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

LUTHER V. DYE,

a Justice of the Supreme Court, 11th Judicial
District, Queens County.

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AGREED STATEMENT OF FACTS

Subject to the approval of the Commission on Judicial Conduct (hereinafter "Commission"):

IT IS HEREBY STIPULATED AND AGREED by and between Gerald Stern, Administrator of the Commission, and Honorable Luther V. Dye (hereinafter "respondent"), who is represented by David Louis Cohen, Esq., that the hearing provided for by Judiciary Law Section 44, subdivision 4, in the above-entitled proceeding shall be waived.

IT IS FURTHER STIPULATED AND AGREED that the Commission shall make its determination in the above-entitled matter upon the following facts and conclusions of law, which shall constitute the entire record.

1. Respondent served as a judge of the Civil Court of the City of New York from 1989 to 1993. Respondent has served as a Supreme Court Justice from 1994 to the present.

2. Because respondent will be 70 years old in 2003, his term as a Supreme Court Justice will expire at the end of 2003. He is eligible to apply this year for a two-year term as a certificated Supreme Court Justice, and if he is certificated, he may seek re-certification in 2005, and, if re-certificated, he may seek a third two-year term in 2007 for the period, 2008-09. The decision to grant certification is within the discretion of the Administrative Board of the unified court system.

CHARGE I

3. On August 6, 2002, respondent presided over *Catherine Capanelli; natural guardian, Esther I. Benitez* v. *Wycoff Park Associates*, in which the infant plaintiff and her mother and guardian appeared before respondent concerning an application that $6,000.00 be withdrawn from funds previously awarded to Ms. Capanelli in connection with a negligence matter and used to pay educational expenses for Ms. Capanelli, including tuition, at Christ the King Regional High School, a Catholic parochial secondary school. Respondent denied the request.

4. During the *Capanelli* proceeding, respondent made inappropriate comments about education at Catholic parochial schools and inappropriately referred to the publicized allegations concerning the Catholic Church. Respondent stated that respondent would not send his children to a Catholic parochial school, although, in fact, he had done so, and he asked Ms. Benitez if she has read the newspapers about what was occurring in Catholic schools and stated that he would not permit any funds to be used for such a purpose.

5. Respondent asserts that at the time of the Benitez proceeding, he was not biased against the Catholic Church or a Catholic education and that he rendered a decision in the Benitez case on the merits and on what he believed was in the best interests of the child.

6. In addition to the comments included in the charge, respondent stated that it was in the child's best interests to attend a public school. Respondent took into account the fact that the sole remaining funds being held for the child was $12,614.03, of which educational expenses would have been $6,000.00. Respondent asserts that he believed it was best for the child to have those funds used for other purposes, subject to the discretion of the Court. Respondent asserts further that he regrets making the comments that are the subject of this charge and he apologizes for any impression he conveyed that he was critical of the Catholic Church, of a Catholic school education, or of Ms. Benitez or Ms. Capanelli for making the application.

7. Commission Counsel asserts that respondent's words in court conveyed the appearance of bias, and it is not relevant whether respondent's decision was on the merits or whether another judge would have made the same decision. If respondent had denied the application without making the statements that are the basis of the charges, he would not have been charged with misconduct. Based on the beliefs he expressed, however, he should have disqualified himself, which would have resulted in another judge hearing the matter.

8. By reason of the foregoing paragraphs 3 through 7, respondent manifested bias or prejudice, in violation of Section 100.3(B)(4) of the Rules; and failed to

disqualify himself in a proceeding in which his impartiality might reasonably be questioned, in violation of Section 100.3(E)(1) of the Rules.

CHARGE II

9. From August 21, 2002, to August 30, 2002, respondent presided over a jury trial in *Philip Ougourlian and Arpena Ougourlian* v. *NYC Health & Hospitals Corp.*, a medical malpractice matter.

10. During the proceeding and outside the presence of the jury, respondent acted in an undignified and discourteous manner toward Steven B. Samuel, Esq., who represented the plaintiffs by:

a. stating repeatedly that Mr. Samuel should "shut up;"

b. threatening to mark the matter off the trial calendar after Mr. Samuel requested a one-day adjournment on the grounds that the daughter of the plaintiff, Philip Ougourlian, had been involved in an automobile accident; and

c. stating, without adequate basis, that Mr. Samuel should return to court with an attorney after the trial for a sanctions hearing to determine if Mr. Samuel had manipulated the court because he had submitted an affidavit of the plaintiff, Philip Ougourlian, in support of a request for a one-day adjournment of the trial after Mr. Ougourlian's daughter was involved in an automobile accident.

11. During the proceeding, on August 22, 2002, Mr. Samuel stated to respondent that Mr. Samuel was offended because respondent had accused him of having manipulated the court and Mr. Samuel added that he intended to file a complaint

concerning respondent's conduct. Respondent was annoyed with Mr. Samuel and believed him to be an aggressive lawyer.

12. On August 26, 2002, at the end of the court day, respondent and Mr. Samuel engaged in a contentious dialogue. Respondent accused Mr. Samuel of attacking him and told Mr. Samuel that any complaint Mr. Samuel would make to the Commission was "as worthless as a bucket of spit." As Mr. Samuel was leaving the courtroom, after the matter was adjourned until August 28, 2002, respondent asked Mr. Samuel whether he was Jewish.

13. On August 28, 2002, Mr. Samuel complained on the record about being asked by respondent if he was Jewish. Mr. Samuel asked: "Why did the Court ask me that question?" Respondent stated that he would answer the question, but then turned to Mr. Steve Rubin, Esq. of the New York City Law Department, who was representing the defendant, and said, "Mr. Rubin, why don't you answer that, you know the answer, you answer it." Mr. Rubin then stated:

> I don't think there was anything meant by it. I don't think it was a reflection of any type of bias. It was more just a friendly remark. I know that because the Judge asked me if I was Jewish and said there weren't – he knew I was from Virginia, that there weren't too many Jewish people that are from Virginia, and it stemmed out of that. The Judge is from North Carolina. That was my understanding.

Respondent then made the following statement on the record:

> I was born and bred in North Carolina. I saw no Jewish people, none. I saw no West Indians. I didn't know what a West Indian was until I came to New York. The only Chinese people I saw were in the

> laundry. I never saw a Jewish person. I never saw a temple. I never saw a synagogue. Didn't know what it was. I thought everybody went to church. I thought everybody was Christian. That's why I asked. Does that answer your question?

Mr. Samuel replied that it did not answer his question, and a contentious discussion ensued.

14. Respondent left North Carolina for New York City in approximately 1949.

15. By reason of the foregoing paragraphs 9 through 13, respondent failed to be faithful to the law and maintain professional competence in it, in violation of Section 100.3(B)(1) of the Rules; failed to be patient, dignified and courteous to Mr. Samuel, who was an attorney appearing before him, in violation of Section 100.3(B)(3) of the Rules; and manifested, by words or conduct, bias or prejudice, in violation of section 100.3(B)(4) of the Rules.

16. Respondent recognizes that he cannot successfully defend the charges, and for the purposes of discipline to be imposed, if the Commission accepts this Agreed Statement, the Commission is authorized to consider the prior determination of censure, dated February 6, 1998, against respondent.

17. In consideration of the disposition of this proceeding, if this Agreed Statement of facts is accepted by the Commission, respondent agrees that he will not seek or accept certification as a Supreme Court Justice, will retire from the judiciary on December 31, 2003, and will not seek or accept any judicial position in the unified court

system in the State of New York, including as a Judicial Hearing Officer, at any time in the future.

IT IS FURTHER STIPULATED AND AGREED that if the Commission accepts this Agreed Statement of Facts, the parties waive oral argument and waive further submissions to the Commission as to the issues of violation of the Rules Governing Judicial Conduct and sanction, and that the Commission shall thereupon make a finding that respondent has engaged in conduct in violation of the Rules Governing Judicial Conduct and impose the jointly recommended sanction of a public censure without further submission of the parties, based solely on this Agreed Statement. If the Commission rejects this Agreed Statement of Facts, the matter shall proceed to a hearing, and the statements made herein shall not be used by either the Commission or the respondent.

Dated: 05-15-03

Honorable Luther V. Dye
Respondent

Dated: 05-15-03

David Louis Cohen, Esq.
Attorney for Respondent

Dated: May 21, 2003

Gerald Stern, Esq.
Administrator of the Commission
(Alan W. Friedberg, Of Counsel)