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COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF CATHRYN M. DOYLE,

Petitioner,

-against-

No. 106

NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT,

Respondent.

20 Eagle Street
Albany, New York 12207
June 5, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 106.

2 Counselor?

3 MR. DREYER: Thank you, Your Honor.

4 Your Honor, may I reserve two minutes - - -

5 CHIEF JUDGE LIPPMAN: Two minutes.

6 MR. DREYER: - - - for rebuttal.

7 CHIEF JUDGE LIPPMAN: You have it. Go
8 ahead, counsel.

9 MR. DREYER: May it please the court, when
10 - - - when Judge Doyle first appeared before the
11 Commission, and answered questions of the Commission,
12 the ten members present, she was questioned
13 vigorously about Judge Spargo, and I'd like to spend
14 some time on her answers, because - - -

15 CHIEF JUDGE LIPPMAN: Well, why don't you
16 start by - - - by explaining to us the dynamic of the
17 prior case and what was involved with Judge Doyle and
18 now this new case that has Spargo as a part of it?

19 MR. DREYER: Yes, well, of course, in 2007,
20 Judge Doyle was censored, and the censure was based -
21 - -

22 CHIEF JUDGE LIPPMAN: Right.

23 MR. DREYER: - - - on her being evasive in
24 a proceeding involving Mr. Spargo, who was the
25 subject of that proceeding, and who, as a result of

1 that proceeding, was removed from the bench. But
2 that - - -

3 CHIEF JUDGE LIPPMAN: What's the
4 relationship between the two of them?

5 MR. DREYER: Personal, very close personal
6 friends.

7 CHIEF JUDGE LIPPMAN: It's the - - - it's
8 the relationship between the two of them - - -

9 MR. DREYER: Yes.

10 CHIEF JUDGE LIPPMAN: - - - rather than the
11 connection between what the two cases are about?

12 MR. DREYER: I think they're both, but - -
13 - but I'm - - - the - - - the Commission in this case
14 found that the proximity of the censure in 2007 - - -

15 CHIEF JUDGE LIPPMAN: Right.

16 MR. DREYER: - - - was an aggravating
17 factor - - -

18 CHIEF JUDGE LIPPMAN: Right.

19 MR. DREYER: - - - because the proximity of
20 the censure which was based on evasiveness of
21 testimony, evasiveness in the first proceeding,
22 somehow impacted this proceeding.

23 CHIEF JUDGE LIPPMAN: Why does - - - why
24 doesn't it, counselor? What's - - -

25 MR. DREYER: Because it's a pro - - - it's

1 a propensity argument as the dissent found at the
2 Commission that the two - - - the two cases are
3 unrelated - - - the two cases are un - - -

4 JUDGE SMITH: Did they - - - did they find
5 a similar evasiveness here or not?

6 MR. DREYER: The evasiveness - - - the
7 evasiveness in this particular case contradicts what
8 the referee found, who found her to be credible, and
9 who found her, not only to be credible, but to have
10 an explanation as to each and every act she took.
11 The evasiveness here - - -

12 JUDGE SMITH: The - - - the - - - in - - -
13 in the previous one, there was - - - the word
14 "candor" was used.

15 MR. DREYER: That's correct.

16 JUDGE SMITH: I guess I don't - - - I'm not
17 sure I read them as saying she's not candid this
18 time. Are - - - do you think they're saying that?

19 MR. DREYER: I think they're saying two
20 things. I think they said that the proximity of the
21 censure to these proceedings in 2007 and 2008
22 demonstrate that she was not - - -

23 JUDGE SMITH: She should - - - she should
24 have been on her extra good behavior.

25 MR. DREYER: That's correct. That's number

1 one. And then they throw in the fact that she was
2 evasive in the first case. They're not necessarily
3 suggesting - - - they're not saying that means she
4 has the propensity - - -

5 CHIEF JUDGE LIPPMAN: Counsel, if you take
6 out the first case - - -

7 MR. DREYER: Yes.

8 CHIEF JUDGE LIPPMAN: - - - take it away.
9 Does it change the equation this time?

10 MR. DREYER: It does, Your Honor. It does,
11 because that's the only aggravating factor that was -
12 - - in my view that was the only aggravating factor -
13 - -

14 CHIEF JUDGE LIPPMAN: So in your view is
15 that the key to this - - - this case, as to how - - -
16 how much weight to give to that - - - the earlier
17 case?

18 MR. DREYER: I say that the aggravating
19 factor that they cited should not be part of this
20 case, and that the court should judge Judge Doyle's
21 actions on the merits, and based on what she believed
22 to be the correct standard.

23 CHIEF JUDGE LIPPMAN: So why do you - - -
24 why do you - - - what's your rationale for putting
25 out of the equation the first case?

1 MR. DREYER: It's a propensity argument.
2 It doesn't follow that it has any bearing. The
3 dissent said it's not related - - -

4 JUDGE SMITH: Well - - - well - - - well,
5 wait. If we're determining sanction, aren't we
6 allowed to look at propensity?

7 MR. DREYER: Well, that's a different
8 issue. That's a different issue. The court can
9 always rely on pro - - - the history of the
10 discipline and decide - - -

11 CHIEF JUDGE LIPPMAN: Okay, so you're
12 saying it's relevant, you agree it's relevant for
13 sanction; you don't think it's relevant, because it's
14 a propensity argument?

15 MR. DREYER: And it's not - - - yes.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. DREYER: It's not relevant on the
18 merits - - -

19 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

20 MR. DREYER: - - - because the court can
21 always consider, obviously, the history.

22 CHIEF JUDGE LIPPMAN: But what - - - let's
23 go - - - let's go to the other two situations, with
24 the campaign manager and the personal lawyer.

25 MR. DREYER: Yes.

1 CHIEF JUDGE LIPPMAN: Why - - - why isn't
2 that a - - - also a lapse of judgment?

3 MR. DREYER: I think that by the time Judge
4 Doyle got to the Commission, she understood that she
5 had made a wrong decision, that the decision to
6 disqualify is based on the status of the attorney,
7 not on the nature of the proceeding.

8 But when she looked at, for example, Mr.
9 Cade's case, she ruled that this was a statutorily
10 mandated result, and the important point is that when
11 Mr. Cade returned a year later or so to have her fix
12 fees, she recused herself.

13 CHIEF JUDGE LIPPMAN: Counsel, why should
14 it have been a surprise to the judge that - - - that
15 even in an uncontested proceeding that might be
16 viewed in certain respects as ministerial, why should
17 that have been a surprise to a sitting surrogate that
18 that's a problem?

19 MR. DREYER: I think that Judge Doyle's
20 testimony before the Commission, before the referee
21 and before the Commission, was that she looked at all
22 the cases. And she thought, for example, that she
23 was applying correctly the cases concerning campaign
24 managers. But when it came - - - when it came to the
25 issue of appearance of impropriety, she thought that

1 Surrogate's Court was unique and it had unique
2 features that no other court has.

3 CHIEF JUDGE LIPPMAN: Wouldn't it cut - - -
4 doesn't it in some ways cut the other way that there
5 - - - it's a one-sided proceeding, and - - - I mean,
6 one could argue that it's even more important that
7 you be very careful about perception?

8 MR. DREYER: One could argue, but the
9 anomaly, of course, in a one-sided proceeding is that
10 disclosure and remittal, which is available in every
11 other court, and I submit to this court that
12 disclosure and remittal in many of these cases would
13 have been accomplished. But in Surrogate's Court
14 there's the anomaly that - - -

15 CHIEF JUDGE LIPPMAN: Well - - -

16 MR. DREYER: - - - there's nobody to
17 disclose to.

18 CHIEF JUDGE LIPPMAN: Right, but the
19 alternative would be to just recuse, or you don't
20 have that option?

21 MR. DREYER: Correct. But - - - but of
22 course, her rationale was, when I - - - when I get
23 rid of the case, I'm the only surrogate in Albany
24 County.

25 CHIEF JUDGE LIPPMAN: Right.

1 MR. DREYER: I turn cases around in one to
2 two days. Who gets hurt? The litigant? The
3 administration of justice? And all of a sudden, the
4 litigant, who has a statutorily mandated result - - -

5 CHIEF JUDGE LIPPMAN: So - - -

6 MR. DREYER: - - - goes to another county?

7 CHIEF JUDGE LIPPMAN: So counsel, is your -
8 - - your basic argument here that - - - that the
9 judge was sincere in what she did and did not think
10 she was doing anything wrong? Is that the thrust of
11 your - - - your argument?

12 MR. DREYER: Sincere, and credible, and
13 candid, and more importantly, that there was no
14 partiality shown, and - - -

15 JUDGE SMITH: What about - - - I'm actually
16 more bo - - - I mean, I understand the - - - I
17 understand the point that even the most ministerial
18 things she probably should have stayed away from, but
19 I'm more bothered by the couple of the things with
20 Mr. Kelly that weren't so ministerial, where she's
21 sitting there at a - - - at an examination where his
22 - - - the issue really is whether his client unduly
23 influenced the test data.

24 And that's at a moment, you know, when
25 there's something that looks a lot like a campaign to

1 me going on, and he looks a lot like her campaign
2 manager. What's - - - what's the justification for
3 that?

4 MR. DREYER: The answer to that, I think,
5 lies in what the opinion - - - what the advisory
6 opinion was in effect as of 2007. The proscription
7 was against campaign managers. So I think, as the
8 testimony bears out, Mr. Kelly himself did not
9 believe he was a campaign manager. He said, look - -
10 -

11 JUDGE SMITH: Yeah, I - - - wouldn't - - -
12 wouldn't you think, I mean, that a - - - someone who
13 has - - - as much reason to be sensitive as she did
14 at that point, to - - - to being, as somebody said,
15 "Caesar's wife", shouldn't - - - shouldn't she have
16 thought, like, maybe he's my campaign manager, maybe
17 he's not, but he - - - he's - - - he's helping me
18 organize fundraisers and giving out mailing lists,
19 and appearing at rallies where it says "Judge Doyle
20 for the Supreme Court", and maybe I ought to stay
21 away from this where his - - - where his conduct
22 might be personally questioned?

23 MR. DREYER: Well, certainly the Commission
24 came to that conclusion, but our argument before the
25 Commission and the argument we make today is that in

1 2010, when he became the campaign manager, she
2 immediately recused herself.

3 CHIEF JUDGE LIPPMAN: Right, but - - - but
4 again, I know that, obviously, there are two sides to
5 every argument, but he was in the mode of someone
6 being very active in her campaign. I mean that we
7 know, and that's, I think, uncon - - - uncontested,
8 right?

9 MR. DREYER: The 2007 campaign was a so-
10 called "testing the waters" campaign - - -

11 CHIEF JUDGE LIPPMAN: Right - - -

12 MR. DREYER: - - - and never resulted - - -

13 CHIEF JUDGE LIPPMAN: - - - but I mean, he
14 was a key player - - -

15 MR. DREYER: He was a key player - - -

16 CHIEF JUDGE LIPPMAN: - - - in that effort.

17 MR. DREYER: - - - in the sense that he
18 threw an event for her - - -

19 JUDGE ABDUS-SALAAM: Is there - - -

20 MR. DREYER: - - - and didn't even show up
21 to the second event.

22 JUDGE ABDUS-SALAAM: Counsel, is there a
23 difference between a testing-the-waters campaign and
24 a full-blown campaign? It's - - -

25 MR. DREYER: Not as - - -

1 JUDGE ABDUS-SALAAM: You're still
2 describing it as a campaign, aren't you?

3 MR. DREYER: It's a campaign. I don't
4 think we - - - we disputed that during the hearing,
5 but what we did say is that the facts of the case
6 were much different than what occurred in 2010, when
7 he actually became the campaign manager.

8 JUDGE SMITH: Did - - - did she acknowledge
9 before the Commission, or does she acknowledge now,
10 that what she did in 2007 was a mistake, that she
11 should have stayed away from those Kelly things?

12 MR. DREYER: I believe - - - I believe that
13 her general position before the Commission was that
14 she erred. But she also said in 2010, when first
15 approached by Commission counsel, and - - - and asked
16 for an explanation as to all of these things, please
17 let me know if I have erred - - - this is at 886 of
18 the record - - - because I want to correct the way
19 I'm doing things in court. And that request or plea
20 to the Commission was ignored, and instead two years
21 later she was charged.

22 CHIEF JUDGE LIPPMAN: Coun - - -

23 MR. DREYER: So she was asking for guidance
24 then.

25 CHIEF JUDGE LIPPMAN: Counsel, what about

1 the third relationship that's involved here with her
2 personal attorney, Mr. Cade?

3 MR. DREYER: Mr. Cade, as I said, made - -
4 - there's one case involving Mr. Cade. There's no
5 question that he was in, what we call, the tainted
6 class. In other words, he was the former attorney
7 who represented her before the Commission. Then he
8 applied for letters in order to commence a personal
9 injury action.

10 She, again, concluded that that's a
11 ministerial, mechanical event and that no partiality
12 would be shown. And I guess, her sensitivity was
13 then heightened when he returned and he asked her to
14 do something substantive with respect to the legal
15 fees, and she recused herself and sent it off to a
16 Supreme Court judge.

17 JUDGE ABDUS-SALAAM: Counsel, could I go
18 back quickly to something you said a little earlier
19 about looking for guidance? Did you - - - were you
20 saying that Surrogate Doyle was looking for guidance
21 from the Judicial Conduct Commission or was she
22 looking for guidance from the Judicial Ethics
23 Commission, because that exists, and has existed for
24 a long time.

25 MR. DREYER: She conceded that she did not

1 go to the Ethics Commission, but when the first
2 inquiry was made by the Judicial Commission, she
3 wrote a responsive letter explaining all of her
4 actions, and said, in connection with guidance, if
5 I've made mistakes, I'm willing to immediately change
6 my ways, and do things - - -

7 CHIEF JUDGE LIPPMAN: Coun - - - counsel,
8 there's the - - - one more question.

9 MR. DREYER: Yes.

10 CHIEF JUDGE LIPPMAN: Of what weight are we
11 give - - - are we to give to the cumulative nature of
12 this? What I mean is, there's lots of different
13 cases with three different relationships. Does the
14 cumulative effect matter, or are you saying they all
15 grow out of the same misconception or - - -

16 MR. DREYER: They grow out of the same
17 misconception - - -

18 CHIEF JUDGE LIPPMAN: - - - most of them?

19 MR. DREYER: - - - but as I've said, there
20 are 14,000 cases during this period of time. She was
21 jealously guarding her jurisdiction, as many judges
22 do. These are seven cases, three relating to Spargo.
23 And so I'm not suggesting that that's still not an
24 important issue.

25 CHIEF JUDGE LIPPMAN: Right.

1 MR. DREYER: But on the question that the
2 court is specifically asking me, her good faith
3 coupled with all of the other mitigating factors that
4 the referee found, including her truthfulness and
5 candor, I think warrant the consideration for Judge -
6 - -

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 Thanks - - -

9 MR. DREYER: Thank you.

10 CHIEF JUDGE LIPPMAN: - - - you'll have
11 your rebuttal time.

12 MR. DREYER: Thank you.

13 CHIEF JUDGE LIPPMAN: Let's hear from your
14 adversary.

15 MR. LINDNER: Good afternoon, Your Honors,
16 may it please the court. I'd like to begin by
17 following up on something I think I just heard Mr.
18 Dreyer say, that the Judge has never disputed that
19 her 2007 run was a campaign. In fact, that was the
20 entire basis of the Commission's finding or a
21 principal basis that her testimony was evasive and
22 misleading.

23 She testified under oath, I was in charge
24 in 2007 and it wasn't a campaign. If you look at her
25 verified answer to the formal written complaint, she

1 denied even that she was a candidate for Supreme
2 Court.

3 JUDGE PIGOTT: Well, all of that's
4 technically true, and I - - - and I certainly
5 understand your point, that there's no doubt that
6 when you've got somebody doing what, in that case,
7 Mr. Kelly was doing, but in terms of someone, you
8 know, knowing that it's a - - - with Supreme Court,
9 it's - - - it's all going - - - coming down to the
10 convention in September. And you're trying to figure
11 out whether or not, you know, you even have enough
12 support to do it, and you're trying to raise money.
13 But it doesn't turn into a campaign until after you
14 get the nomination.

15 But I see your point that as far - - - from
16 the point of view - - -

17 MR. LINDNER: With respect to that, Your
18 Honor, there's not a single authority that they can
19 cite, and not a single authority I'm ever - - - I'm
20 aware of that would support that proposition.

21 JUDGE PIGOTT: Well, a - - - trust me - - -

22 MR. LINDNER: The handbook on Judicial
23 Ethics says that it's - - - testing the waters ends
24 when you make a public pronouncement, which - - -

25 JUDGE PIGOTT: No, I - - - I'm agreeing

1 with you. I - - - those things that you just said,
2 testing the waters and making a pronouncement kick
3 stuff in, but in terms of when you're talking about a
4 campaign, it's usually when - - - when you are a
5 nominee and you run. So - - - and I agree; the
6 wordsmithing and the fencing over that was - - -
7 didn't get to - - -

8 MR. LINDNER: The wordsmithing and fencing
9 is the problem here.

10 JUDGE PIGOTT: - - - didn't get to the - -
11 - didn't get to the point that - - - that you - - -
12 you folks were raising, but - - - and I agree with
13 you. It seemed to me that Mr. Kelly was in it far
14 enough to do it.

15 But I - - - I couldn't lose a - - - I
16 didn't understand why they were making the argument.

17 MR. LINDNER: Well, the reason that I - - -
18 I stood up and began with responding to Mr. Dreyer's
19 statement is he - - - is precisely that. I mean,
20 it's bad enough what happened in 2007, but at the
21 time the - - -

22 JUDGE SMITH: Do you dispute that in 2007,
23 obviously you think she was wrong - - - you've got a
24 good argument that she was wrong - - - she believed
25 in good faith that he wasn't - - - that this wasn't a

1 campaign within the meaning of the law?

2 MR. LINDNER: An experienced judge, an
3 experienced lawyer, a formal election law lawyer - -
4 -

5 JUDGE SMITH: Okay, but I'm not - - - I'm
6 not - - -

7 MR. LINDNER: How - - - how can - - - if
8 you're going to argue that she thought this in good
9 faith - - -

10 JUDGE SMITH: Are you saying yes or no?

11 MR. LINDNER: I'm saying, no, she didn't.

12 JUDGE SMITH: She - - - you - - -

13 MR. LINDNER: What's the basis - - -

14 JUDGE SMITH: Do you think she was trying
15 to get away with something?

16 MR. LINDNER: I think that's the pattern
17 through all of this.

18 JUDGE SMITH: Well, what's she trying to
19 get - - - what's the motivation there?

20 MR. LINDNER: I - - - you know, I think she
21 just wants to have her friends' cases in her court,
22 and when she thinks she can get away with it, she
23 does it. Look at the time line with respect to Mr.
24 Cade.

25 JUDGE PIGOTT: Wait, wait, wait. You're -

1 - - you say she's trying to get her friends' cases in
2 her - - - I mean, they're - - -

3 MR. LINDNER: Not to get them in her case,
4 but when they bring cases to - - -

5 JUDGE PIGOTT: That's what you said.

6 MR. LINDNER: - - - she's happy to
7 accommodate them.

8 JUDGE PIGOTT: That's what you said. But,
9 well, to talk about that for a minute - - -

10 MR. LINDNER: I don't want to - - -

11 JUDGE PIGOTT: - - - and I don't mean to
12 cut off your train of thought. This is a filing
13 court, right? I mean, this is like filing deeds
14 practically. I mean, every - - - everybody that does
15 Surrogate Court work knows that you get the petition,
16 you get the waivers, you get the proofs of will, and
17 you file them. And - - - and as I think what's
18 pointed out in the record that - - - and Mr. Dreyer
19 talked about 14,000; I was counting about 9,000 in
20 three years - - - we're talking about 7. And that I
21 could see - - -

22 MR. LINDNER: Nine, I believe.

23 JUDGE PIGOTT: Okay, we'll do 9 out of - -
24 - whatever the fraction is. But they - - - they were
25 filings, and - - - and I didn't see where anybody was

1 hurt by them. In fact, the clients got properly
2 served as a result of this. And it seems, as Mr.
3 Dreyer was saying, that every time there was a hint
4 of a breeze of something that might be controversial,
5 the judge recused herself.

6 MR. LINDNER: Well, that's not entirely
7 true. The couple of cases that the judge recused
8 herself in early of January in 2007 came a couple of
9 months after the Commission's first inquiry letter in
10 October of 2010. So they - - - those recusals in
11 those cases may have been motivated by something
12 other than a sudden recognition - - -

13 JUDGE SMITH: She - - - well, she was
14 recusing herself in Kelly matters in earlier 2010,
15 wasn't she?

16 MR. LINDNER: Yes, but the Kelly matter
17 which you raised is particularly problematic. I
18 mean, again, the time line with that. She's censured
19 in February 2007. Mr. Kelly is testifying in this
20 very disputed estate in May. She announces in June
21 that she's running for Supreme Court.

22 A day before she announces or two days
23 before, she gets a letter from the guardian ad litem
24 saying I want time, because I want to - - - an
25 opportunity to raise objections as to whether or not

1 the test data was unduly influenced. It was a very
2 live case. It was a contested proceeding, and yet -
3 - -

4 JUDGE SMITH: Did she do - - - did she do
5 anything that looks like doing Kelly a favor in that
6 time?

7 MR. LINDNER: No. No, and let me address
8 it if I may, because it's come up a couple of times.
9 If she had had - - - if there was any evidence of
10 favoritism, we would have charged a different rule.
11 We have a rule that prohibits a judge from exhibiting
12 bias in favor or against any party; that's
13 100.3(B)(4).

14 The fact that there's a separate rule,
15 100.3(E)(1), which pro - - - which requires a judge
16 to recuse herself whenever her jud - - - impartiality
17 might be questioned shows you that it's - - -
18 favoritism isn't required. There's a separate - - -

19 JUDGE SMITH: Okay, I - - - I understand
20 that point, but if we're thinking about the sanction,
21 surely the favoritism would be - - - a stronger
22 reason for removal.

23 MR. LINDNER: No question about that. No
24 question about that. But - - -

25 JUDGE PIGOTT: This is an appearance case,

1 essentially?

2 MR. LINDNER: Well, more than that. You
3 know, you have a rule which quite clearly says you
4 have to get off if your impartiality can reasonably
5 be questioned, and that's not really subject to
6 interpretation, because you found - - -

7 CHIEF JUDGE LIPPMAN: Counselor, what -
8 what's the relationship between this case and the
9 earlier Spargo case - - -

10 MR. LINDNER: Well, I think it comes up in
11 a number of ways.

12 CHIEF JUDGE LIPPMAN: - - - and - - - and
13 Judge Doyle's involvement in that case?

14 MR. LINDNER: I think it comes up in a
15 number of ways. First of all, anytime that a judge
16 receives a sanction of censure, it's a serious
17 discipline, and one would think that you would be
18 more sensitive to your ethical obligations, and the
19 judge, in fact, testified that she was, that she
20 pored over the advisory opinions.

21 Secondly, I think you see in that case and
22 in this one the same pattern of evasive and
23 misleading testimony. In the first censure, the
24 Commission called her testimony an "elaborate tale
25 that strained credulity". You could say that here.

1 With respect to - - -

2 JUDGE PIGOTT: What did - - - what did the
3 referee - - -

4 JUDGE SMITH: Well, well - - - is it really
5 - - -

6 JUDGE PIGOTT: What did the referee say?

7 JUDGE SMITH: It is really the same?

8 MR. LINDNER: I'm sorry?

9 JUDGE SMITH: I mean, the - - - I can see
10 how the first one would read - - - it's the first one
11 was things like I didn't talk to so-and-so about that
12 - - - about that, and then so-and-so says, yes, she
13 did. You don't really have anything like that here,
14 do you?

15 MR. LINDNER: I think we have a lot that's
16 very tough to swallow. Again, I - - - I got cut off.
17 But can you - - - can you think of a way in which an
18 experienced election lawyer could convince herself
19 that what happened in 2007 wasn't a campaign and
20 could sit in a witness chair and testify under oath
21 three years later, no, that wasn't a campaign. I
22 have no authority - - -

23 JUDGE SMITH: Can experienced lawyers
24 convince themselves of almost everything? Yeah.

25 JUDGE PIGOTT: No I - - -

1 JUDGE SMITH: If you're asking me, the
2 answer is yes.

3 MR. LINDNER: Well, there - - - there are
4 other - - - you know, there's a lot in there. You
5 know, she testified - - -

6 JUDGE PIGOTT: Mr. - - -

7 MR. LINDNER: - - - Mr. Spargo filed - - -

8 JUDGE PIGOTT: I - - - I un - - - I can
9 answer yes to that. I mean, I could - - - I could
10 see where - - - where a lawyer or a judge who is
11 sitting in a justice court or some other court, and -
12 - - and has it in their minds - - - crazy as it
13 sometimes may be - - - I think we have thirty-two
14 possible candidates for Supreme Court on one
15 particular party in Erie County this year.

16 Each one of them thinks that the - - - the
17 brass ring is going to fall to them. Each one of
18 them is out doing something. Now are they all
19 "campaigning"? It would be hard to define, because
20 some of them you see everywhere; some you rarely see;
21 some may be out doing something else.

22 But if - - - if we were to say under all of
23 those circumstances, we - - - you know, that there's
24 campaigns going, then - - - then there may be some
25 town judges and village judges that you're going to

1 visit soon. I - - - it's a tough definition for - -
2 -

3 MR. LINDNER: How about when you file a
4 document with the New York State Board of Election in
5 which you swear or affirm that you are candidate for
6 Supreme Court?

7 JUDGE PIGOTT: There you got something.

8 MR. LINDNER: It seems like she knew she
9 was a candidate, although she denied it in her
10 answer.

11 CHIEF JUDGE LIPPMAN: Counsel - - -

12 MR. LINDNER: She was running a campaign.
13 But I - - -

14 CHIEF JUDGE LIPPMAN: Yeah, let me - - -
15 let me go to another issue. What is the state - - -
16 or what was the state of ethic opinions or general
17 knowledge that in surrogate's cases they were no
18 different than other cases, you know, contested cases
19 that the judge's obligation to recuse the same?
20 Where - - - where would one know what the state of
21 the law is or the state of compliance with ethical
22 rules was - - -

23 MR. LINDNER: It's been established - - -

24 CHIEF JUDGE LIPPMAN: - - - as of that
25 time?

1 MR. LINDNER: It's been settled for twenty
2 years.

3 CHIEF JUDGE LIPPMAN: Tell us.

4 MR. LINDNER: Two opinions in 1994. In
5 9405, the advisory can be held that a surrogate must
6 recuse herself in cases brought by the former law
7 firm, and they specifically said, the fact that in
8 many surrogate matters that there's no opposing
9 counsel does not diminish the appearance of
10 impropriety.

11 In 9412, a surrogate must recuse in cases
12 brought by her campaign manager, and the quote was
13 "even if the matters are routine, noncontested or
14 administrative".

15 CHIEF JUDGE LIPPMAN: Do you think it's a
16 fine point of the law or of ethical conduct this
17 distinction or is this something that's patently
18 obvious, at least from your perspective, the
19 Commission's perspective.

20 MR. LINDNER: We've cited for you a number
21 of advisory opinions, all involving surrogates which
22 quite clearly hold you have to get off, even if
23 there's no counsel on the other side, even if it's
24 routine.

25 JUDGE PIGOTT: One of - - - one - - - one

1 of the things I was thinking about when we were
2 reading all of this is there are sixty-one - - -
3 well, it's probably more than sixty-one other
4 surrogates, because a lot of them are two- or three-
5 hatters - - -

6 CHIEF JUDGE LIPPMAN: Yeah, yeah.

7 JUDGE PIGOTT: - - - where they know
8 everybody in the county, where the definition of
9 what's a friend and what isn't, et cetera, and isn't
10 there some room for latitude where you - - - where
11 you have cases where - - - if - - -

12 MR. LINDNER: Let me refer you to 07-128.

13 JUDGE PIGOTT: I'm almost done. If I - - -
14 if I recuse on this one, what I'm going to do is I'm
15 going to delay this thing. It's going to go over to
16 Judge Jones over here, who is then going to do
17 exactly what the clerk tells him or her to do,
18 because this is a filing.

19 Now, I understand you're going to say it's
20 the appearance, and I - - - I get that. But, when
21 I'm talking about latit - - -

22 MR. LINDNER: It's not a small thing, Your
23 Honor.

24 JUDGE PIGOTT: I know. But when I'm
25 talking about latitude, when you - - - when you're

1 dealing - - - I'll take Mr. Dreyer's number of 14,000
2 cases, and we're dealing with 9. That make a
3 difference to you?

4 MR. LINDNER: Well, you know, you've always
5 said there's no numerical yardstick; you consider all
6 of it. I would say the fact that she made nine of
7 these quite serious mistakes in a period of a couple
8 of years after a censure was enforced is a
9 significant number.

10 JUDGE SMITH: Granted that you - - -
11 granted that you're right that she had to recuse
12 herself no matter how ministerial it was and she
13 should have known it, if - - - if - - - I mean, most
14 of these, except for two of the Kelly things, it
15 looks to me that they were indeed totally
16 ministerial. There was nothing any - - - any other -
17 - - any surrogate could possibly have done except
18 what she did.

19 MR. LINDNER: Absolutely. There are cases
20 that fell exactly within the holdings of 9405 and
21 9412.

22 JUDGE SMITH: Okay. But - - - and I'm not
23 - - - I'm not saying that she wasn't wrong, but isn't
24 it rele - - - isn't it relevant to sanction - - -

25 MR. LINDNER: Yes.

1 JUDGE SMITH: Yeah.

2 MR. LINDNER: Absolutely.

3 JUDGE SMITH: So certainly if these had
4 been controverted matters or even discretionary
5 matters - - -

6 MR. LINDNER: The Commission - - -

7 JUDGE SMITH: - - - you'd be all over it.

8 MR. LINDNER: The Commission wrote that if
9 it were only this matter, the judge would have a
10 better argument for retaining her judgeship. But
11 when you look at the prior censure, you look at the
12 evasive testimony, you look at the fact that she
13 testified at the hearing that she would do this
14 again. There's no concession that she did anything
15 wrong here. It's - - -

16 CHIEF JUDGE LIPPMAN: Do you agree that you
17 could have nine cases out of whatever - - -
18 thousands, and just inadvertently handle it?

19 MR. LINDNER: I don't know that that's
20 really possible, Your Honor. We're talking about Mr.
21 Spargo, her friend's - - -

22 CHIEF JUDGE LIPPMAN: But she's not saying
23 she - - - she inadvertently heard them - - - she's
24 saying she mistakenly heard them.

25 MR. LINDNER: And in two cases, Mr. Spargo

1 handed the papers to the judge himself, rather than
2 taking them to the clerk's office.

3 CHIEF JUDGE LIPPMAN: Right, but what I'm
4 saying is - - - I'm just trying to make that
5 distinction. This is not a case of inadvertently
6 handling them - - - there's a huge volume and you
7 don't know who it is - - -

8 MR. LINDNER: That argument has never been
9 made.

10 CHIEF JUDGE LIPPMAN: - - - what this is
11 about from your perspective and from your opposition
12 is that this was a - - - a contention on her part
13 that she mistakenly heard them - - - she - - -
14 knowing who - - - who were the lawyers.

15 MR. LINDNER: Let me, if I can - - - the
16 answer is no. None of these were inadvertent - - -

17 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

18 MR. LINDNER: - - - but let me - - - let me
19 try to give you an example. She's censured in
20 February of 2007. Six months later the advisory
21 committee issues opinion 07-128, which says that a
22 surrogate must recuse herself when the attorney
23 representing the judge's child appears in the court,
24 even if the matters are uncontested. Not the judge
25 herself, but the judge's child.

1 Four months later, Mr. Cade brings the
2 Gould matter. She's testified that she researched
3 all of this, and then she decided that she couldn't -
4 - - that she didn't have to go for - - - oh, sorry -
5 - - that he could appear. I don't know that - - -
6 how you could interpret that in any other way.

7 She researched the issue; it wasn't
8 inadvertent. She decided, looking at the advisory
9 opinions that this was permissible, and it looks like
10 the same - - -

11 CHIEF JUDGE LIPPMAN: Okay, one - - - one
12 more question. From the perspective of the Conduct
13 Commission, if you didn't have the first Spargo case,
14 would this be a removal case in terms of the
15 sanction?

16 MR. LINDNER: I think it's very close. The
17 Commission said this was serious misconduct, and you
18 said in cases like Young that having cases in which a
19 friend or relative appears in front of you is serious
20 misconduct.

21 The charges themselves plus the evasive
22 testimony and the failure to acknowledge any
23 wrongdoing would certainly - - -

24 CHIEF JUDGE LIPPMAN: Even without the
25 original - - -

1 MR. LINDNER: I think so, Your Honor.

2 CHIEF JUDGE LIPPMAN: - - - Spargo says - -
3 - or censure?

4 MR. LINDNER: I - - - I agree - - - and I
5 get where Judge Smith is coming from here. It's a
6 closer case as you peel away some of these layers.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. LINDNER: But - - -

9 JUDGE PIGOTT: Can I ask one other - - -

10 CHIEF JUDGE LIPPMAN: Sure, Judge Pigott.

11 JUDGE PIGOTT: I want to ask - - - on the
12 Cade one, if I understood Mr. Dreyer's argument,
13 that's one where you - - - you just need somebody to
14 bring the action, right?

15 MR. LINDNER: Ministerial, administrative
16 or routine.

17 JUDGE PIGOTT: Right. But I mean, it's no
18 - - - it's no - - - it is a little bit different, but
19 - - - but - - - you got somebody who wants to - - -
20 wants to represent a child who's been injured, and
21 you've got a good case, and you need somebody - - -

22 MR. LINDNER: It's all noble, Your Honor.
23 But if you read 07-128, try to read it in a way that
24 you could research it, asking yourself the question,
25 can Mr. Cade appear and conclude, sure, it's fine.

1 JUDGE READ: Okay, I take it from your
2 answer, Mr. Lindner, to the Chief that you don't
3 agree with Mr. Dreyer that the prior - - - the prior
4 censure goes just to the sanction, rather than to the
5 merits of whether or not - - -

6 MR. LINDNER: I think it principally goes
7 to the sanction. It's - - - it's relative - - -
8 relevant, I suppose to the misconduct here in the
9 sense that it's notice. And the judge testified
10 that.

11 JUDGE READ: Well, I un - - - I understood
12 you to reply to Judge - - - when Judge - - - Judge
13 Lippman asked you - - - Chief Judge Lippman asked you
14 if it would be a different case without that; I
15 understood you to say that that made a difference,
16 and that without that, on the - - - on the merits it
17 might be a much closer case.

18 MR. LINDNER: I'm not sure I'm catching all
19 the nuance in your question, Judge. I think it's
20 true that if we didn't have the prior censure, this
21 would be a closer case, and the Commission
22 acknowledged that in the last page of their
23 determination.

24 JUDGE SMITH: A close case on the merits or
25 on sanction?

1 JUDGE READ: On the sanctions?

2 CHIEF JUDGE LIPPMAN: Yeah, that's what the
3 question is.

4 MR. LINDNER: As to sanction, would it
5 still be removal? I believe that it would be, and
6 that would be our position.

7 JUDGE SMITH: What about - - - what about
8 on the merits, would you - - - does - - - I think the
9 real question is, does the - - - is this misconduct
10 in part because of the prior - - - the prior
11 proceeding, or are they - - - or for the - - - as to
12 misconduct or not misconduct, are the two completely
13 independent?

14 MR. LINDNER: So is the question, just the
15 hearing the nine cases without the evasive testimony,
16 without the prior censure, and without the failure to
17 acknowledge wrongdoing?

18 JUDGE SMITH: Yeah, what I'm talking - - -
19 not - - -

20 MR. LINDNER: If - - -

21 JUDGE SMITH: Not - - - now not talking
22 about sanction; talking about whether she's guilty of
23 misconduct or not?

24 MR. LINDNER: Oh, absolutely. The rule
25 says you can't hear; you've got to get off the case

1 in the first - - -

2 CHIEF JUDGE LIPPMAN: No, no, no, that's -

3 - -

4 JUDGE SMITH: Absolutely, what? The

5 question is, is the prior - - - does the prior

6 proceeding make it misconduct or is it misconduct on

7 its own?

8 MR. LINDNER: No, Rule 100.3(E)(1) makes it

9 misconduct.

10 JUDGE SMITH: Okay, and the prior

11 proceeding has nothing to do with that question?

12 MR. LINDNER: No.

13 JUDGE SMITH: Okay.

14 CHIEF JUDGE LIPPMAN: Okay, it has to do

15 principally with sanction.

16 JUDGE READ: Okay.

17 MR. LINDNER: Yes.

18 CHIEF JUDGE LIPPMAN: That's the answer to

19 the question.

20 MR. LINDNER: I'm sorry if I misunderstood

21 Judge - - - yes.

22 CHIEF JUDGE LIPPMAN: Yes, that's the - - -

23 thrust of Judge Read's question.

24 MR. LINDNER: It's a conflict because the

25 rule says you must get off and because the advisory

1 committee - - -

2 CHIEF JUDGE LIPPMAN: Okay, thank you.

3 MR. LINDNER: - - - report says when your
4 personal attorney appears - - -

5 CHIEF JUDGE LIPPMAN: Good, counsel.

6 MR. LINDNER: Thank you.

7 CHIEF JUDGE LIPPMAN: Thank you.

8 Counselor?

9 MR. DREYER: Thanks, Your Honor. Your
10 Honor, in response to your question about prior
11 authority, I think it's very instructive to read
12 advisory opinion 11-43, which came out after the
13 conduct in question and before she was charged,
14 because there a surrogate, a downstate surrogate,
15 asked all the very questions concerning a recusal of
16 his wife and his wife's law firm, which led to an
17 opinion being expressed about the lack of distinction
18 between uncontested, contested, mechanical,
19 ministerial cases.

20 CHIEF JUDGE LIPPMAN: Right, but the - - -
21 but your adversary is saying that that was obvious
22 from earlier opinions.

23 MR. DREYER: There were - - -

24 CHIEF JUDGE LIPPMAN: You're saying it's
25 not as fleshed out in the - - -

1 MR. DREYER: Correct.

2 CHIEF JUDGE LIPPMAN: - - - as it was in
3 the later opinions.

4 MR. DREYER: Correct. One might read a
5 prior decision and see that it applies to a
6 nonsurrogate judge or one might read a prior opinion
7 and see that it's a bright line test only about
8 campaign managers.

9 Finally we get to 11-43, and the reason
10 it's important is that after she received it, and in
11 large part, based her testimony before the Commission
12 on the findings of that advisory opinion, she
13 attempted to change procedures in her own chambers to
14 order to flesh out conflicts. And she was rebuffed
15 as the papers point out.

16 So on the - - - on the issue raised by - -
17 -

18 CHIEF JUDGE LIPPMAN: Well, let me ask you
19 more - - - another question is jumping to my mind.

20 With Mr. Spargo, himself.

21 MR. DREYER: Yes.

22 CHIEF JUDGE LIPPMAN: Given the earlier
23 incident where Judge Doyle was censured, wouldn't you
24 be - - - wouldn't a reasonably prudent judge - - - if
25 there - - - really be super, super sensitive to

1 anything that had to do with Mr. Spargo, including a
2 case in which he was a lawyer in your court?

3 MR. DREYER: Yes. And she an - - -

4 CHIEF JUDGE LIPPMAN: But why - - - why
5 wasn't - - -

6 MR. DREYER: And she answered yes to the
7 Commission, but here's what she said - - -

8 CHIEF JUDGE LIPPMAN: Yeah.

9 MR. DREYER: - - - that was important. Her
10 - - -

11 CHIEF JUDGE LIPPMAN: Why wouldn't you - -
12 - just jump out at you, gees, like - - -

13 MR. DREYER: We're judging Mr. Spargo today
14 after having gone through not only a removal, but a
15 disbarment, a federal conviction - - -

16 CHIEF JUDGE LIPPMAN: No, no, but we're not
17 - - - we're not judging him at all. I'm asking you
18 as to Judge Doyle. Why wouldn't it have jumped off
19 the page at her that this was a case that had Mr.
20 Spargo in it?

21 MR. DREYER: For two reasons. She thought,
22 first of all, that the statutory mandate was more
23 important to protect litigants than Spargo or Cade or
24 anybody else. So what she told the Commission was
25 that when I ever identify a potential for conflict,

1 for example, when she sat as acting Supreme Court
2 judge, she immediate - - - she had a rule: no
3 Spargo; no Cade. They never even got into - - -

4 CHIEF JUDGE LIPPMAN: You're saying she was
5 supersensitive but she viewed these kind of cases in
6 a different way.

7 MR. DREYER: She was. And she relied in
8 large part on her law - - - law clerk to review with
9 her opinions. And her law clerk testified at the
10 hearing that she reviewed them, and she also came
11 down on the side of concluding that if there's no
12 possibility of partiality, then the appearance issue
13 also is removed from the matter. I'm not - - - I'm -
14 - - that's not necessarily correct, but that's how
15 she testified.

16 Counsel testified - - - or argued that this
17 is more than an appearance case. It isn't more than
18 an appearance case. That's what was charged. That
19 what - - - that's what was addressed; that's what the
20 referee addressed at the hearing.

21 He was in the best position to understand
22 what Judge Doyle testified to, and he found that she
23 was credible and that she believed that what she was
24 doing was the correct way to handle these ministerial
25 cases.

1 Important is that he was a practitioner in
2 Surrogate's Court for over fifty years himself, and
3 he knew the difference between a separate proceeding
4 and an act - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MR. DREYER: - - - and that was very
7 important to him.

8 CHIEF JUDGE LIPPMAN: Okay, thank you both.
9 Appreciate it.

10 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Doyle v. State Commission on Judicial Conduct, No. 106, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: June 13, 2014