

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

MICHAEL A. FIECHTER,

a Judge of the District Court, Nassau County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
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 (Robert H. Tembeckjian, Of Counsel) for the Commission
Spinola & Mirotznik, P.C. (By Joseph P. Spinola) for Respondent

The respondent, Michael A. Fiechter, a Judge of the District Court, Nassau County, was served with a Formal Written Complaint dated February 14, 2002, containing one charge. Respondent filed an answer dated February 27, 2002.

By Order dated April 8, 2002, the Commission designated Robert L. Ellis, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 7 and 8, 2002, in New York City, and the referee filed his report dated August 14, 2002, with the Commission.

On August 30, 2002, the Administrator of the Commission, respondent's counsel and respondent entered into a Stipulation, agreeing that the Commission make its determination based upon the referee's findings of fact and conclusions of law, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On September 19, 2002, the Commission approved the stipulation and made the following determination.

1. Respondent has served as a judge of the District Court, Nassau County, since 1997, when he was appointed and subsequently elected to that position.
2. According to statute, the Board of Judges of the Nassau County District Court is comprised of the 26 judges of the court and the Presiding Judge is the individual elected from Nassau County's First District.
3. In November 2000, then-Presiding Judge Ira J. Raab was elected to the Supreme Court and, upon his ascension to that post in January 2001, the position of Presiding Judge of the District Court became vacant. Nassau County Administrative Judge Edward G. McCabe attempted to fill the vacancy by naming District Court Judge George R. Peck to the post, notwithstanding that Judge Peck was elected from the Third

and not the First District.

4. In February 2001, District Court Judge Jonathan S. Kaiman and a co-plaintiff, Nassau County Legislator Joseph Scannell, commenced a lawsuit against Judge McCabe, the Board of Judges and others (hereinafter “the lawsuit”). The lawsuit *inter alia* alleges: (1) that Judge McCabe did not have the authority to designate Judge Peck to succeed Judge Raab as Presiding Judge of the District Court, (2) that certain Board of Judges meetings were being held in private, contrary to laws requiring that such meetings be held in public; and (3) that it was contrary to law and public policy for the Board of Judges to participate in the selection of the Executive Director of the Nassau County Traffic and Parking Violations Agency.

5. The lawsuit sought to enjoin the Board of Judges from making the Traffic and Parking appointment and to nullify actions taken by the Board of Judges at meetings that did not comport with the Open Meetings Law.

6. The lawsuit was filed in Nassau County and was transferred by Administrative Judge McCabe to Supreme Court, Suffolk County.

7. The lawsuit addressed issues of statutory construction, local governance and constitutional law.

8. That branch of the lawsuit contesting Justice McCabe’s attempt to name a new Presiding Judge was discontinued when the Nassau County Executive and Legislature filled the vacancy by naming Denise Sher as District Court Judge from the First District, which by operation of law made her the Presiding Judge of the Board of

Judges. Justice McCabe was therefore dropped as a defendant.

9. The remaining issues of the lawsuit are pending.

10. On March 1, 2001, respondent wrote a one-page letter of complaint to the Commission, with numerous attachments, alleging that the lawsuit constituted a “political attack” on a colleague (*i.e.*, Judge Peck) who was then running for re-election, an attack on the integrity of “the Board of Judges generally,” and an attack on “Republican members of the Board specifically.” Respondent also took issue with Newsday articles that discussed the lawsuit and quoted Judge Kaiman.

11. The March 1 letter was not sent to any recipient other than the Commission.

12. The Commission dismissed respondent’s complaint.

13. On May 17, 2001, respondent wrote a seven-page letter to the Commission, with numerous attachments, seeking reconsideration of the dismissal of his initial complaint, commenting extensively on the lawsuit, *inter alia* calling it “meritless” and “frivolous,” and accusing Judge Kaiman of various acts of misconduct, as follows:

(a) “Judge Kaiman falsely accused Republican Judges of dishonesty and illegality in performing the duties of the Board of Judges” (Emphasis in original);

(b) “Whether Judge Kaiman lacked the mental capacity to do the [legal] research or chose to do it out of partisan animosity toward Republican judges, or both, is an issue, it is most respectfully submitted, that is worth the time of the Commission”;

(c) “It is not unreasonable to assume that after reading the lies spouted

by Judge Kaiman in the local newspaper,... [anyone affiliated] with the Republican Party had better settle quickly [in Judge Kaiman's court]”;

(d) “The Democratic Party enjoys a very friendly relationship with the local daily newspaper on Long Island.... It is submitted that the law suit instituted by Judge Kaiman and the newspaper interview given by him were specifically designed to exploit the special relationship with the local press and advance [his] political ambitions... and to cause political damage to Republican Judges who must run for election in Nassau County”;

(e) “It is respectfully submitted that the Commission's summary dismissal of the complaints filed by the undersigned and other Judges against Judge Kaiman will leave Republican and Conservative Judges on Long Island with an impression that Judge Kaiman is also the beneficiary of a ‘back room deal’”;

(f) [Judge Kaiman's] “meritless lawsuit... [makes] disparaging remarks about Judge George Peck [and]... is frivolous if based on an undisputedly meritless legal theory”;

(g) “The baseless accusations against Judge Peck, who is up for re-election this year, are as politically motivated as Judge Kaiman's lawsuit...”; and

(h) “The Commission can do nothing about simple-minded partisan political hacks victimizing Republican public officials on and off the bench by using a hostile partisan and unprincipled press. But when a sitting Judge behaves in this manner, it is respectfully submitted that the Commission is obliged to act.”

14. Respondent sent copies of his May 17 letter to 12 State Senators and all 89 full-time judges in Nassau County.

15. Despite respondent's claims in the May 17 letter that the Kaiman lawsuit is "meritless," he concedes that at least portions of the Kaiman lawsuit are valid, *i.e.*, that a meeting of the Board of Judges was required by UDCA §2406 to be public.

16. The Commission considered respondent's letter of May 17 and adhered to its earlier decision to dismiss his complaint.

17. At the time respondent disseminated his May 17 letter to 12 State Senators and 89 judges and to the date of the hearing in this matter, Judge Kaiman's lawsuit was and is still pending.

18. Respondent's letters of March 1 and May 17 are the only complaints that have been filed at the Commission by anyone against Judge Kaiman.

19. Respondent's assertions in his May 17 letter and in his testimony about the purported "lies spouted by Judge Kaiman" in a Newsday article describing the lawsuit on February 27, 2001, are not substantiated by the article.

20. Respondent's letter of May 17 is not marked "confidential," does not contain any reference to being confidential, does not indicate the purpose for which respondent disseminated it to State Senators and judges and was not accompanied by an explanatory cover letter.

21. Among respondent's purposes in disseminating his letter was to publicize his critical views about Judge Kaiman.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(8) and 100.4(A)(2) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

Judges are held to higher standards of conduct than the public at large and, upon assuming the bench, surrender certain rights and must refrain from certain conduct that may be permissible for others.

By widely disseminating his letter to the Commission, which contained inaccurate, unsubstantiated allegations denigrating a fellow judge, respondent engaged in conduct that detracted from the dignity of judicial office and violated the above-cited ethical provisions. Respondent should have recognized that such conduct was prohibited and would reflect adversely on the judiciary.

After the Commission had dismissed his complaint against another District Court judge, respondent wrote a seven-page letter to the Commission seeking reconsideration of his allegations and again accusing the other judge of various acts of misconduct related to a lawsuit the judge had filed and to remarks attributed to the judge in the press. By sending a copy of the letter to 89 judges and 12 State Senators, respondent ensured that his "*ad hominem* broadside," as the referee characterized respondent's statements, would reach a wide audience. It is clear that the purpose of the letter was not merely to ask the Commission to reconsider his complaint, but to publicize

his vitriolic allegations, which the Commission had already considered and dismissed.

As the referee concluded, respondent's letter consisted of "partisan personal and political attacks," included numerous inaccuracies, and was written "without the reasonable factual and legal inquiry required under the circumstances." The tone of the letter was not merely critical, but vituperative and insulting. Such conduct was unprofessional and serves to bring the judiciary into disrepute. *See Matter of Holtzman*, 78 NY2d 184, 191 (1991).

In addition, by commenting extensively on the pending lawsuit commenced by the other judge, respondent violated a specific rule proscribing judges from making public comment about a pending or impending proceeding (Section 100.3[B][8] of the Rules Governing Judicial Conduct).

We emphasize that this determination should not be viewed as punishing a judge for making a complaint to the Commission. Indeed, it is not only appropriate but obligatory for a judge to take appropriate action upon receiving information "indicating a substantial likelihood that another judge has committed a substantial violation" of the ethical rules (Section 100.3[D][1] of the Rules). Respondent's gratuitous dissemination of allegations that had been dismissed by the Commission served no salutary purpose but merely provided a wider audience for his unseemly, *ad hominem* diatribe. Such conduct is properly the subject of discipline, as respondent recognizes in his acceptance of misconduct and the stipulation of censure.

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

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

CERTIFICATION

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

Dated: November 18, 2002



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