender for ten years) and that he has received the support and praise of his judicial colleagues, court personnel and community leaders.

Judge Violante describes respondent as being "dedicated," and testified that when he appointed him, he believed that respondent's "dedication...for this assignment was second to none and I sat in that part for three years, so I'm including myself in that vein of assigned judges" (Tr. 457). Judge Violante further indicated that respondent was vice president of the New York State City Court Judges organization and that he "handled himself as a distinguished member of our group and a distinguished member of the bench" (Tr. 462). He went on to say regarding respondent, "on his social, his personal and his professional character, it's been nothing but impeccable from what I can comment upon and that would be my only response" (Tr. 466). Angelo Morinello, respondent's co-judge, knew respondent both when he was practicing before the court, and "pretty much on a daily basis" when he was City Court judge (Tr. 479). He said that respondent's reputation was "excellent" – one "that exceeds that of most judges" (Tr. 480, 481).

Putting aside the question of competency and dedication, what respondent did here is beyond reprehensible. He abused the most serious power that a judge possesses: taking away a person's liberty. Previously, I have stated that "Tyrants come in more varieties than Baskin-Robbins has flavors" (*Matter of Mills*, 2005 Annual Report 185), and if I believed that this respondent was indeed a tyrant, I certainly would not hesitate to vote for his removal.

Although the majority insists that the improper incarceration of defendants for several hours required respondent's removal, the fact is that in numerous cases, for various reasons, the Commission has censured or even admonished judges who improperly held defendants in custody for far lengthier periods. In *Matter of Mills*, for example, the Commission, on the recommendation of Commission counsel, censured a City Court judge who abused his power by holding one individual (a college student who had interrupted the judge during a post-acquittal lecture) in solitary confinement for four days, and another individual (a courtroom spectator) in handcuffs for several hours for having used an expletive in the courthouse parking lot. In *Mills*, I voted for the judge's removal since the record amply demonstrated the judge's arrogance and dishonesty in attempting to justify his actions. (In contrast, in this case respondent appears to be sincerely remorseful and quite humble.) In *Matter of Teresi*, 2002 Annual Report 163, pursuant to a stipulation, the Commission censured a Supreme Court Justice for numerous acts of misconduct, including abusing his contempt power by sentencing a *pro se* litigant to six months in jail for refusing to sign a corrective deed (the litigant was incarcerated for 45 days until he was released by another court). I note these cases not to minimize the conduct of those judges, but merely to place in perspective the severity and consequences of respondent's actions. Admittedly, this case involves more than one person whose rights were violated egregiously, but the judge's conduct here, in my view, was a single *res gestae* – two hours of viral lunacy out of a person's entire professional life.

Although *Matter of Blackburne*, 7 NY3d 213 (2006) establishes that a judge can be removed for a single incident of notoriously poor judgment, the conduct in that case arose from a calculated determination to undermine the criminal justice process by thwarting a lawful arrest. In contrast, the respondent here was attempting to have an individual (as well as the individual's peers who may have witnessed the breach) take responsibility for a breach of courtroom decorum. In *Blackburne*, the judge acted purely out of personal pique, based on incomplete information, and, further, she persisted in the face of contrary advice from experienced court personnel. Perhaps most significantly, in *Blackburne* there was a serious question as to the sincerity and timeliness of the judge's contrition. In contrast, in this case the referee, a distinguished former judge who heard the testimony, concluded that the respondent, who testified at great length, appeared to be sincerely remorseful. The referee also commented on the impressive testimony of a psychologist and a psychiatrist who gave persuasive testimony as to the unlikelihood of a recurrence.

In *Matter of Carter*, 2007 Annual Report 79, the Commission censured a judge who left the bench and attempted to assault a defendant but was unsuccessful only because he was physically restrained by court officers; a few months later, the judge suggested to a police officer that the officer "thump the s---" out of a defendant. If Judge Carter is deemed fit to remain on the bench and was given an opportunity to continue to serve as a judge, I believe that Judge Restaino deserves the same opportunity.

Having heard from respondent, I believe along with the referee that he is sincerely filled with remorse. The record also reveals that respondent promptly sought counseling in an effort to understand what may have prompted such aberrational misbehavior and to do whatever is humanly possible to insure that such a serious lapse would not be repeated. The judge is continuing to receive regular counseling, and his therapist has stated that, insofar as we can ever be certain about the future, such an aberrational act will likely not recur. In this regard, I cannot conclude that he is unfit to continue to serve or is a menace to the public, as the majority suggests.

At the oral argument, my colleagues expressed dismay that respondent did not apologize to each individual defendant (except in a chance encounter with one defendant) either in person or by letter. I can understand that when respondent consulted a lawyer, the lawyer's reaction might well have been, "Put nothing in writing and admit nothing," since this might be construed as an admission against interest. Most people follow – for better or worse – their lawyer's advice. I believe it is most unfair and unprecedented to use the lack of a personal apology as the linchpin for determining that the judge should be removed.

I would have preferred to vote for a more serious penalty than censure, but a lesser one than removal; however, none is available. This speaks for the value of the Commission having the ability to vote to suspend a judge without pay, as a penalty that would be in severity between censure and removal. In my view this case would have easily fallen into such a category. Further, in the only other public case involving a

disturbance created by an electronic device, we were far less draconian in our remedy. In *Matter of Feinman*, 2000 Annual Report 105, the Commission admonished a judge who held a defendant in custody for 90 minutes after the defendant's pager rang in his court. There may well be value in having some uniformity in the rules as to how such disturbances should be handled (and, indeed, as to whether cell phones should even be permitted in the courtroom), and had such rules existed, the situation in respondent's courtroom on March 11th would likely not have escalated to the degree that it did. However, this should be addressed by a different forum.

The reality here is that even a public censure would undoubtedly have a deleterious effect on the judge's career. In any event, I believe this is a case where it should be up to the public, who elected respondent to serve in his community, to decide when he is up for re-election whether he should remain on the bench.

When, in my view, the Commission votes for removal of a judge, it should not be as part of a game of "gotcha." The reason should be (1) if a judge is unchecked, he or she would be a danger to the community, and (2) unless restrained by our determination, the judge would repeat his or her misconduct. Viewing this judge, for the reasons stated above, I do not believe such to be the case. A third rationale for removal may be "to send a message" to the judiciary. I believe, short of Western Union, that message has been sent by this proceeding. Certainly, if our purpose is to show we are "tough guys" and will wield the bludgeon of removal if a judge loses control in the courtroom, then that is not a proper purpose, either by its intention or result.

I am constrained to comment on Commission counsel's attempt to belittle respondent's explanation that he "snapped" because of personal stresses in his life. Although Commission counsel argues that such an explanation is not believable because no single triggering event in his personal life had occurred that morning and that prolonged stress cannot explain a temporary loss of reason, I believe that simple human experience has shown that that is simply untrue.

I can understand the Commission's judgment, having been confronted with respondent's atrocious actions. The facts are so hypnotically awful that one's judgment can comfortably and perhaps even logically be closed to a more searching analysis. In this case it was the majority's decision to toss respondent into that judicial dustbin of removed and disgraced judges. I admit that initially, after reading all the material concerning respondent, I agreed with that view. I then listened to respondent with an open mind and particular attention. The repulsive nature of his actions on March 11, 2005 (and I believe that respondent himself would accept that characterization), juxtaposed against his otherwise impeccable judicial career, was particularly puzzling.

Having listened to the judge, and having considered the matter carefully, I cannot find it within myself to destroy this individual's professional life over this regrettable episode. The record shows without contradiction that he is a decent, humble, dedicated individual who is well-liked and respected. After growing up in public housing, he built an exemplary career in public service. Significantly, one individual who was incarcerated by respondent on March 11th testified on the judge's behalf at the

hearing and stated, quite movingly, that the judge had been a positive influence in his life. He expressed gratitude for the judge's encouragement in his staying with the Domestic Violence Program and earning a diploma, stating that "[without] the judge's helpfulness to really keep me focused in what I need to get done, I would have to say...I probably wouldn't have that diploma now" (Tr. 554). Indeed, he also testified that a year and a half after the incident, when he appeared before respondent in traffic court, he bought a photograph of himself with his diploma and in his cap and gown to show to the judge to thank him for his encouragement, at which time the judge led the court in applauding him. To be sure, it is likely that most defendants who were held in custody that day by respondent may not regard him so fondly, but I believe this individual's testimony is quite revealing as to the kind of judge respondent has been, and can continue to be, if permitted to serve.

Although the ultimate cause of respondent's bizarre behavior that day may never be known with certainty, it is uncontroverted that the conduct was a profound aberration in an otherwise unblemished career. On a human level, I simply do not believe that such an episode should outweigh a lengthy, distinguished career of public service.

Dated: November 13, 2007

Raoul Lionel Felder, Esq., Chair
New York State
Commission on Judicial Conduct