STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

JOHN G. CONNOR,

a Justice of the Supreme Court, 3rd Judicial
District, Columbia County.

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THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Raoul Lionel Felder, Esq.[1]
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

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

Tobin and Dempf LLP (By Kevin A. Luibrand) for Respondent

[1] Mr. Felder was appointed to the Commission on August 25, 2003. The vote in this matter was taken on May 21, 2003.

The respondent, John G. Connor, a Justice of the Supreme Court, 3rd Judicial District, Columbia County, was served with a Formal Written Complaint dated March 4, 2002, containing two charges. Respondent filed an answer dated March 25, 2002.

On May 21, 2003, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts, agreeing that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On May 21, 2003, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Supreme Court since 1982. Respondent, who is over the age of 70, is currently serving as a certificated justice through 2003.

As to Charge I of the Formal Written Complaint:

2. The case of *Cooney v. Cooney* was initially assigned to Columbia County Court Judge John Leaman. On December 1, 2000, Judge Leaman informed the attorneys that he was recusing himself because the plaintiff's attorney, John Clark, had recently been hired as Judge Leaman's confidential law assistant. Mr. Clark had also notified respondent that he was hired by Judge Leaman and that his employment would begin on December 21, 2000.

3. After respondent's assignment to the *Cooney* case, he presided over a one-day trial on December 5, 2000. By a previous Family Court order, the defendant, James Cooney, had been granted residential custody of the couple's young daughter who had resided with Mr. Cooney for approximately two years.

4. Shortly after the conclusion of the *Cooney* trial, respondent met with his law clerk and instructed him to order a transcript of the trial and prepare a letter directing the parties to submit proposed findings of fact. On December 11, 2000, respondent sent a letter to the parties' attorneys requesting proposed findings of fact and conclusions of law within 60 days of the date of the letter. Ten days later, on December 21, 2000, without having received any post-trial submissions, respondent issued his decision. The parties' attorneys had intended to submit proposed findings and conclusions as requested by respondent.

5. Respondent's decision of December 21, 2000, granted the divorce to Mrs. Cooney and granted her sole legal and residential custody of the couple's daughter. Respondent adopted and made part of his decision the law guardian's recommendations, which had not been furnished to the attorneys. Respondent had specifically directed the law guardian to submit his report to the court *ex parte*.

6. Respondent maintains a general policy that requires law guardian reports to be submitted to him *ex parte* to first ascertain whether the report contains sensitive material. After a review of the law guardian report, respondent decides if it should be revealed to the parties.

7. Respondent's decision in *Cooney* was issued the same day that the plaintiff's attorney, Mr. Clark, became employed as Judge Leaman's confidential law assistant. Respondent's failure to provide the parties with a fair opportunity to be heard is compounded by keeping the report from the parties by instructing the law guardian to submit the report *ex parte* and then relying on the report in his decision.

As to Charge II of the Formal Written Complaint:

8. In November 1999, Bethene Lindstedt-Simmons, the attorney for Bettina Broer, brought a motion for summary judgment that her client should be granted a divorce from William Hellerman, based upon a separation agreement the parties had entered into a year before; the motion also requested a judgment of arrears in child support and maintenance. Respondent issued a decision on July 5, 2000, denying summary judgment for the divorce and directing Mr. Hellerman to pay half of the children's medical expenses and temporary support of less than half of what had been agreed to in the separation agreement. Respondent's decision did not address the issue of arrears or maintenance.

9. A hearing was set for August 17, 2000, on all of the issues with respect to Ms. Broer's application to move with the children to Hawaii. Ms. Broer, who had been residing with the children on the island of Nantucket by agreement of the parties, was required to move from the residence she had been living in rent-free. On August 17, 2000, Ms. Broer, her fiancé and her children, who had traveled from Nantucket, the parties' attorneys and the law guardian were all present at the courthouse

in expectation of a hearing.

10. An order to show cause was signed by Judge George Cobb returnable on August 17, 2000, to determine a motion on where the children could be moved. Respondent did not hold a hearing on August 17, 2000, although all of the parties were present and ready to proceed, but held a conference in chambers with the attorneys and the law guardian, John Clark. Ms. Lindstedt-Simmons discussed her client's urgent need to relocate because the children were not enrolled in the costly private school in Nantucket and her client was required to move from the home she had been living in rent-free. Either Ms. Lindstedt-Simmons or Mr. Clark broached the subject of an alternative move to Florida because Mr. Hellerman objected to moving the children to Hawaii; the law guardian supported the move to either Hawaii or Florida.

11. During the conference on August 17, 2000, Ms. Lindstedt-Simmons stressed the importance for respondent to decide the matter before school began on September 1, 2000. At the conference, there was a discussion among the parties' attorneys, the law guardian and respondent regarding a move by Ms. Broer and the children to a location other than Hawaii. Florida was proposed as an alternative and the parties were going to explore that as a possibility. Respondent said he would allow a move to someplace reasonable. Respondent made no decision at the August 17, 2000 conference nor were any orders issued permitting Ms. Broer to move to Florida.

12. Respondent set August 23, 2000, as the date for the filing of any supplemental papers. On August 23, 2000, respondent's law clerk extended the time for

Mr. Hellerman's attorney to submit his supplemental papers. This extension was given without any consent or notice to Ms. Broer's attorney, who filed timely supplemental papers. By cover letter attached to her supplemental papers, Ms. Lindstedt-Simmons specifically requested an expeditious decision because the children were required to be in school by September 1, 2000.

13. Respondent did not issue his decision until September 18, 2000, at which time he denied a move to either Hawaii or Florida and also denied that part of Ms. Broer's motion to find Mr. Hellerman in violation of respondent's July 2000 order of support.

14. The law guardian submitted his report on August 23, 2000, *ex parte*, with the request that respondent keep the report confidential. While respondent did not instruct the law guardian to submit his report *ex parte*, respondent did consider the report in making his decision of September 18, 2000, and did not distribute the report to the attorneys.

15. Thereafter, Ms. Broer retained new counsel, Jason Shaw, who, prior to making a formal appearance in the case, stopped at respondent's chambers on December 20, 2000, and informed respondent that Ms. Broer had made a complaint about respondent to the Commission. Respondent asked Mr. Shaw, who had not seen the complaint, to find out more about it and to "get back" to him regarding the nature of the complaint.

16. In February 2001, respondent held a conference in *Broer v.*

Hellerman. Respondent did not disclose his earlier meeting with Mr. Shaw to the parties' attorneys or offer to disqualify himself because he did not consider that there was anything improper about Mr. Shaw's December 20, 2000, visit.

17. Thereafter, Mr. Shaw filed a motion to compel Mr. Hellerman to appear for a deposition and for summary judgment. Mr. Hellerman's attorney cross-moved to quash a subpoena Mr. Shaw had issued to Mr. Hellerman's previous attorney and to disqualify Mr. Shaw from representing Ms. Broer. It was alleged that Mr. Hellerman had discussed his matrimonial matters with Mr. Shaw's law partner and that Mr. Shaw should therefore be disqualified.

18. On May 25, 2001, respondent disqualified himself from *Broer v. Hellerman* on the spurious basis that Mr. Shaw's visit to inform him of Ms. Broer's complaint five months earlier had prompted the disqualification. The decision stated that although respondent did not wish "to reward Plaintiff or her counsel's actions by succumbing to their request for recusal," in light of Mr. Shaw's "requests," respondent had no choice but to recuse himself.

19. Although respondent's decision states that Mr. Shaw had requested respondent's disqualification, Mr. Shaw did not, in fact, request that respondent disqualify himself.

20. From Mr. Shaw's initial contact with respondent on December 20, 2000, until respondent's decision on May 25, 2001, respondent did not consider his communication with Mr. Shaw to be an improper *ex parte* contact. As of May 25, 2001,

respondent did not have any actual knowledge as to whether Ms. Broer had, in fact, made a complaint against him to the Commission. Additionally, respondent was aware that the mere fact that a litigant filed a complaint with the Commission is not a basis for a judge's recusal.

21. If respondent genuinely believed that the *ex parte* comments by Mr. Shaw should lead to respondent's recusal, it was improper for respondent to wait five months before doing so. The evidence establishes that the disqualification was based on spurious grounds.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Section 100.3(B)(6) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

A judge is required to provide all legally interested persons the right to be heard and is prohibited from engaging in *ex parte* communications outside the presence of the parties or their lawyers (Section 100.3[B][6] of the Rules Governing Judicial Conduct). Respondent violated this standard in the *Cooney* and *Broer* cases by considering the law guardians' reports in rendering his decisions without furnishing the report to the parties. A law guardian is not a member of the judge's staff, but independent legal counsel for the child. It follows that a judge should not have private

communications with a law guardian to which the parties and their attorneys are not privy. *See* Adv Op 95-29 of the Advisory Committee on Judicial Ethics; Standard B-7 of the NYSBA Law Guardian Representation Standards.

In the *Cooney* case, respondent specifically directed the law guardian to submit his report *ex parte*, consistent with respondent's general policy of requiring a report to be filed *ex parte* to permit respondent to ascertain whether it contains "sensitive material" before deciding whether to provide it to the parties. However well-intentioned, withholding a law guardian's report from the parties is inconsistent with due process and deprives the parties of the opportunity to address the law guardian's recommendations.

In *Cooney*, respondent further deprived the parties of an opportunity to be heard by issuing his decision 10 days after he had accorded the attorneys 60 days for post-trial submissions and without having received any submissions from them. Respondent's conduct in that regard compounds the impropriety of relying on the law guardian's *ex parte* recommendations.

In *Broer*, respondent's decision implicitly blames the plaintiff's attorney for respondent's need to disqualify himself, citing an *ex parte* meeting initiated by the plaintiff's attorney in which the attorney disclosed that his client had filed a complaint about respondent's conduct, and stating inaccurately that the attorney had requested respondent's recusal. Such grounds were spurious, as respondent has stipulated. (*See Matter of Leonard*, 2003 Ann Rep 136 [Commn on Jud Conduct, Dec 26, 2002].) Moreover, even if respondent genuinely believed that the *ex parte* comments by the

attorney should lead to respondent's recusal, it was improper for respondent to wait five months before doing so.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Ms. Moore, Mr. Pope and Judge Ruderman concur.

Judge Luciano and Judge Peters were not present.

CERTIFICATION

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

Dated: September 22, 2003

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