



## AS TO THE ALLEGATIONS IN COUNT I

3. Respondent admits the allegations in paragraph 3 of the Amended Formal Complaint.

4. Respondent admits the allegations in paragraph 4 of the Amended Formal Complaint.

5. Respondent admits the allegations in paragraph 5 of the Amended Formal Complaint. By way of further answer, prior to April 8, 2009, Respondent had already discussed the holiday with Grievant<sup>1</sup> and defense counsel, and had agreed to end the trial early on the first night of Passover, so that Jewish counsel, witnesses and/or jurors could attend Seder.

6. Respondent denies the allegations in paragraph 6 of the Amended Formal Complaint. By way of further answer, Respondent admits that at approximately 3:30 p.m. on April 8, 2009, Respondent summoned both counsel to sidebar. The purpose of the discussion at sidebar, which was off the record and which the jury could not hear, was to further accommodate Grievant's request to end the trial early so Grievant could attend his Passover Seder. At sidebar, defense counsel, notwithstanding prior discussions, responded that he could continue the trial until 8:00 p.m. As Respondent and both counsel had already discussed this issue, any remark made by the Respondent was solely directed at defense counsel because defense counsel's statement that he could stay late that night was perceived as an insensitive attempt at humor. Immediately following the sidebar, Respondent dismissed the jury for the day to accommodate the Grievant so that Grievant could attend his Seder, as requested.

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<sup>1</sup> The term Grievant is used herein as defined in the Amended Formal Complaint.

7. Respondent lacks information and belief as to the truth of the allegations in paragraph 7 of the Amended Formal Complaint, and therefore denies same and leaves Complainant to its proofs.

8. Respondent admits the allegations in paragraph 8 of the Amended Formal Complaint, subject to the clarification that the discussion was outside the presence of the jury.

9. Respondent denies the allegations in paragraph 9 of the Amended Formal Complaint.

10. Respondent denies the allegations in paragraph 10 of the Amended Formal Complaint.

#### **AS TO THE ALLEGATIONS IN COUNT II**

11. Respondent repeats and realleges his responses to the allegations in paragraphs 1 through 10 of the Amended Formal Complaint as if each were set forth fully and at length herein.

12. Respondent admits in part and denies in part the allegations in paragraph 12 of the Amended Formal Complaint. Respondent admits that Respondent's sheriff's officer was the brother of the defendant in the McDonald v. Malcolm matter (improperly pleaded as William v. Malcolm), and that, on or about December 19, 2001, the Advisory Committee on Judicial Conduct ("Committee") concluded that Respondent should have recused himself from presiding over various pretrial motions in the Malcolm case. Respondent does not recall receiving a letter of admonition on or about December 19, 2001, and therefore denies same and leaves the Complainant to its proofs. If such letter exists, Respondent refers to said letter for the accuracy and content thereof. In all other respects, Respondent denies the allegations in paragraph 12 of the Amended Formal Complaint. By way of further answer, notwithstanding the Committee's ruling, Respondent denies that he was required to recuse himself from hearing a pre-trial motion

in the Malcolm matter and denies that there was a clear conflict of interest. Neither party requested that Respondent recuse himself. Respondent denied the Malcolm defendant's motion to dismiss, and up to and through the time of decision, neither party took issue with Respondent presiding over the motion. The Malcolm matter was then tried to conclusion before a **different** judge, and the jury returned a verdict **against** the Malcolm defendant. The remaining punitive damages count was thereafter settled by the Malcolm defendant. It was only after this adverse verdict that the Malcolm defendant complained of Respondent's conduct.

13. Respondent admits the allegations in paragraph 13 of the Amended Formal Complaint, subject to the clarifications that: 1) there was no female attorney of Nigerian descent involved; 2) the comments referred to in this paragraph have been taken completely out of context, and 3) as to the content of the June 5, 2007 letter that the Committee issued to Respondent, Respondent refers to said letter for the accuracy and content thereof. By way of further answer, the assistant prosecutor of Nigerian descent had been assigned to Respondent's court and regularly appeared before Respondent. He and Respondent had a friendly working relationship. For example, with respect to the alleged "crappy attorney" statement, it was said by the Respondent as mere light-hearted banter in response to an admittedly sarcastic comment by the assistant prosecutor that the assistant prosecutor was not familiar with a specific law because it had been enacted when he was only a few years old. Not only has the assistant prosecutor never complained about Respondent, he extolled Respondent's virtues in a 2007 letter to the Committee, stating that "[a]t no point during my time as an Assistant Prosecutor did Judge Wertheimer ever say or do anything to personally offend me...Judge Wertheimer's keen understanding of the law coupled with his dry sense of humor made his courtroom both an ideal forum for a young attorney to be introduced to the practice of law, as well as an enjoyable place

to be” (emphasis added). Furthermore, Respondent made a comment similar to the second alleged comment in paragraph 13 in response to a different assistant prosecutor’s direct request for constructive criticism following a trial, and his comment was not based on any type of racial animus, but rather his observation, from presiding over countless criminal trials and his then 40 years of trial experience in both military and civil courts, that blacks of a lower socioeconomic status were less likely to convict a defendant in a case involving transit police. The statement was pedantic not pejorative. In fact, defense counsel requested similar educational input and Respondent commended him for getting the same two jurors seated.

14. Respondent denies the allegations in paragraph 14 of the Amended Formal Complaint.

15. Respondent denies the allegations in paragraph 15 of the Amended Formal Complaint.

### **SEPARATE DEFENSES**

Without any admission as to the burden of proof or as to any of the allegations in the Amended Formal Complaint, Respondent sets forth the following defenses:

#### **FIRST SEPARATE DEFENSE**

As to Count I of the Amended Formal Complaint, Respondent’s comment was not anti-Semitic. To the contrary, Respondent, who was at all times receptive to Grievant’s request to observe Passover and attend his Seder, expressed disapproval at defense counsel’s attempt at humor that the trial continue until 8:00 p.m. Furthermore, Respondent knew that this matter had been previously tried before a different judge and that tensions had run high in both the initial trial and in the earlier days of this one. Indeed, the first trial judge has noted that “to say that the matter was hotly contested would be an understatement.” Recognizing that defense counsel’s

statement about working until 8:00 p.m. could be construed as “tired” humor or insensitive to Grievant, and knowing the history of animosity between Grievant and defense counsel in this particular matter, Respondent chided defense counsel by saying something to the effect of: “then what are you going to do, go to a Bund meeting?” For this reason, Respondent was not being anti-Semitic, but sensitive to Grievant’s religion-related request, and Count I should be dismissed.

#### **SECOND SEPARATE DEFENSE**

As to Count I of the Amended Formal Complaint, although Respondent never made the alleged comment or remark to Grievant, the next day, when Grievant first stated that he took offense to Respondent’s comment or remark, Respondent was surprised, and immediately apologized for anything he had done to offend Grievant.

#### **THIRD SEPARATE DEFENSE**

As to Count I of the Amended Formal Complaint, although the possibility of a motion for mistrial was discussed by Grievant and Respondent based upon Respondent’s alleged comment, Grievant declined to file such a motion. Indeed, the subject was never raised again during the ensuing days of the trial or at the charge conference. Similarly, Grievant did not appeal the jury’s verdict in favor of defendant, which was returned in less than five minutes.

#### **FOURTH SEPARATE DEFENSE**

During Respondent’s 24-plus year career on the bench, in which he has personally handled thousands of cases and had tens of thousands of people in his courtroom, he has served as the Presiding Judge of the Civil and Criminal Parts, and has been a long-time fellow of the International Society of Barristers and a life fellow of the American Bar Foundation. He was asked three times to ascend to the Appellate Division. He has distinguished himself with

repeated assignments to the most difficult and sensitive cases in the courthouse, and is held in the highest esteem by the vast majority of the bench and the bar. In all this time, Respondent has been subject to only the three within grievances wherein he was criticized (all of which were instigated by the losing side), an extraordinarily small percentage of potential complaints given his lengthy service, and the fact that over 50,000 people have appeared in his Courtroom.

#### **FIFTH SEPARATE DEFENSE**

Under the circumstances present here, the Amended Formal Complaint did not issue upon a proper showing of probable cause pursuant to R. 2:15-12(a). Here, the Amended Formal Complaint was brought: 1) on information and belief, based on the statement of Grievant alone; 2) without contacting or interviewing either Respondent or defense counsel; 3) without interviewing Respondent's staff who were stationed in proximity to the conversation; 4) to the best of Respondent's knowledge and belief, without contacting or interviewing anyone, other than Grievant, who was privy to the conversation; and 5) without contacting or interviewing the assistant prosecutor of Nigerian descent.

#### **SIXTH SEPARATE DEFENSE**

Respondent's conduct was not prejudicial to the administration of justice and/or did not bring the judicial office into disrepute. At all times Respondent maintained high standards of conduct so as to preserve the integrity and independence of the judiciary. He respected and complied with the law and acted in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Similarly, he was always dignified, courteous and impartial to those he dealt with in a judicial capacity. Never did Respondent discriminate because of race, color, religion, age, sexual orientation, national origin, language, marital status, socioeconomic status or disability.

## SEVENTH SEPARATE DEFENSE

Contrary to the groundless assertions that Respondent has somehow undermined “public confidence” in the judiciary, Respondent has publicly brought credit and honor to the New Jersey judiciary. To wit: 1) Respondent brought credit, favor and recognition to the administration of justice and his judicial office by his flawless presiding over the List case, which was covered nationally and internationally; 2) as result of the List case, Respondent has been profiled in the Courier News in an article entitled “The Best, Bar None”(“Colleagues Praise Judge in List Case”); 3) other newspapers noted: “List judge known for wit...[Wertheimer’s] wit in the Courtroom helps put [criminal] defendants and juries at ease and he’s been known to needle lawyers and reporters” (The Daily Journal); “Joking jurist jabs justice with a wink and a smile...” (The Asbury Park Press); 4) Sheriff Ralph Froelich (at one point the Malcolm defendant’s supervisor) has noted, “People here from secretaries to my men to the attorneys like him and respect him;” 5) a letter was written to the Sunday Star Ledger stating: “I wish we could ‘clone’ Superior Court Judge William Wertheimer ... and put (him) in every court of the country;” and 6) he has mentored and nurtured judges in his vicinage at the request of assignment judges, was a founding and charter member of the Richard J. Hughes Inn of Court, wherein new attorneys are educated to the practicalities of the practice of law, and he has been requested to speak to various bar associations and civic groups.

## EIGHTH SEPARATE DEFENSE

Respondent was not required to recuse himself from the Malcolm matter under R. 1:12-1 or Canon of Judicial Conduct 3C(1).

#### **NINTH SEPARATE DEFENSE**

No matter underlying the claims in the Amended Formal Complaint resulted in a reversal or remand or action on appeal.

#### **TENTH SEPARATE DEFENSE**

Count II of the Amended Formal Complaint should be dismissed due to the principles of claim preclusion, issue preclusion and/or the entire controversy doctrine.

#### **ELEVENTH SEPARATE DEFENSE**

The claims in the Amended Formal Complaint cannot be proved by clear and convincing evidence and/or beyond a reasonable doubt.

#### **TWELFTH SEPARATE DEFENSE**

Count II of the Amended Formal Complaint is barred by the equitable doctrines of laches, estoppel and/or waiver.

#### **THIRTEENTH SEPARATE DEFENSE**

Trial judges must be extended the deference to use their discretion unless such would undermine the interests of justice, and at no time did Respondent undermine the interest of justice or abuse his discretion.

#### **FOURTEENTH SEPARATE DEFENSE**

The allegations in the Amended Formal Complaint do not demonstrate a pattern of conduct that calls into question his judgment or judicial abilities.

#### **FIFTEENTH SEPARATE DEFENSE**

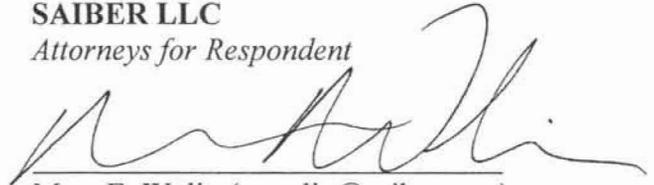
Respondent has not engaged in similar alleged misconduct in the past nor has he shown the propensity that he will do so in the future.

**SIXTEENTH SEPARATE DEFENSE**

Respondent reserves the right to raise additional separate defenses as warranted.

Respectfully submitted,

**SAIBER LLC**  
*Attorneys for Respondent*

A handwritten signature in black ink, appearing to read "Marc E. Wolin", written over a horizontal line.

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