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

JOSEPH W. ESWORTHY,

Determination

a Judge of the Family Court,
Broome County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Myriam J. Altman
Helaine M. Barnett, Esq.
Herbert L. Bellamy, Sr.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores Del Bello
Lawrence S. Goldman, Esq.
Honorable Eugene W. Salisbury
John J. Sheehy, Esq.
Honorable William C. Thompson

APPEARANCES:

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

Jon S. Blechman for Respondent

The respondent, Joseph W. Esworthy, a judge of the Family Court, Broome County, was served with a Formal Written Complaint dated August 8, 1989, alleging, inter alia, that he failed to follow the law, that he conveyed the impression of partiality and that he deprived parties of their rights in numerous cases. Respondent filed an answer dated October 6, 1989.

By order dated October 6, 1989, the Commission designated the Honorable John S. Marsh as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 28, 29 and 30 and December 1, 4, 5, 6 and 7, 1989, and the referee filed his report with the Commission on April 4, 1990.

By motion dated April 24, 1990, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on May 10, 1990.

On May 18, 1990, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Broome County Family Court since January 1, 1986. He was a judge of the Binghamton City Court from 1961 to 1966.

2. On December 10, 1986, Barbara N. appeared before respondent for a hearing on her petition for an order of protection against her husband, Michael N. Respondent had issued a temporary order of protection on November 20, 1986, and told the wife that if she used the order "frivolously," she would "be

doing the [jail] time" of up to six months that he would otherwise give her husband.

3. On December 10, both parties appeared, but neither was sworn. Respondent told the husband that his wife was entitled to an order of protection for one year "without any proof or admission or any hearing," even though no such procedure is authorized by law and Section 841 of the Family Court Act permits imposition of an order of protection "at the conclusion of a dispositional hearing."

4. Michael repeatedly denied the allegations in the family offense petition.

5. Respondent asked him, "Do you want to give her an order of protection without a trial? I'm telling you if I have a trial, and if I find you guilty, I'm going to give you six months--six months in jail," notwithstanding that no jail term is authorized by Section 841 of the Family Court Act simply upon a petition for an order of protection.

6. When Michael objected to an order of protection, the following exchange took place:

> **Respondent: ...She's got one person to testify to a bruise, and she brings in the broken chairs, and you're guilty. You're a dead man. Understand what I'm telling you?**
>
> **Do you want your trial because if I find you guilty, you are going to do six months based on the testimony of the bruise on her and the broken chairs....**

Now you want to give her an order of protection against physical and verbal abuse for a period of one year or do you want your trial? What do you want?

Michael: I'm looking for a job right now.

Respondent: Then you don't want your trial, right?

Michael: No.

Respondent: You want to give her an order of protection for a period of one year against physical and verbal abuse, right?

Michael: Compared to the alternatives, that would be very good.

7. Respondent then granted the wife an order of protection for one year.

8. On December 24, 1986, the wife filed a complaint with the police that her husband had violated the order of protection. The complaint form that she signed directed her to appear in court on the next working day, which was December 26, 1986.

9. The husband was arrested and brought to respondent's court shortly after the complaint was made on December 24. Barbara was not present, and respondent issued a warrant for her arrest.

10. That morning, she was arrested and brought to court. Neither party was sworn. Respondent engaged in colloquy with the parties and the assistant county attorney, Lee Hartjen, who was representing the wife. Respondent ordered both parties to return to their home and indicated that he would issue mutual

orders of protection. Mr. Hartjen objected and asked for a hearing, which respondent scheduled for December 26, 1986. The husband, who was not represented, said that he had to work on that day.

11. Respondent then said:

> I think I can easily resolve this and remand both of them to the Broome County Jail until such time as we can have a hearing. Give me a remand, I'll send them both to jail. I'm not going to screw around with this. Both of you sit in the Broome County Jail and have your Christmas there.

12. Later in the day, Mr. Hartjen appealed to respondent to release Barbara. Respondent attempted to assign Gerard E. O'Connor, an intern in Mr. Hartjen's office who had not yet been admitted to the bar, to represent Michael, but Mr. O'Connor objected.

13. Respondent then released both parties from jail.

14. On December 26, 1986, the parties returned to court. No witnesses were sworn, and no hearing was held, as required by Sections 835 and 841 of the Family Court Act. Michael did not admit to the allegations of the petition.

15. Respondent said that he would "suspend the violation" and continue the order of protection for one year.

As to Charge II of the Formal Written Complaint:

16. On November 30, 1987, Warren C. appeared before respondent on the complaint of his wife, Penny C., who alleged

that he had violated an order of protection. The wife was not present and was not represented.

17. Warren told respondent under oath that Penny had not appeared in court because they had been living together for nine months.

18. Without hearing the wife, respondent dismissed the violation petition and revoked the order of protection.

19. On December 14, 1987, respondent received a letter on behalf of the wife from Rose Garrity of the Victim/Witness Assistance Center of Tioga County. She asserted that the wife had not appeared in court on November 30 because she was hospitalized, her jaw broken in two places as the result of an assault by her husband, and that, except for one week in September 1987, the parties had not lived together during the nine-month period.

20. Without a hearing, respondent issued a new, one-year order of protection on behalf of the wife and signed an arrest warrant for the husband for "being found in contempt of Court for having lied in open court."

21. On February 8, 1988, Warren appeared before respondent without an attorney.

22. Respondent did not advise him of his right to assigned counsel, as required by Section 262(a)(ii) of the Family Court Act.

23. Respondent accused him of lying and of breaking his wife's jaw, which Warren denied. Respondent replied, "You

certainly did. You didn't tell me you were arrested for the fact that you broke her jaw in two places, and that's what you did."

24. Respondent then asked Warren whether he wanted an attorney and whether he wanted to admit the allegations of the violation petition. Warren did not admit to the allegations; no witnesses were sworn, and no testimony was taken.

25. Throughout the proceeding, respondent repeated, "It was violated when you broke her jaw in two places," and, "...you certainly didn't benefit her when you broke her jaw in two places."

26. Respondent then told Warren that the minimum disposition he could give was six months in jail, then ordered him to jail "not to exceed six months unless you can prove... that all medical payments have been made and all bills are straightened in connection with that busted jaw." He then signed an order jailing Warren for six months "for wilful violation of an order of this Court," even though respondent had dismissed the violation petition on November 30, 1987.

As to Charge III of the Formal Written Complaint:

27. On April 9, 1987, respondent met alone in chambers with Binghamton Police Chief James T. O'Neil to discuss Lawrence P., a police officer who had matters pending in respondent's court.

28. Chief O'Neil told respondent that Lawrence P. had threatened to shoot a computer in the police station, had threatened suicide and had threatened to kill his wife. Respondent mentioned that there was a hearing coming up involving Lawrence.

29. Later that day, respondent held a scheduled pretrial conference in Kristine P. v. Lawrence P. There were seven pending petitions before him at that time: five had been filed by Lawrence and two by his wife. All the petitions alleged violations or sought modifications of a prior order of February 4, 1987, which provided for mutual orders of protection and for visitation by the husband. The wife resided in the marital residence at the time and had physical custody of the minor children.

30. Respondent began the conference by stating that he was sick of the case, that he had decided what to do and that he was going "to spin the case on its ear." He said that he had decided to allow Lawrence back into the marital residence with mutual orders of protection.

31. The wife's attorney, William K. Maney, vigorously objected and said that respondent was sentencing his client to either an eviction or an execution because he was afraid Lawrence would kill her and she would not stay in the house with him.

32. Respondent then said he would give Kristine two choices: either she was to allow her husband back into the house with mutual orders of protection, or she could stay in the house but the husband would get custody of the children.

33. Mr. Maney reiterated that Lawrence was violent and unstable and that he had threatened to kill his wife. Respondent then said to Mr. Maney, "You haven't got such an angel; it's really not that one-sided." Respondent then produced a handwritten letter he had received from Lawrence which Mr. Maney had not seen before.

34. Referring to the contents of the letter, respondent said that the wife had been unfaithful and uncooperative. He did not distribute copies of the letter but permitted Mr. Maney to take notes from it.

35. Respondent directed Mr. Maney to inform the court by April 13, 1987, as to which option Kristine had chosen.

36. On April 14, 1987, respondent held another pre-trial conference. The husband's attorney, Richard Schwartz, argued that the wife had abandoned the children a day earlier. Mr. Maney argued that she had misunderstood respondent's ultimatum and had left the home because she believed that her husband was returning.

37. Without a hearing, respondent dictated an order awarding custody of the children to Lawrence, even though he had not requested custody. Respondent also issued mutual orders of protection barring the wife from the marital home, cancelled a

prior order of protection and dismissed all pending petitions. The order stated that Kristine had "abandoned" the children.

As to Charge IV of the Formal Written Complaint:

38. On November 26, 1986, and April 9, 1987, respondent conducted a trial in Lucie A. v. Timothy A. on issues of child custody, visitation and violation of an order of protection.

39. At the conclusion of the trial, respondent said:

> ...Both of these people have convinced me that they are both liars. You both have made each other out as unfit. The question of custody it seems to me should be resolved very succinctly and very easily by placing the custody of the child, Amy, in the Broome County Department of Social Services for placement in foster care. You both have indicated you are both pigs....
>
> If you don't want this child to be placed in foster care based on the parents' unfitness, I will permit you to move back into the house and to resume a relationship that is normal, and if you're not going to do it in 30 days and resolve your differences, I'm going to place the child in the custody of the Department of Social Services....
>
> No orders of protection. If you kill each other, fine. The child will be in the custody of social services automatically.

40. Respondent had no authority to place the child in the custody of the Department of Social Services since no petition for the termination of parental rights was before him.

41. After the hearing, respondent signed mutual orders of protection, vacated a prior order of protection on behalf of the wife and gave the parties joint custody.

As to Charge V of the Formal Written Complaint:

42. On March 13, 1987, Dennis M. appeared before respondent on an allegation of juvenile delinquency.

43. Respondent directed him to immediately pay $190 to reimburse the county for the cost of bringing him from Florida, where he had been arrested, even though the county attorney had not requested reimbursement.

44. Respondent ordered Dennis to give the county attorney an affidavit implicating a young woman with whom he had travelled, even though the county attorney had not requested that either.

45. Respondent then told Dennis:

> **...The next time you come back to this court, the closest place I'll be shipping you is Buffalo, New York or down city, and maybe you'll get some experience like you had in Florida with all those spics and blacks that you didn't like, that you were scared of. You understand? Because detention in those bigger areas is not just all white detention.**

46. On February 17, 1989, Dennis returned to court on a petition for modification of the prior court order.

47. Addressing his mother, respondent said, "The court has reviewed the file in connection with this matter and with full knowledge that I spent six hours and 40 minutes before the

judicial commission. One of the complaints was filed by you."

48. The mother denied filing a complaint. Respondent retorted, "I will do the talking. I spent six hours and 40 minutes before the judicial commission. One of the complaints was filed by Joan M[ ] in that commission. And one of the cases that I had to justify was this one."

49. Respondent then dismissed the petition, conveying to the mother the reasonable impression that it was dismissed because respondent believed she had made a complaint to the Commission.

50. Respondent's order in the matter indicates that the petition was dismissed because Dennis had reached the age of 17.

As to Charge VI of the Formal Written Complaint:

51. On May 7, 1987, Andrew Y. appeared before respondent on a petition alleging juvenile delinquency.

52. After the juvenile admitted the allegations of the petition, his mother objected to the location of her son's placement by the Division For Youth.

53. Respondent replied in a sarcastic tone:

> Now, obviously we are trying to keep him upstate, but we could probably find him a bed with Hispanics and blacks and send him downstate if you would prefer that.

As to Charge VII of the Formal Written Complaint:

54. The charge is not sustained and is, therefore, dismissed.

As to Charge VIII of the Formal Written Complaint:

55. On December 30, 1987, Deborah D. appeared before respondent on a complaint that the father of her children, William K., had violated a court order regarding visitation by returning the children to her more than two hours after the appointed time.

56. Respondent issued a warrant for the father's arrest and said, "Hopefully, they will be able to immediately find him, and maybe if he sits in the lockup overnight, he will make some sense."

57. Respondent wrote on the arrest warrant, "No bail."

58. William was arrested the same day and brought before another judge, who set bail at $1,500.

59. On December 31, 1987, he appeared before respondent. Although he had counsel, counsel was not present. Respondent told William that he had spoken to his attorney by telephone before the proceeding.

60. Respondent asked William what time he had been ordered to return the children from visitation. He replied that he had arranged with Deborah to return the children after he got out of work.

61. Respondent angrily said:

> You can either admit to this now and I'll suspend the whole thing as far as any sentence, you understand, and if you want a trial on this violation, I assure you, if you're found guilty, I'm going to give you six months in jail. Now, what do you want to do? Do you want to admit to this violation?

62. William responded, "Yes."

As to Charge IX of the Formal Written Complaint:

63. On February 3, 1987, Debra W. and Joseph W. appeared before respondent on her complaint that Joseph had violated an order of protection.

64. The following exchange took place between respondent and Joseph:

> Respondent: ...What's the matter with you? Huh?
>
> Joseph: Nothing, sir.
>
> Respondent: Well, why do you violate the order?
>
> Joseph: I don't see exactly where I violated the order.
>
> Respondent: This morning you had a knife at her, didn't you?
>
> Joseph: That's not true.
>
> Respondent: You didn't have a knife at her?
>
> Joseph: No, sir.
>
> Respondent: It is my understanding this morning you had a knife.... The mere fact that you have been arrested is a violation of the court order....

65. Respondent then remanded Joseph to jail without bail, where he remained for six days.

As to Charge X of the Formal Written Complaint:

66. On February 18, 1987, Susan K. and Edwin F. appeared before respondent on Susan's petition for custody of their son.

67. Edwin was not represented by counsel, and respondent did not advise him of his right to assigned counsel, as required by Section 262(a)(iii) of the Family Court Act. Respondent signed an order granting custody to the mother and made no provision for visitation by the father.

68. On April 21, 1987, Susan and Edwin appeared before respondent on her petition for an order of protection and his petition for visitation.

69. Again, Edwin was not represented. Respondent failed to advise him of his right to assigned counsel, as required by Section 262(a)(ii) of the Family Court Act. Respondent granted the order of protection to Susan and provided for visitation by Edwin.

70. On April 27, 1987, Edwin again appeared before respondent on Susan's petition alleging that he had violated the order of protection.

71. Edwin again was not represented, and respondent failed to advise him of his right to assigned counsel, as

required by law. Edwin admitted the violation and respondent imposed and suspended a 30-day jail sentence.

As to Charge XI of the Formal Written Complaint:

72. On June 13, 1988, respondent signed an ex parte order awarding custody to Sandra S., on a petition filed by her that day; the respondent father, Brad S., had not been notified of the proceeding.

73. In 1975 and 1976, respondent had represented Brad as law guardian in juvenile delinquency proceedings in Broome County Family Court.

74. At the June 1988 custody proceeding, respondent had before him the files of the juvenile delinquency proceedings, on the covers of which his name was clearly marked as law guardian.

75. Respondent never held a hearing on the issue of custody.

As to Charge XII of the Formal Written Complaint:

76. The charge is not sustained and is, therefore, dismissed.

As to Charge XIII of the Formal Written Complaint:

77. On October 5, 1987, Allison T. appeared before respondent on a petition by the Department of Social Services to

extend for one year the placement of her daughter, who had been previously adjudicated a neglected child.

78. Allison was not represented by counsel, and respondent did not advise her of her right to counsel, her right to an adjournment to confer with counsel and her right to assigned counsel if she could not afford a lawyer, as required by Section 262(a)(i) of the Family Court Act.

79. Respondent elicited Allison's consent to the extension of placement, even though she indicated that she wished to retract a statement to the Department of Social Services which formed the basis for the petition. Respondent extended the placement to October 5, 1988.

80. On October 17, 1988, Allison again appeared before respondent on a petition to extend placement for another year.

81. She was not represented, and respondent again failed to advise her of her right to counsel, as required by law. When Allison suggested that a lawyer should be present, respondent replied, "If you want to apply for an attorney, you would have to make an application.... You didn't do so."

82. Allison stated that she had just received the notice to appear. Respondent made no response.

83. Respondent elicited Allison's consent to the extended placement. He granted an extension to October 5, 1989.

As to Charge XIV of the Formal Written Complaint:

84. In nine cases involving 15 appearances, as enumerated in Schedule A to the Formal Written Complaint, respondent failed to fully inform litigants of their rights to counsel, as required by Section 262 of the Family Court Act.

85. In three cases involving five appearances, as enumerated in Schedule A to the Formal Written Complaint, respondent confirmed hearing examiners' findings in support order violation cases without according parties 30 days in which to file objections, as required by Section 439(e) of the Family Court Act.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a), 100.3(a), 100.3(a)(1), 100.3(a)(3) and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A, 3A(1), 3A(3) and 3A(4) of the Code of Judicial Conduct. Charges I, II, III, IV, V, VI, VIII, IX, X, XI, XIII and XIV of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charges VII and XII are dismissed.

In less than four years on the Family Court bench, respondent amassed an egregious record. He abused the rights of litigants, flouted the law, conveyed the impression of bias, was intemperate and made racist statements.

Respondent, in case after case, failed to advise parties of their statutory right to counsel, elicited admissions from them, made statements indicating that he presumed unproven allegations to be true and coerced parties to accept settlements and waive their right to a hearing, sometimes by threatening incarceration or other consequences which he had no authority to impose. See Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105; Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286. Respondent often made findings on child custody and family offense matters without taking testimony, obtaining admissions or giving notice to all interested parties.

He abused his authority by jailing the petitioner in one case and by sentencing another party to six months in jail without a hearing and based solely on an unsworn, ex parte letter.

In two cases, respondent improperly made racist statements about the population of detention facilities. See Matter of Aldrich v. State Commission on Judicial Conduct, 58 NY2d 279, 281; Matter of Abbott, 1990 Annual Report 69, 71 (Com. on Jud. Conduct, Apr. 5, 1989); Matter of Evens, 1986 Annual Report 103 (Com. on Jud. Conduct, Sept. 18, 1985). In another, he called the litigants "pigs" and "liars," ordered them to resume living together and said, "If you kill each other, fine." See Matter of Trost, 1980 Annual Report 153 (Com. on Jud. Conduct, Aug. 13, 1979).

No judge is above the law he is sworn to administer. Respondent has engaged in a pattern of misconduct that shocks the conscience. See Matter of Ellis, 1983 Annual Report 107, 113 (Com. on Jud. Conduct, July 14, 1982); Matter of Jutkofsky, 1986 Annual Report 111, 132 (Com. on Jud. Conduct, Dec. 24, 1985). His conduct is inconsistent with the fair and proper administration of justice and renders him unfit to remain in office. Reeves, supra at 111.

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur, except that Mrs. Del Bello also votes to sustain Charge XII.

Mr. Sheehy 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: June 21, 1990

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