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

LISA J. WHITMARSH,

a Justice of the Morristown Town Court,
St. Lawrence County.

DETERMINATION

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THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

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

Michael F. Young for the Respondent

The respondent, Lisa J. Whitmarsh, a Justice of the Morristown Town Court, St. Lawrence County, was served with a Formal Written Complaint dated October 28, 2016, containing one charge. The Formal Written Complaint alleged that respondent

made improper public comments on her Facebook account about a matter pending in another court and failed to delete public comments about the matter made by her court clerk. Respondent filed a Verified Answer dated November 16, 2016.

On December 2, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 7, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Morristown Town Court, St. Lawrence County, since January 1, 2014. Her term expires on December 31, 2017. She is not an attorney.

2. As set forth below, from March 13, 2016 to March 28, 2016, with respect to *People v David VanArnam,* a matter then pending in the Canton Town Court, St. Lawrence County, respondent made public comments on her Facebook account about the pending proceeding and failed to delete public comments about the pending proceeding made by a Morristown Town Court clerk.

3. On March 3, 2016, a felony complaint was filed in the Canton Town Court charging David VanArnam with Offering a False Instrument for Filing in the First Degree, in violation of Penal Law Section 175.35(1). The felony complaint alleged that

Mr. VanArnam, who was running for election to the Morristown town council, had filed nominating petitions in which he falsely swore that he personally witnessed the signatures on the petitions. On March 7, 2016, Mr. VanArnam was issued an appearance ticket, directing him to appear in the Canton Town Court on March 16, 2016.

4. Facebook is an internet social networking website which allows its users to, *inter alia*, post and share content on their own Facebook pages as well as on the pages of other users. Facebook users are responsible for managing the privacy settings associated with their accounts. At the option of the account holder, the content on one's internet Facebook page may be viewable by the public or restricted to one's Facebook "friends."

5. In March 2016, respondent maintained a Facebook account under the name "Lisa Brown Whitmarsh." Respondent had approximately 352 Facebook "friends." Respondent's Facebook account privacy settings were set to "Public," meaning that any internet user, with or without a Facebook account, could view content posted on her Facebook page.

6. On March 13, 2016, respondent posted a comment to her publicly viewable Facebook account, as shown on Exhibit A to the Agreed Statement of Facts, criticizing the investigation and prosecution of Mr. VanArnam. Respondent commented, *inter alia*, that she felt "disgust for a select few," that Mr. VanArnam had been charged with a felony rather than a misdemeanor because of a "personal vendetta," that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors," and that Mr. VanArnam had "[a]bsolutely" no criminal intent.

7. Respondent's post also referred to her judicial position, stating, "When the town board attempted to remove a Judge position – I stood up for my Co-Judge. When there is a charge, I feel is an abuse of the Penal Law – I WILL stand up for DAVID VANARNUM" [sic] [emphasis in original].

8. Other Facebook users posted comments on respondent's Facebook page, commending respondent's statements in her post of March 13, 2016, and/or criticizing the prosecution of Mr. VanArnam. The first Facebook user to comment was Morristown Town Court Clerk Judy Wright, who posted the following on March 13, 2016, at 7:58 AM: "Thank you Judge Lisa! You hit the nail on the head." Respondent did not delete the court clerk's comment, which was viewable by the public.

9. In two comments, posted on respondent's Facebook page on March 13, 2016, at 8:02 AM and 8:56 AM, respondent's husband, Gary Whitmarsh, questioned whether the complainant in the *VanArnam* case had a "close personal relationship" with "our prosecutor" and called the matter a "real 'Rain Wreck,'" referring to St. Lawrence County District Attorney Mary Rain. These comments were viewable by the public.

10. Respondent clicked the "like" button next to some of the comments to her post, including, *inter alia*, the following:

- one comment posted on March 13, 2016, at 8:12 AM, stating that the charges against Mr. VanArnam were "an abuse of our legal system" and "uncalled for";
- a comment posted on March 13, 2016, at 9:22 AM, criticizing District Attorney Rain; and

- another comment by Mr. Whitmarsh posted on March 13, 2016, at 2:10 PM, stating, "This is what's wrong with our justice system."

11. Respondent's "likes" of these comments were visible to the public when viewed online by hovering one's cursor over the "like" button next to each comment.

12. According to the Facebook online Help Center, clicking the "like" button is a way for Facebook users to indicate that they "enjoy" a post. The person who posted the content receives a notification that another Facebook user has "liked" it. *See* https://www.facebook.com/help/452446998120360.

13. Respondent's March 13, 2016, post about the *VanArnam* case was shared at least 90 times by other Facebook users.

14. On March 16, 2016, respondent posted on her public Facebook account a website link to a news article reporting that the charge against Mr. VanArnam had been dismissed.

15. On March 23, 2016, a local news outlet posted an article on its website reporting on respondent's Facebook comments concerning the *VanArnam* case and re-printed respondent's Facebook post of March 13, 2016, in its entirety.

16. On March 28, 2016, respondent removed all postings concerning the *VanArnam* matter from her Facebook page after receiving a letter from District Attorney Rain questioning the propriety of her comments and requesting her recusal from all matters involving the District Attorney's office.

17. On August 29, 2016, based upon the same conduct for which he was

earlier charged, Mr. VanArnam was indicted by a grand jury for Offering a False Instrument for Filing in the First Degree and Making an Apparently Sworn False Statement in the Second Degree. On November 30, 2016, the indictment was dismissed with leave to re-present within 30 days.

Additional Factors

18. Respondent has been cooperative and contrite throughout the Commission's inquiry.

19. Respondent avers – and the Administrator has no evidence to the contrary – that she had set her Facebook account privacy settings to "Public" for an unrelated reason a few years earlier. At the time of her posting about the *VanArnam* case, respondent did not realize that her privacy settings were still set to "Public" and had intended her post to be seen by her Facebook "friends" only. Nevertheless, respondent recognizes that commenting about a pending case to an intended audience of 352 individuals is still an impermissible "public" comment under the Rules.

20. Respondent avers that she will refrain from all similar conduct in the future.

21. Respondent deleted all postings concerning the *VanArnam* matter promptly upon her receipt of District Attorney Rain's letter and, by letter dated March 28, 2016, informed District Attorney Rain of that fact.

22. Soon after receiving District Attorney Rain's letter, respondent recused herself from all matters involving the District Attorney's office to avoid any 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(B)(8) 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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By posting public comments on her Facebook page criticizing the prosecution of an individual whose case was pending in another court, respondent violated Section 100.3(B)(8) of the Rules, which prohibits a judge from "mak[ing] any public comment about a pending or impending proceeding in any court within the United States or its territories." As the language of the rule makes clear, the prohibition is not limited to comments about cases in the judge's own court. *See Matter of McKeon*, 1999 NYSCJC Annual Report 117 (judge's televised comments addressing the merits of the pending O.J. Simpson case, the witnesses' credibility and the attorneys' strategies in that matter violated the rule). Comments posted on Facebook are clearly public, regardless of whether they are intended to be viewable by anyone with an internet connection or by a more limited audience of the user's Facebook "friends." Even such a "limited" audience, we note, can be substantial, and to the extent that such postings can be captured or shared by others who have the ability to see them, they cannot be viewed as private in any

meaningful sense.[1] Accordingly, a judge who uses Facebook or any other online social network "should ... recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly" (Adv Op 08-176).

Respondent's comments about the VanArnam matter, posted on her Facebook page ten days after a felony complaint against him was filed in another town court, addressed the defendant's culpability (stating that he "is not a criminal" and had "[a]bsolutely" no criminal intent) and criticized the prosecution in intemperate language, suggesting that it arose from a "personal vendetta" and that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors." These statements were improper (*see Matter of Williams*, 2002 NYSCJC Annual Report 175 [judge's "unwarranted public criticism of the prosecutor," alleging with no basis that his office was making prosecutorial decisions for political reasons, was inconsistent with the Rules]). Regardless of respondent's intent, her comments – and her "likes" of comments criticizing the District Attorney that were posted in response to her message – conveyed not only respondent's personal view that the prosecution was unjust, but the appearance that she was impugning the integrity of the prosecution and endorsing others' criticism of the District Attorney's office and the District Attorney personally. Her statements, which were viewable online for 15 days and were reported by the media, were inconsistent with her duty to "act at all times in a manner that promotes public

[1] *See* ABA Formal Opinion 462, "Judge's Use of Electronic Social Networking Media," (2/21/13) (advising that judges who use electronic social media "must assume that comments posted [on such forums] will not remain within the circle of the judge's connections").

confidence in the integrity and impartiality of the judiciary" (Rule 100.2[A]) and resulted in her recusal from all matters involving the District Attorney's office. Moreover, by referring to her judicial position in the same post (stating that she had once "stood up for my Co-Judge"), respondent lent her judicial prestige to her comments, which violated the prohibition against using the prestige of judicial office to advance private interests (Rule 100.2[C]).

We note further that since Rule 100.3(B)(8) mandates that a judge "require similar abstention [from public comment about pending proceedings] on the part of court personnel subject to the judge's direction and control," the comments posted by respondent's court clerk on respondent's Facebook page were also objectionable. Respondent promptly deleted her own post and all references to the VanArnam matter on her Facebook page after the District Attorney contacted her and questioned the propriety of her statements.

In accepting the stipulated sanction of admonition in this matter, we note that respondent has been cooperative and contrite throughout the Commission's inquiry and avers that she will refrain from all similar conduct in the future. We also take this opportunity to remind judges that the Rules Governing Judicial Conduct apply in cyberspace as well as to more traditional forms of communications and that in using technology, every judge must consider how such activity may impact the judge's ethical responsibilities.

The obligations potentially affected by evolving technology extend well beyond Rule 100.3(B)(8) and include, for example, the duty to refrain from *ex parte*

communications, political endorsements, improper pledges and promises, and any extra-judicial activity that detracts from the dignity of judicial office or undermines public confidence in the judiciary (Rules, §§100.3[B][6], 100.5[A][1][e], 100.3[B][9], 100.4[A][2], 100.2[A]). While the ease of electronic communication may encourage informality, it can also, as we are frequently reminded, foster an illusory sense of privacy and enable too-hasty communications that, once posted, are surprisingly permanent. For judges, who are held to "standards of conduct more stringent than those acceptable for others" (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]) and must expect a heightened degree of public scrutiny, internet-based social networks can be a minefield of "ethical traps for the unwary" (John G. Browning, "Why Can't We Be Friends? Judges' Use of Social Media," 68 U. Miami L. Rev. 487, 511 [Winter 2014]).

The Advisory Committee on Judicial Ethics has cautioned judges about the public nature and potential perils of social networks and has advised that judges who use such forums must exercise "an appropriate level of prudence, discretion and decorum" so as to ensure that their conduct is consistent with their ethical responsibilities (Adv Op 08-176). Further, since the technology behind social media can change rapidly and unpredictably, it is essential that judges who use such forums "stay abreast of new features of and changes to any social networks they use" since such developments may impact the judge's duties under the Rules (*Id*).

These are excellent guidelines for any judge who joins and uses an online social network. At a minimum, judges who do so must exercise caution and common sense in order to avoid ethical missteps.

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

Mr. Belluck, Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Judge Klonick, Judge Leach, Mr. Stoloff and Judge Weinstein concur.

Ms. Yeboah did not participate.

CERTIFICATION

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

Dated: December 28, 2016

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