ARTHUR J. GIACALONE
Attorney At Law
140 Knox Road
East Aurora, New York 14052
Telephone: (716) 687-1902 Email: ArtG2012@verizon.net

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Here are eight examples of conduct on the part of the Hon. John A. Michalek, State Supreme Court Justice, Erie County, in his capacity as presiding judge in *Affinity Elmwood Gateway Properties LLC v. AJC Properties LLC, et al.* (Index No. 2011-3883) (Sup. Ct., Erie Co,), which, in my opinion, are unacceptable if we, as New Yorkers, expect courtesy, an open mind, and, at a minimum, the appearance of impartiality from our judges:

Example 1. Justice Michalek's angry, intimidating outburst on "Day 7" of trial - March 25, 2014.

A non-jury trial in the *Affinity* action commenced on March 17, 2014. Plaintiff's counsel, Dennis C. Vacco, Esq., and Brendan H. Little, Esq., of the Buffalo, New York law firm of Lippes Mathias Wexler Friedman LLP (the "Lippes firm"), were still presenting plaintiff's case on the seventh day of trial, March 25, 2014. Plaintiff had subpoenaed and placed on the stand six of my clients between March 20th and 25th. Ten days prior to the commencement of trial, on March 7, 2014, Justice Michalek had granted plaintiff's motion *in limine* and ruled that the defendants would be precluded from offering evidence at trial "that they lacked or did not have knowledge of the restrictive covenants." However, the Court's oral decision recognized the limitations of that ruling, expressly stating that its granting of the motion "does not necessarily affect any other lines of inquiry which may be made in this area," and that "must await the posing of those specific questions."

My clients and I respected the Court's ruling throughout the trial, and never once did any of the defendants testify that he or she did not have knowledge of the restrictive covenants at the time he or she purchased their respective properties (although, in fact, they lacked actual knowledge of the restrictions). Defendant ABC, the sixth and final client of mine to be called to the stand by plaintiff's counsel, testified on March 25th. Earlier in the trial, at least two of her co-defendants, when responding to questions asked by plaintiff's attorney, testified that they were not aware that they had the right to challenge violations of the covenants. At no time had plaintiff's counsel objected to such testimony or asked that such testimony be stricken from the record as violative of the Court's March 7, 2014 ruling. The distinction between knowledge of the restrictive covenants themselves, and knowledge of the power to challenge violations of the covenants on someone else's property, appeared to be recognized by all participants, including the Court.

During plaintiff's direct examination of Ms. ABC, she was asked by opposing counsel Brendan H. Little, Esq., whether she had participated as a petitioner in a 2006 lawsuit which had challenged a prior project proposed by another developer on a portion of the properties now owned by plaintiff Affinity. When Ms. ABC answered affirmatively, she was then asked

whether the 2006 lawsuit included a cause of action based on the restrictive covenants, and the witness responded in the negative. Subsequently, during my cross-examination of my own client, I asked Ms. ABC the following question:

> *In April of 2006 were you aware that you had the ability to challenge commercial activity on Elmwood Avenue?*

Mr. Little immediately stood up and objected to my question. This objection by Mr. Little, on the seventh day of trial, was the first time opposing counsel had objected to a question or testimony based on the Court's 03/07/14 decision precluding defendants from offering evidence at trial that they lacked knowledge of the restrictive covenants. The Court did not bother to wait for Mr. Little to identify how my question violated the 03/07/14 ruling before launching into a two- to three-minute outburst aimed at me, refusing to allow me to seek clarification on how his question was impermissible under the Court's earlier ruling.

The Court's outburst was so sudden, prolonged and disturbing that Ms. ABC, believing she must have done something terribly wrong, left the stand trembling and apologizing for having made the Judge angry, and ran out of the courtroom sobbing hysterically. Another defendant, EFG, found Justice Michalek's words and tone so inappropriate that she walked out of the courtroom at its conclusion. EFG subsequently advised me that Justice Michalek was "red-faced and sputtering" throughout what she described as a rant or tirade. One member of the court staff told me shortly after thereafter that while Justice Michalek was known to be "impatient" in the courtroom, several of the court personnel present during the Court's words to me were "cringing" as he spoke out.

The following excerpt is taken verbatim from the court reporter's certified transcript [except for any name changes]. Please note that despite its accuracy, the words on the page fail to capture the intensity of Justice Michalek's emotion and tone:

Excerpt from March 25, 2014 Trial

CROSS-EXAMINATION OF DEFENDANT EVELYN BENCINICH

BY MR. GIACALONE:

Q. Good afternoon.

A. Good Afternoon.

Q. Miss ABC, you testified regarding an April 2006 lawsuit that involved XYZ, is that correct?

A. Yes.

Q. Is that the lawsuit challenging the proposed Savarino hotel project?

A. Yes.

Q. Why did you choose to join in the Savarino lawsuit?

A. Well, we're opposing a 90-room hotel. The zoning law said no hotels and – let me think. Could you rephrase it, again. Like – I'm sorry.

Q. Why did you join in the lawsuit in April of 2006?

A. Because I was opposed to the project. I thought it was too large for the fingerprint, and the zoning of Buffalo said that no hotels were allowed and we had an argument that we could build on.

Q. In April of 2006 were you aware that you had the ability to challenge commercial activity on Elmwood Avenue?

MR. LITTLE: Objection.

THE WITNESS: No. I did not.

MR. LITTLE: Objection, Judge. This is – we've had a pretrial ruling that the witnesses are precluded from --

THE COURT: Yeah, it's of no – it's of no moment.

MR. GIACALONE: I never asked –

THE COURT: It's of no moment.

MR. GIACALONE: I'm not sure –

THE COURT: It doesn't matter if she knew or didn't know at the time because it's of no moment to this lawsuit whether she knew or didn't know. Again, it's the law. I know you're looking for all these pragmatic effects, but it's the law. Okay. It's of no moment. It doesn't matter whether she knew or didn't know then, now, yesterday. It's completely irrelevant. Don't look at me like that. You know it's the law. You can't undo it. You can't – you can't blame the Court. It's the law.

MR. GIACALONE: No, you're –

THE COURT: So move along.

MR. GIACALONE: I can't ask for a clarification?

THE COURT: I just gave you a ruling. It's not a debate. You keep thinking there's some dialogue between you and me. You keep thinking it's some dialogue between you and me and you get to comment, editorialize on what I'm saying. We're done with that. He's right. His ruling – my ruling is sustained and that's the end of that. You don't – I get this look from you like, gee, how can I rule against – how can I rule against Mr. Giacalone. How can I –

MR. GIACALONE: Your honor –

THE COURT: How can I do that. I've done it. Okay. Any other lawyer who practices –

MR. GIACALONE: I want –

THE COURT: Quiet. I'm talking now. Do you ever get this at all. You talk under – when other lawyers are talking, you undercut them and you undercut me. And you don't think that's disrespectful or rude to the highest degree? You say, oh, yes, you do, but you do it again and again. I'm talking now. You be quiet. I can't understand – I wish the record could get this because I wish any appeal could see this,[1] the way you undercut other lawyers and you undercut the Court. You talk while the Court's talking, implying that somehow I can't possibly understand what you're saying, otherwise I would never rule against you. Well, I'm sorry, I have, I've done. Be a competent enough lawyer to understand that you lost this ruling and to move along to the next question. We are done now. Move along. I don't know what the look is for, and I'll bet you five dollars you still think somehow I've erred. Well, you can think whatever you want.

MR. GIACALONE: It's not an error, your Honor.

THE COURT: You're entitled to think that.

MR. GIACALONE: I'm not – that's not – that's not what I wanted to say, your Honor.

THE COURT: I don't care what you want to say. You're not saying anything. You have to ask another question now. Thank you.

MR. GIACALONE: Thank you, your Honor. Miss ABC, when you bought your property in 1989, was the twenty-five foot setback complied with?

THE WITNESS: Yes.

[1] It is unclear why Justice Michalek is referring to an appeal here. Perhaps he is upset that on January 3, 2014 the Appellate Division, Fourth Department, concluding that the record contained "no evidence" to support Justice Michalek's action, ruled unanimously that the lower court had "abused its discretion" when it issued a protective order pursuant to CPLR 3103(a) precluding me from communicating with Kaleida Health, a non-party health care provider, concerning the subject matter of the *Affinity* lawsuit. See *Affinity Elmwood v. AJC Properties*, 113 AD3d 1094 (AD4 2014).

MR. GIACALONE: No further question.[2]

THE COURT: Redirect.

MR. LITLE: No redirect, Judge.

THE COURT: Ma'am, thank you very much. You're excused.

THE WITNESS: I'm sorry if I made you mad, judge.

THE COURT: You didn't make me mad at all. Next.

Example 2: Justice Michalek's demeaning insistence on "Day 5" of trial – March 21, 2014 – that Attorney Giacalone's argument could only be made by a "layperson," not a lawyer.

The above-quoted occurrence on March 25, 2014 was not the first time Justice Michalek's words and demeanor during trial struck me as inappropriate. On the fifth day of trial, March 21, 2014, plaintiff called Barbara Campagna, an architect and historian, to the stand as an expert to address the historical development of Elmwood Avenue in the vicinity of the Affinity Property. Her testimony during direct examination by opposing counsel Dennis C. Vacco, Esq., appeared to confirm defendants' position that, unlike the structures on the parcels owned by Affinity, which were constructed in the early 20th century as residential buildings (in compliance with the "construction covenant"), many of the properties directly across the street from the Affinity parcels (none of which has a restrictive covenant) were constructed during the same timeframe as commercial buildings.

Defendants had expressed the position throughout the *Affinity* action that the small boutique-style retail shops occupying portions of three or four of plaintiff's eleven properties have never had the substantial adverse impacts on their nearby residences that commercial buildings would have. While the "use covenant" had been violated in some of the Affinity parcels over the years, the more significant and permanent "construction covenant" had not. Defendants' argument dovetailed with the principle expressed by several appellate courts, including the 4th Department, and that was expressly acknowledged by Justice Michalek in the Court's 2/10/14 decision denying plaintiff's summary judgment motion, that property owners "are entitled to ignore inoffensive violations of the restrictions without forfeiting their right to restrain others which they find offensive."

It was my intention, through cross-examination of Ms. Campagna, to demonstrate that the covenants have had, and continue to have, the beneficial effect of deterring the construction of commercial buildings adjacent to their properties. To that end, I sought to obtain from

[2] I was so stunned and shell-shocked by the Court's 2 to 3 minute outburst that I was only able to ask one question of my client following Justice Michalek's command that I "ask another question now." I had planned a much more extensive cross-examination of Ms. ABC.

plaintiff's expert additional details regarding the development history of the five or six parcels directly across Elmwood Avenue from Affinity's properties. During my cross-examination, Mr. Vacco objected to my questioning, not because it was an improper line of inquiry during cross-examination, but because he wanted to place another expert on the stand that afternoon.[3] In response, not satisfied with merely addressing Mr. Vacco's "objection," Justice Michalek launched into a denigrating critique of defendants' legal theory, saying, in effect, that only a layperson would make the arguments that I was asserting on behalf of my clients:

> *.. So what I'm saying is that I don't know where your argument goes legally whether the restrictive covenants are preventing those buildings from going commercial. That's not a very good argument…*
>
> *…*
>
> *That's an argument, but how far does it go. I mean, does it go to – a layperson I could see thinking that. That you can parse. You can't parse, as far as a legal argument goes, you're wandering into pragmatics into what a layperson versus legal…That's – no, no, that's not a legal concept, Mr. – and you keep wandering into laypeople concept. God bless. If I was a layperson, I'd feel that way. But that argument, I can see where it's coming from a layperson … but that's not a legal argument. At least as far as I can see.*
>
> *…*
>
> *… From a layperson I understand it, but not from a legal situation as far as restrictive covenant, okay, and what it is… So, again, that's why we don't impute to restrictive covenants – and you know the law, Mr. Giacalone, to say – to know that we don't do that.*

It was very upsetting for my clients to sit in a courtroom and hear Justice Michalek belittle their attorney and his efforts to protect their interests. It was also disturbing for my clients to hear the Court insisting, in effect, that their lawyer knew better than to raise such issues. In fact, despite my conscientious efforts to research and analyze pertinent precedent, I do not "know" what interpretation of "the law" Justice Michalek was referring to on March 21st. To the contrary, given the knowledge I have of pertinent case law regarding the interpretation, enforcement and extinguishment of restrictive covenants, it appears that the Court failed to maintain the "open mind in considering issues" that is a critical aspect of the definition of "impartiality" found at 22 NYCRR 100.0(R).

While Justice Michalek's words on March 21, 2014 were upsetting and disturbing to my clients, they were not surprising. The Court had engaged in a similarly demeaning (and, from my perspective, inappropriately close-minded) scolding of their lawyer during oral argument at Special Term six or seven weeks earlier.

<u>Example 3</u>: Justice Michalek's angry command on 2/5/14 that Attorney Giacalone not mention a 4th Dept. holding – regarding "partial extinguishment" – followed by a gratuitous comment that Attorney Giacalone lacked the "eloquence" to change the Court's mind.

[3] Had Mr. Vacco merely expressed that concern to me, I would have gladly accommodated his needs, and resumed cross-examination of Ms. Campagna at a subsequent time.

On February 5, 2014, Justice Michalek heard oral argument for and against plaintiff's summary judgment motion (which had been filed by opposing counsel in August 2013). During oral argument, I made reference to a legal principle that defendants had raised in a number of circumstances throughout the course of the litigation, that is, the Appellate Division, Fourth Department's holding in Nature Conservancy v. Congel, 296 AD2d 840 (AD4 2002), that a court does not possess the authority to "partially extinguish" restrictive covenants. More specifically, the Fourth Department stated the following:

> *... Initially, we note that the court was without authority to direct the partial extinguishment of the restrictive covenant. RPAPL 1951(2) does not expressly provide for such partial extinguishment, nor is there any case law interpreting that section so as to permit partial extinguishment.*

The issue was of direct pertinence to the summary judgment motion given the fact that plaintiff was requesting "partial extinguishment" of the restrictive covenants, that is, extinguishing the restrictions on the property owned by Affinity, but not on the parcels owned by my clients or the other named defendants. I do not believe that Justice Michalek had previously ruled expressly on the merits of defendants' "no partial extinguishment" defense. The Court, however, had referenced, during previous oral argument sessions, two Fourth Department cases raised by plaintiff (which had preceded the Nature Conservancy ruling by two and three decades, respectively) where partial extinguishment had been granted.[4] In response, defendants have argued that neither of the earlier cases had addressed the "partial extinguishment" issue, noting that the Nature Conservancy case expressly mentions the absence of "any case law interpreting [RPAPL 191(2)] to permit partial extinguishment."

To the best of my recollection, the moment that I referenced the Nature Conservancy holding during oral argument on February 5, 2014, Justice Michalek angrily ordered me not to raise the "partial extinguishment" issue again, stated that the Court had already made its position clear regarding that point,[5] mentioned that he was insulted that I would argue that the Court lacked the authority to grant the requested relief,[6] and expressly ordered me not to try to change his mind. Justice Michalek then paused a moment, and stated loudly and clearly in front of my clients, opposing counsel, plaintiff's principals, etc., that I lacked the "eloquence" needed to change the Court's mind. This last comment was not made in a joking or friendly manner.

I do not have a transcript of the February 5, 2014 proceeding. However, in light of the tenor of Justice Michalek's words during the 02/05/2014 proceedings (as well as an incident that occurred a week earlier which is addressed in "Example 4" below), I sent a letter on February 6, 2014 to Justice Michalek and Mr. Vacco which, among other things, recounts what I observed during oral argument the prior day.

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[4] See, *Bd. of Ed. v. Doe*, 88 AD2d 108 (AD4 1982); *Uvanni v. CMB Builders*, 41 AD2d 1019 (AD4 1973).

[5] I do not know when it is that Justice Michalek believes the Court made its position clear on this important issue.

[6] Justice Michalek appeared to treat the legal principle that I was expressing as originating from me, not the Fourth Department, and seemed upset that I would refer to a Fourth Department holding as "binding authority."

<u>Example 4</u>: The sharp contrast in the manner in which Justice Michalek handled "interruptions" by Attorney Vacco and by Attorney Giacalone.

My clients have observed what they perceive as two very different standards when it comes to Justice Michalek's response when one attorney speaks while opposing counsel is speaking at the podium during Special Term proceedings.

January 31, 2014 was the return date for plaintiff's so-called "*nunc pro tunc*" motion, having been started by way of an Order to Show Cause ["OSC"] granted by Justice Michalek on January 28, 2014. During oral argument in support of the motion, in an apparent attempt to justify plaintiff's use of an OSC on January 28, 2014, Mr. Vacco insisted that I had "demanded" on 01/27/14 that the Lippes firm obtain the signature of counsel for another defendant [attorney "Land Use Expert"] before I would sign a proposed stipulation that would have eliminated the need for the pending motion. When it was my turn at the podium, I advised the Court that Mr. Vacco's claim was not accurate, and read to the Court the words in my 01/27/14 email to Mr. Vacco and his paralegal, Stephanie Canastraro, that were being mischaracterized by plaintiff's counsel:

> *Stephanie,*
> *I will not be able to get to this task until tomorrow at the earliest. I would suggest that you start with* [attorney "Land Use Expert"] *so that you don't lose any time.*
> *Thanks.*
> *Art Giacalone*

Justice Michalek did not respond in any ostensible fashion to my reading of the above statement. However, Mr. Vacco did. While I was still standing at the podium facing Justice Michalek to continue my argument, Mr. Vacco rose from his chair, approached my back and shouted in a threatening tone, "*Are you calling me a liar?"* Mr. Vacco continued speaking in a loud and agitated voice, accusing me of somehow engaging in unprofessional conduct. Justice Michalek remained silent during Mr. Vacco's interruption of my oral argument. At no time did the Court expressly advise Mr. Vacco that he was acting inappropriately, although Justice Michalek eventually reminded both me and Mr. Vacco that we would have to act civilly in front of a jury in the upcoming trial.

Less than a week later, on February 5, 2014, in addition to the "partial extinguishment" scolding that is described *supra*, my clients observed the following: During rebuttal, Mr. Vacco stood at the podium and referenced a lawsuit that I had brought to challenge a prior project proposed for the same site as Affinity's properties at the southeast corner of Elmwood and Forest avenues. Mr. Vacco incorrectly stated the year of that litigation. While sitting next to the podium, I stated out loud in a conversational tone the correct year. Mr. Vacco did not react, but Justice Michalek immediately and sternly chastised me for speaking while it was opposing counsel's time to speak.

<u>Example 5</u>: Attorney Vacco's Nov. 26, 2013 *ex parte* communication with Justice Michalek's chambers requesting adjournment of a court-ordered motion date – and

Justice Michalek's vindictive response to Attorney Giacalone's written correspondence regarding the adjournment.

Many questionable actions occurred beyond the sight of my clients which, in my mind, raise serious questions regarding the propriety of Justice Michalek's handling of the *Affinity* action. One such incident revolves around an *ex parte* communication apparently initiated by Dennis Vacco on November 26, 2013.[7] I must first provide some background information to provide the Commission with the proper context.

Despite multiple extensions of the deadline for completing discovery, Justice Michalek steadfastly insisted that the Court would not change the date set in its July 24, 2012 amended discovery and trial scheduling order for the commencement of trial – *October 15, 2013*. Consistent with that position, Justice Michalek refused my request on May 3, 2013 for an adjournment based on the six to twelve months my orthopedic surgeon advised me that I would need for recovery and rehabilitation following extensive rotator cuff/bicep surgery scheduled for May 10, 2013. In denying the request, Justice Michalek assured me that, "You'll be fine." [Note: Given how badly I had injured my shoulder in a March 2013 accident, I had no choice but to proceed with the scheduled surgery.] Subsequently, in response to defendants' filing of a motion on September 4, 2013 seeking dismissal of plaintiff's action for failure to name all necessary parties, opposing counsel requested an adjournment of both its pending summary judgment motion (scheduled to be argued on September 12, 2103) and the October 15, 2013 trial-commencement date, to allow plaintiff time to serve its Fourth Amended Complaint and conduct any necessary discovery. Justice Michalek did not hesitate to grant the requested adjournments. At a September 13, 2013 scheduling conference, it was mutually agreed to by the Court and counsel that oral argument on plaintiff's summary judgment motion and defendants' motion to dismiss would take place on December 19, 2013, that plaintiff would serve its reply papers by 12/05/13, defendants would serve their sur-reply papers by 12/12/13, plaintiff's "last word" would be served by 12/17/13, and trial, if needed following the Court's summary judgment motion, would take place in March or April 2014. On September 17, 2013, Justice Michalek issued an amended trial scheduling order that set "on a **date certain basis**" [emphasis in the original] December 19, 2013 as the date for oral argument of the summary judgment motion, March 13, 2014 as the date to select a jury, and March 17, 2014 as the new trial date.

Unbeknownst to me, and according to a December 19, 2013 letter written by Brendan H. Little, Esq., of the Lippes firm, Mr. Vacco called Justice Michalek's chambers on November 26, 2013 to request an adjournment of the December 19, 2013 date for oral argument of the pending motions. This is how Mr. Little describes what occurred:

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[7] Please note that I am well aware of the exception to the prohibition against "ex parte communications" for "scheduling or administrative purposes" found at 22 NYCRR 100.3(B)(6)(a). That exception only applies, however, when the communications "do not affect a substantial right of any party, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond." It is my opinion that in both circumstances in the *Affinity* lawsuit where I have complained of ex parte communications, substantial rights of my clients or their counsel have been affected, the opposing party and/or their counsel have gained a procedural or tactical advantage, and I have not had an opportunity to respond in a timely fashion.

> *… On November 26, 2013, the partner coordinating this file, Dennis C. Vacco, Esq., left a voicemail message with Judge Michalek's assistant requesting an adjournment of the oral argument on December 19, 2013. Mr. Vacco requested the adjournment because he had a conflict and could not be present for oral argument on December 19, 2013. Mr. Vacco was later advised by Judge Michalek's chambers that oral argument could be adjourned to January 16, 2014 or January 30, 2014. Thereafter, a letter was sent to Judge Michalek and Mr. Giacalone confirming the adjournment to January 16, 2014…*

I did not learn of the requested adjournment or plaintiff's unilateral choice of January 16, 2014 as the new date for oral argument until the afternoon of December 4th when I received in the mail a copy of Mr. Little's confirmation letter to the Court. [Mr. Little had not mentioned the 11/26/13 request for an adjournment to me on December 2nd, when I spent four hours at the Lippes firm's office to allow Mr. Little to depose one of the newly-added defendants, or when we spoke at the Appellate Division, Fourth Department, on the morning of December 4th prior to our arguing of two appeals in the *Affinity* action.]

In addition to confirming the January 16, 2014 oral argument date, Mr. Little's December 3, 2013 letter to Justice Michalek also states that January 2, 2014 would be the due date for plaintiff's reply to defendants' September 5, 2013 opposing papers, January 9, 2014 would be the due date for defendants' "sur-reply" papers, and plaintiff's "final submission" would be due on or before January 14, 2014. Upon reviewing Mr. Little's letter, I sent an email to Mr. Little, with a "cc" to Confidential Law Clerk ESQ, asking why he had not contacted me ahead of time to discuss plaintiff's desire to adjourn argument of the summary judgment motion. I also advised Mr. Little that the delay would force defendants to simultaneously incur, for an additional month, the expense and burden of preparing for trial while awaiting the Court's decision on whether or not there would a trial in mid-March. When I had not received a response from Mr. Little for over a week, I emailed a message to him on December 12, 2013 telling him that I was awaiting his reply to my December 4th email. Mr. Little emailed me later that morning and provided the following explanation for his firm's failure to include me in the communications with the Court concerning an adjournment of the 12/29/13 oral argument:

> *Art, I will remind you that the adjourned motion is the Plaintiff's motion and we had a conflict with that required a date change.*
>
> …

Mr. Little's December 12, 2013 email message makes no mention of Mr. Vacco's initiation of the *ex parte* communication, or the fact that that contact with the Court had occurred on November 26, 2013.

Given the inadequacy of Mr. Little's explanation, on December 12, 2013, I sent a letter to Justice Michalek regarding the unilateral adjournment of the scheduled oral argument which included the following:

...

I am sorry to have to burden the Court with this correspondence. And I clearly acknowledge the Court's authority to alter its schedule. However, I am finding it difficult to explain to my clients (or, myself) how a September 17, 2013 trial scheduling order that set "on a ***date certain basis*** *" December 19, 2013 as the date for oral argument on plaintiff's summary judgment motion, was effectively amended without opposing counsel or the Court providing me an opportunity to be heard.*

...

The new date for plaintiff's service of its reply papers, January 2, 2014, will significantly prejudice my ability to effectively prepare a sur-reply. I respectfully request, in light of plaintiff's unilateral disturbance of the schedule agreed to on September 13th, that defendants be given until 01/14/2014 to serve its sur-reply, and that plaintiff not be allowed an opportunity to serve and file a "final submission."

By email dated December 16, 2013, Confidential Law Clerk ESQ advised me and Messrs. Vacco and Little that Justice Michalek would no longer allow defendants to submit a sur-reply. No explanation was given:

Good Morning Gentlemen,
I conferred with Judge Michalek this morning. The last papers which the Judge will accept is the moving party's Reply. The Plaintiff's Reply remains due Jan. 2, 2014. Oral argument will be held Jan. 16, 2014. I apologize to Mr. Giacalone for not contacting him prior to the Court granting the adjournment, it was granted over an assumed objection.
I hope all have pleasant Holidays.
Ms. ESQ.

Upon receipt of Ms. ESQ's emailed message, I sent the following email to her in reply:

Dear Ms. ESQ,

With all due respect, it is not an apology that defendants wish to hear. It is an explanation why:

(1) This Court chose to disregard the clear mandate of the Uniform Civil Rules for the Supreme Court, 22 NYCRR Section 202.8(e)(1), which states: "Absent agreement by the parties, a request by any party for an adjournment [of a motion] shall be submitted in writing, upon notice to the other party, to the assigned judge on or before the return date." Defendants received notice AFTER the adjournment was granted. And,

(2) At the same time plaintiff is being benefitted by an additional four weeks to prepare its reply papers (giving it four months when the CPLR envisions one week), defendants are being prejudiced in their ability to oppose a motion as significant as a summary judgment motion by disallowing a sur-reply that had been agreed to by the Court and opposing counsel at the time plaintiff requested an adjournment of its original return date.

Sincerely,
Arthur J. Giacalone

The round of communications then ended with Ms. ESQ's following response to me: "*I respectfully suggest that you take these matters up with Judge Michalek on the motion return date.*"

Consistent with the parties' expectations during the September 13, 2013 scheduling conference with the Court, plaintiff's summary judgment reply papers (which I received on January 4, 2014) raised new issues that defendants had not addressed in their September 5, 2013 opposing papers. Additionally, plaintiff's reply papers failed to provide the Court with a copy of the December 2, 2013 deposition transcript of the newly-added defendant, NEW. In light of the critical nature of the summary judgment motion, on January 9, 2014, defendants filed (with some trepidation) a motion seeking leave of the Court to file sur-reply papers (as had initially been agreed to by Justice Michalek and plaintiff) to address the new issues raised in plaintiff's reply papers, and to submit the transcript of defendant NEW's 12/02/13 deposition. The motion was returnable on the same date as the adjourned date for the summary judgment argument. Justice Michalek granted the requested leave, but, as a result of the Court's 12/16/2013 decision to disallow defendants' sur-reply, oral argument on the summary judgment motion was delayed another three weeks, to February 5, 2014, less than six weeks before the scheduled trial date.

Example 6: Justice Michalek's granting of an order extinguishing restrictive covenants on 1091 Elmwood Ave., despite the fact that plaintiff's pleadings had not requested relief concerning that property, and the Court knew that plaintiff did not own the parcel.

I have attempted not use examples of Justice Michalek's conduct involving His Honor's decisions on substantive matters. However, in my professional opinion, Justice Michalek's decision to grant opposing counsel's request for extinguishment of the restriction on 1091 Elmwood Avenue – despite the fact that such relief had not been requested in Affinity's original complaint or any of its four amended complaints, and, at the time he signed the order, the Court knew that plaintiff did not own the parcel – reflects a disturbing absence of the impartiality and integrity required of a Judge when performing his or her judicial duties. The facts are as follows:

On March 11, 2014, six days before the commencement of trial in the *Affinity* action, the Lippes firm submitted an Order to Show Cause ("OSC") to Justice Michalek requesting extinguishment of the restrictive covenant on **1095 Elmwood Avenue**, one of the eleven parcels of land owned by plaintiff. More specifically, in pertinent part, the OSC stated the following:

> *Upon the annexed affirmation of Denis C. Vacco, Esq., with exhibits, and upon all the pleadings and proceedings heretofore had herein, and sufficient cause being shown, it is hereby,*
>
> *ORDERED: that the Defendants show cause at a Special Term of this Court to be held before the Honorable John A. Michalek ... [why] an Order should not be entered*

declaring that the restrictive covenant should be extinguished ***on 1095 Elmwood Avenue****, Buffalo, New York;* [emphasis added]

...

Justice Michalek granted the OSC on March 11, 2014, made returnable on March 14, 2014 (three days prior to commencement of the non-jury trial).

Attached to the March 11, 2014 OSC was an affirmation, not by Mr. Vacco as indicated in the OSC, but by Mr. Little. Paragraph "2" of Mr. Little's March 11, 2014 affirmation states the following:

...

2. This affirmation is submitted in support of Affinity's Order to Show Cause seeking an Order of the Court declaring that the restrictive covenant has been extinguished on ***1095 Elmwood Avenue****, Buffalo, New York.* [Emphasis added.]

…

However, without an explanation or evidentiary support, the next paragraph in the Little affirmation alleges that plaintiff Affinity is the owner of both 1095 Elmwood Avenue and 1091 Elmwood Avenue:

…

3. As this Court is aware, the Plaintiff commenced this action against over 50 defendants seeking extinguishment of a restrictive covenant from the year 1892 on real ***property it owns on Elmwood Avenue*** *between Forest Ave and Bird Ave in the City of Buffalo.* ***Two of those parcels of real property are 1091 and 1095 Elmwood Avenue****, Buffalo, New York.* [Emphasis added.]

…

At its conclusion, the Little affirmation requests an order extinguishing the restrictive covenant on both 1091 and 1095 Elmwood Avenue:

...

17. Accordingly, the Plaintiff respectfully requests that the Court extinguish the 1892 restrictive covenant ***at 1091 and 1095 Elmwood Avenue****, Buffalo, New York and is contained in the deed filed in the Erie County Clerk's Office at Liber 649 and Page 749.*

WHEREFORE, the Plaintiff requests an Order of the Court ***declaring that the restrictive covenant on the parcels of land commonly known as 1091 and 1095 Elmwood*** *Avenue, Buffalo, New York and that is contained in the deed filed in the Erie County Clerk's Office at Liber 649 and Page 749* ***be extinguished*** *as a matter of law with any other and further relief this Court deems necessary and proper.* [Emphasis added.]

…

While the timing of the OSC – just days before the start of trial – was in and of itself problematic and significantly impacted my ability to prepare for the trial, Justice Michalek's

decision to grant the requested relief is even more troubling. Justice Michalek ruled from the bench at the end of oral argument on March 14, 2014, granting plaintiff's request to extinguish the restrictive covenant on both 1095 and 1091 Elmwood Avenue. The Court made no reference in his colloquy to the ownership issue, despite the fact that it was raised by me in writing and during oral argument. Then a few days later, during the first week of the trial, plaintiff submitted evidence establishing its ownership of eleven parcels of land, and confirming that it does not own 1091 Elmwood Avenue. At that point, Justice Michalek (perhaps thinking out loud) stated as an aside, in a tone that appeared to reflect surprise, that plaintiff does not own 1091 Elmwood Avenue. Despite arriving at this realization, on April 3, 2014, Justice Michalek executed the proposed Order presented to the Court by the Lippes firm, and extinguished "the 1892 restrictive covenant encumbering 1091 and 1095 Elmwood Avenue."

Example 7: An unexplained nine-day delay between Justice Michalek's February 10, 2014 signing of a memorandum decision denying plaintiff's summary judgment motion, and the February 19, 2014 filing and mailing of the decision to Mr. Giacalone by the court – a period during which plaintiff's counsel prepared and served two motions that would have been moot had summary judgment been granted.

I have no "smoking gun" to prove any wrongdoing concerning when and how opposing counsel at the Lippes firm obtained access to the Court's February 10, 2014 decision denying plaintiff's summary judgment motion. However, I also have no explanation for either the nine-day delay between the date Justice Michalek signed his Memorandum Decision and the date the decision was mailed to my office, or the two trial-related motions plaintiff's counsel prepared and filed before I even learned on February 20, 2014 that we would be proceeding to trial.

On February 10, 2014, Justice Michalek issued his Memorandum Decision denying plaintiff's summary judgment motion. February 10, 2014 is also the date on the cover letter sent by Justice Michalek's chambers to transmit the written decision to counsel. However, the Memorandum Decision was not filed by the Court staff in the Erie County Clerk's office until February 19, 2014, the date a copy of the decision was mailed to Mr. Vacco and my office. I received the Memorandum Decision, and, therefore, learned that there would in fact be a trial commencing on March 17, 2014, when it arrived in the mail on the afternoon of 02/20/2014.

Plaintiff's Notice of Motion to strike defendants' demand for trial by jury is dated February 18, 2014. March 7, 2014, the day after Justice Michalek's trial scheduling order required service of requests to charge the jury, is set as the motion's return date. On February 19th, plaintiff paid the requisite motion filing fee for both its motion to strike defendants' jury demand and a second trial-related motion, plaintiff's motion *in limine*, also returnable on March 7, 2014. Both sets of motion papers were delivered to my office late afternoon on February 19, 2014, at a time when I had yet to learn of the Court's decision regarding summary judgment.

On February 21, 2014, I sent an email to Justice Michalek's Confidential Law Clerk, Lynn A. Clarke, Esq. (with a "cc" to Dennis Vacco), and asked for confirmation that February 10, 2014 is the correct date for the Court's signing of the Memorandum Decision. Ms. Clarke emailed back and answered in the affirmative.

<u>Example 8</u>: Justice Michalek's *sua sponte* adjournment of plaintiff's motion to strike defendants' request for admissions from February 6 to Feb. 27, 2014 – a date 18 days before trial when a new request for admissions was no longer permissible under the CPLR – and the Court's refusal to reschedule.

On December 6, 2013, I served on opposing counsel a request for admissions as to the truth of a comprehensive set of facts. The request was lengthy due to plaintiff's persistent unwillingness during 2 ½-years of litigation to admit to basic, indisputable facts concerning the eleven parcels it owns, the surrounding neighborhood, applicable zoning laws, etc. Rather than contacting me to address plaintiff's objections to the request, on December 19, 2013, plaintiff's counsel served a motion asking Justice Michalek to strike Defendants' December 6, 2013 notice to admit, and to issue a protective order pursuant to CPLR §3103. Given opposing counsel's failure to contact me prior to filing the motion, the supporting papers did not contain the mandatory affirmation of good faith effort to resolve the discovery issues raised by the motion. [See 22 NYCRR 202.7(a).] Furthermore, without explanation, the motion was made returnable seven weeks ahead, February 6, 2014.

On January 9, 2014, I received a letter from Justice Michalek, dated January 8, 2014, adjourning plaintiff's motion from February 6 to February 27, 2014:

> *Due to circumstances beyond our control, this is to advise the Motion in the above captioned matter currently scheduled to be heard by the Court on February 6th [plaintiff's motion to strike defendants' notice to admit], is being adjourned and re-scheduled to* ***Thursday, February 27, 2014 at 9:30 a.m.*** *Thank you.*

Subsequently, on January 16, 2014, Justice Michalek heard oral argument on defendants' motion for leave to file sur-reply papers in opposition to plaintiff's summary judgment motion. The motion was granted, and Justice Michalek set February 6, 2014 as the date for argument of the summary judgment motion. Immediately, Mr. Vacco told the Court that he [Dennis Vacco] was unavailable on that date, and the Court then scheduled oral argument for February 5th.

During the course of oral argument on other cases on Justice Michalek's January 16, 2014 Special Term calendar, I noticed that the Court had scheduled matters for February 6, 2014, the original date of plaintiff's motion to strike defendants' notice to admit. On January 21, 2014, I sent a letter to Justice Michalek and opposing counsel, and asked the Court to reschedule plaintiff's motion to strike defendants' notice to admit to either its original return date, 02/06/14, or to 02/05/14, the date set by the Court for oral argument of the summary judgment motion:

> *... [B]y letter dated 1/8/14, the Court adjourned plaintiff's motion to strike defendants' first request for admissions from 2/6/14 to 2/27/14. As I relayed to Mr. Vacco and Mr. Little by email on January 16th, defendants are concerned that the new return date is merely two weeks prior to the scheduled date for jury selection. The proximity of the return date to the commencement of trial in this matter greatly complicates trial preparation for defendants. Furthermore, opposing counsel failed to make any effort, much less a good-faith one as required by 22 NYCRR 202.7(a)(2), to*

resolve the discovery dispute prior to filing the motion on December 19, 2013. If the Court were to deny the motion on that procedural ground, it would appear best for both parties to respond to that determination at the earliest possible date.

Based on scheduling decisions made by the Court during Special Term on January 16th, it appears that the Court is conducting Special Term on the original return date, February 6, 2014.

Defendants respectfully request that the Court reschedule plaintiff's motion to strike to either February 6, 2014 or February 5, 2014. By copy of this correspondence, I am advising opposing counsel of this request. If the motion is rescheduled, defendants will serve its opposing papers on or before the seventh day prior to the new return date.

...

On January 23, 2014, Justice Michalek sent a letter to counsel indicating that the February 27, 2014 date to argue plaintiff's motion to strike would not be rescheduled. Thereafter, on January 28, 2014, opposing counsel presented and Justice Michalek granted an Order to Show Cause concerning plaintiff's "*nunc pro tunc"* motion, and plaintiff's motion was argued before Justice Michalek on January 31, 2014. On February 5, 2014, Justice Michalek heard oral argument on plaintiff's summary judgment motion.

Pursuant to Justice Michalek's January 8th letter, oral argument on plaintiff's 12/19/2013 motion to strike defendants' request for admissions was conducted on February 27, 2014. The absence of the requisite good-faith affirmation was not acknowledged or mentioned by either opposing counsel or the Court. I advised the Court that it was now too late for defendants to take advantage of the disclosure tool meant to narrow the issues at trial, given the March 17, 2014 trial date and the requirement in CPLR 3123(a) that a request for admissions be served "not later than twenty days before the trial." Immediately following oral argument, Justice Michalek read his pre-written decision from the bench granting plaintiff's motion in its entirety. The order effectuating the Court's ruling was granted on March 25, 2014.

POST SCRIPT: As I mentioned in the introductory paragraph above, the eight examples I've just described took place during the past 12 months. I should not have been surprised by any of Justice Michalek's conduct given what I was subjected to between November 2012 and January 2013. Here's a quick synopsis:

Nov. - Dec. 2012. Justice Michalek issued and twice extended a Temporary Restraining Order against me, a TRO that, in my opinion, constituted a "prior restraint" of my First Amendment rights, despite the fact that opposing counsel from the Lippes firm never bothered to allege, much less prove, the potential for irreparable and immediate harm if the TRO was not issued, a prerequisite for such extraordinary relief.

Jan. 8, 2013. Justice Michalek wrote a Memorandum Decision in which he determined that I had violated Rule 3.6 (Trial Publicity) of the New York Rules of Professional Conduct ["RPC"], *without ever providing me with an opportunity to be heard on the issue*. Opposing counsel had not accused me of violating that provision of the RPC in its motion papers or at oral

argument, and it had not been raised in any of the court proceedings prior to issuance of the January 8, 2013 Memorandum Decision.

Jan. 8, 2013. After acknowledging in his Memorandum Decision that the court lacked the authority to grant any relief to the moving party pursuant to the provisions asserted by opposing counsel, Justice Michalek issued *on his own initiative* a discovery-related protective order *without ever providing me with an opportunity to be heard on the issue*. The "prior restraint" was entered against me under the guise of Article 31 (Disclosure) of the New York Civil Practice Law & Rules ["CPLR"] despite the fact that opposing counsel had never alleged that I had abused the discovery process, and the information opposing counsel's clients and the court were purportedly concerned about was not obtained through the discovery process. Additionally, the "support" for the order was not any tangible proof, but what the court referred to as "*the elephant in the room*," some unproven fabrication concerning my purported motives.

Note: On January 3, 2014, the Appellate Division, Fourth Department, eliminated the "prior restraint" on my freedom of speech, unanimously ruling that the lower court (that is, Justice Michalek) had "*abused its discretion*" when it precluded me from communicating with Kaleida Health concerning the subject matter of a lawsuit to which it was not a party. In the words of the appellate court:

> ...
>
> *In appeal No. 1, we agree with appellants that Supreme Court abused its discretion in precluding Giacalone from communicating with Kaleida pursuant to CPLR 3103. Plaintiff sought, inter alia, to enjoin Giacalone from communicating with Kaleida on the ground that Giacalone had violated the New York Rules of Professional Conduct (22 NYCRR 1200.0 et seq.), and the order to show cause bringing on the motion contained a temporary restraining order (TRO) enjoining Giacalone from engaging in certain conduct. By the order in appeal No. 1, the court, inter alia, denied that part of plaintiff's motion based on the alleged violation of the Rules of Professional Conduct and vacated the TRO, but the court also sua sponte granted the relief with respect to Kaleida pursuant to CPLR 3103. In pertinent part, that statute permits the court to issue "a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR 3103 [a]). Here, however, there was no evidence establishing that Giacalone had misused the discovery process. Indeed, the documents submitted in support of plaintiff's order to show cause do not mention the discovery process, nor do they contain any evidence establishing that the conduct complained of was related to any information obtained in that process. Thus, inasmuch as "plaintiff failed to show that there was anything unreasonable or improper about defendants' demands" or the use of discovery materials by defendants and Giacalone (Response Personnel, Inc. v Aschenbrenner, 77 AD3d 518, 519), and there was no indication that "the disclosure process [was] used to harass or unduly burden a party" or a witness (Barouh Eaton Allen Corp. v International Bus. Machs. Corp., 76 AD2d 873, 874; see Seaman v Wyckoff Hgts. Med. Ctr., Inc., 25 AD3d 598, 599, lv dismissed 7 NY3d 864), the court abused its discretion in precluding Giacalone from communicating with Kaleida (cf. Jones v*

Maples, 257 AD2d 53, 56- 57). We therefore modify the order by vacating the ordering paragraph in which that relief was granted. In light of our determination, we do not consider appellants' further contentions concerning preclusion.

See *Affinity Elmwood Gateway Properties LLC v. AJC Properties*, 113 AD3d 1094 (AD4 2014).