

State of New York
Commission on Judicial Conduct

In the Matter of the Proceeding Pursuant to Section 44,
subdivision 4, of the Judiciary Law in Relation to

Determination

PHILLIP G. BARKER, SR.,

a Justice of the Oppenheim Town Court, Fulton County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Jeremy Ann Brown
Stephen R. Coffey, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Juanita Bing Newton
Alan J. Pope, Esq.
Honorable Eugene W. Salisbury
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the
Commission

Michael A. Castle for Respondent

The respondent, Phillip G. Barker, Sr., a justice of the Oppenheim Town Court,
Fulton County, was served with a Formal Written Complaint dated February 3, 1997, alleging
that he mishandled a small claims case. Respondent answered the charge by letter dated
February 13, 1997.

By Order dated March 28, 1997, the Commission designated Bruno Colapietro, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 7, 1997, and the referee filed his report with the Commission on August 18, 1997.

By motion dated November 12, 1997, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion on January 16, 1998. The administrator filed a reply dated January 21, 1998. Oral argument was waived.

On January 29, 1998, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Oppenheim Town Court since 1989.
2. On May 24, 1995, respondent presided over Peter Jaikin v Dean Mosher, a small claims case in which Mr. Jaikin was seeking \$2,700 for the installation of a cellar and septic system and excavation on Mr. Mosher's property.
3. In March or April 1995, Mr. Jaikin had done grading work on respondent's property, and respondent had paid him \$125 cash. After the work had been completed, Mr. Jaikin returned to retrieve some equipment and did some additional grading without charge.
4. At the trial on May 24, 1995, respondent did not disclose to Mr. Mosher that Mr. Jaikin had performed work on respondent's property a month or two earlier.

5. Mr. Jaikin and Mr. Mosher discussed the merits of the claim, but respondent did not swear them as witnesses, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.10(j).

6. After the trial, Mr. Mosher retained an attorney, Michael M. Albanese. Mr. Albanese called respondent by telephone and pointed out that the witnesses had not been sworn.

7. Respondent checked with the Office of Court Administration and was told that the witnesses in small claims cases must be sworn. Nonetheless, he did not re-try the case and issued a decision on July 10, 1995, based on unsworn evidence. The decision awarded Mr. Jaikin \$2,508.69.

8. Paragraphs 4(c), 4(d) and 4(e) of the Formal Written Complaint are not sustained and are, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1)¹ and 100.3(c)(1)², and Canons 1, 2A, 3A(1) and 3C(1) of the Code of Judicial Conduct. Paragraphs 4(a), 4(b) and 4(f) of Charge I of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Paragraphs 4(c), 4(d) and 4(e) of Charge I are dismissed.

Inasmuch as respondent had recently engaged in a business transaction with the plaintiff similar to that at issue in the case before him, his impartiality in Jaikin v Mosher might

¹ Now Section 100.3(B)(1)

² Now Section 100.3(E)(1)

reasonably be questioned. (See, Rules Governing Judicial Conduct, 22 NYCRR 100.3[E][1] [formerly Section 100.3[c][1]]). Although his disqualification was not mandatory, he should have disclosed the prior business association and should have considered any objections to his presiding. (See, Matter of Cerbone, 1997 Ann Report of NY Commn on Jud Conduct, at 83, 85).

Respondent failed to follow the law by ignoring a legal requirement that he swear witnesses in small claims proceedings. (See, Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.10[j]). He elevated this legal error to judicial misconduct by failing to re-try the matter once he learned of his error.

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

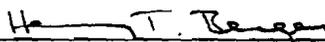
Mr. Berger, Ms. Brown, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Mr. Coffey was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: March 17, 1998


Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct