

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

EDMUND G. FITZGERALD, JR.,

a Judge of the City Court of Yonkers,
Westchester County.

DETERMINATION

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice 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 (Vickie Ma, Of Counsel) for the Commission

Edwards & Angell, LLP (Hal R. Lieberman) for Respondent

The respondent, Edmund G. Fitzgerald, Jr., a judge of the City Court of
Yonkers, Westchester County, was served with a Formal Written Complaint dated

November 13, 2001, containing one charge. Respondent filed a verified answer dated December 27, 2001.

By motion dated January 2, 2002, the administrator of the Commission moved for summary determination, pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR §7000.6[c]). Respondent opposed the motion by memorandum dated January 23, 2002, and the administrator filed a reply dated January 28, 2002. Respondent filed a supplemental memorandum dated January 29, 2002, and the administrator filed a letter dated January 30, 2002. By Decision and Order dated February 6, 2002, the Commission granted the administrator's motion in part and determined that the factual allegations were sustained and that respondent's misconduct was established.

The parties filed briefs with respect to the issue of sanctions and the issue of respondent's fitness and qualifications to serve as a judge under the State Constitution. On May 6, 2002, respondent requested a stay or postponement of the proceeding, which the administrator opposed by letter dated May 7, 2002. On May 9, 2002, the Commission denied the request.

On May 10, 2002, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the City Court of Yonkers, Westchester County since January 2000.

2. On or about September 28, 1990, respondent issued check number 1711 in the amount of \$5,000, payable to cash, which was disbursed from his attorney escrow account entitled "Angelo & Fitzgerald, Attorney Trust Account," number 0306148501, maintained at Hudson Valley National Bank ("attorney escrow account"), in violation of DR 9-102(e) of the Code of Professional Responsibility (22 NYCRR §1200.46).

3. In August 1990 respondent issued check number 1703 in the amount of \$4,060, payable to Iona College for a non-client matter, which was disbursed from his attorney escrow account, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3). The check represented a loan from respondent's client, Joseph DiNapoli, which was used to pay for respondent's son's college tuition.

4. By failing to memorialize the terms of the loan in writing, respondent did not adequately protect his client's interests, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3).

5. As of August 1, 1997, the balance remaining in respondent's attorney escrow account was \$11,088.26. Respondent was unable to account for whom the funds were being held, in violation of DR 1-102(a)(8) (now [7]) of the Code of

Professional Responsibility (22 NYCRR §1200.3).

6. Respondent was unable to account for a substantial portion of the activity in his attorney escrow account from December 1989 through February 1992, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3).

7. As a result of respondent's actions as set forth above, and following formal disciplinary proceedings, respondent was disbarred as an attorney by Order of the Appellate Division, Second Department, dated December 4, 2000. The Appellate Division found that respondent had engaged in "serious professional misconduct" and ordered respondent to:

desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

8. Respondent's motion for leave to appeal to the Court of Appeals was denied on July 2, 2001.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(1) of the Rules Governing Judicial Conduct and lacks the qualifications to perform the official duties of a judge pursuant to Article 6, Sections 20 and 22 of the Constitution of the State of New

York. Charge I of the Formal Written Complaint is sustained insofar as it consistent with the above findings, and respondent's misconduct is established.

The Commission is empowered to consider complaints with respect to the "qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system" (NY Const Art 6 §22[a]).

The New York Constitution provides that no person "may assume the office of" city court judge unless such person has been admitted to practice law in New York State for at least five years (NY Const Art 6 §20[a]). The Court of Appeals has interpreted that language as "impliedly requiring" a continuing obligation to be qualified to practice law. Ginsberg v. Purcell, 51 NY2d 272, 276 (1980).

Considering a claim for back pay by a Family Court judge who was disbarred upon conviction of a felony, the Court in Ginsberg construed the same language at issue here, stating:

The requirement that to be a Judge one must also be an attorney for a given period imports not only the experiential background afforded by the time required but also "the character and general fitness requisite for an attorney" (Jud Law §90, subd 1, par a). The constitutional requirement that to assume office a Judge must be a lawyer can, therefore, quite properly be viewed as impliedly requiring, in order to protect the integrity of the Judge's office, that he not only be a lawyer when he assumes office but that he continue to be qualified as a lawyer, not only intellectually but also in character and fitness (*cf.* Pfingst v. State of New York, 57 AD2d 163, 165).

Id. at 276

In interpreting the relevant constitutional provision, the Court considered both rules of construction and policy considerations. The Court noted that the Constitution should be interpreted “to give its provisions practical effect, so that it receives ‘a fair and liberal construction, not only according to its letter, but also according to its spirit and the general purposes of its enactment’” (*Id.*).

The Court cited with approval Thaler v. State of New York, 79 Misc2d 621, 624 (Ct of Claims 1974), in which the court held that the requirement that one must be an attorney to “assume the office of” justice of the Supreme Court implied continuity and that a person who was disbarred was unable to receive the salary, or discharge the duties and responsibilities, of a Supreme Court justice.

Although the facts in Ginsberg are different from the facts in this case, the Court of Appeals was interpreting the same language that applies here. We conclude, therefore, that in view of his disbarment, respondent should be removed from office since he lacks the requisite “qualifications” to serve as a judge.

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

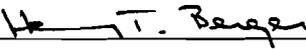
Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Marshall and Ms. Moore were not present.

CERTIFICATION

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

Dated: July 1, 2002



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