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

JOHN J. FROMER,

a Judge of the County Court, Greene County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Stephen F. Downs and Henry S. Stewart, Of Counsel) for the Commission

Garry, Cahill & Edmunds (By John T. Garry, II) for Respondent

The respondent, John J. Fromer, a judge of the County Court, Greene County, was served a Formal Written Complaint dated February 16, 1984, alleging that he made an improper

comment on a pending case to a newspaper reporter. Respondent did not answer the Formal Written Complaint.

On April 26, 1984, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for by Section 44, subdivision 4, of the Judiciary Law, stipulating that the agreed statement be executed in lieu of respondent's answer and further stipulating that the Commission make its determination based upon the pleadings and the agreed upon facts. The Commission approved the agreed statement on May 10, 1984. Oral argument was waived. On August 21, 1984, the Commission considered the record of the proceeding and made the following findings of fact.

1. On June 29, 1983, respondent met with the Greene County District Attorney and defense counsel to discuss a possible plea bargain in People v. Ronald Hickey. Mr. Hickey was charged with Rape, Third Degree, and Burglary, Third Degree.

2. It was alleged that on May 22, 1983, Mr. Hickey had entered a woman's apartment with a stocking mask over his face, put his hands on the woman's throat and said, "Shut up and lay there if you know what's good for you." Mr. Hickey raped the victim several times and then fell asleep in her bed. He was found asleep in the victim's bed with the stocking mask over his head.

3. During the plea negotiations, it was agreed that Mr. Hickey would plead guilty to the charge of Rape, Third Degree. It was also agreed that the charge of Burglary, Third Degree, would be dismissed and that Mr. Hickey would receive a one-year jail sentence.

4. Mr. Hickey subsequently pled guilty to Rape, Third Degree, before respondent, and sentencing was scheduled for August 23, 1983.

5. On August 19, 1983, a newspaper reporter contacted respondent and asked him for information concerning the Hickey case in light of public criticism about a rumored reduction of the charge and the proposed sentence.

6. Respondent explained to the reporter that the charge had not been reduced and that the defendant had pled guilty to the same charge for which he had been indicted.

7. With respect to sentence, respondent said to the reporter:

> As I recall he [the defendant] did go into her [the victim's] apartment without permission....He was drunk, jumped into the sack with her, had sex and went to sleep. I think it started without consent, but maybe they ended up enjoying themselves.
>
> It was not like a rape on the street....People hear rape and they think of the poor girl in the park dragged into the bushes. But it wasn't like that.

8. At the pretrial conference on June 29, 1983, the defense counsel had stated that the defendant claimed he was drunk on the night of the rape, that after the initial rape he fell asleep, that the victim later awoke him, that they engaged again in sexual intercourse and that he then went back to sleep. It was on the basis of this statement that respondent said to the reporter, "[M]aybe they ended up enjoying themselves."

9. The district attorney did not assent to the truth of the defense counsel's recitation of his client's statement. The district attorney did consent to a minimal sentence.

10. Respondent has acknowledged his misconduct and has indicated that he regrets that he made the statement.

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)(4) and 100.3(a)(6) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(4) and 3A(6) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

It would have been improper for respondent to make <u>any</u> public comment, no matter how minor, to a newspaper reporter or to any one else, about a case pending before him. The nature of respondent's misconduct was greatly exacerbated when he granted an interview to a reporter in which he recited his opinions with

regard to the law controlling the case and stated in detail his views of the facts of the case. The misconduct was further compounded by respondent's crude and offensive comments about the victim of the rape and about the rape itself. Respondent's comments were not based on fact but were a distorted version and extrapolation of unsworn statements made by defense counsel in argument during a pre-trial conference.

By making the comments "I think (underlining added) it started without consent..." and "...maybe they ended up enjoying themselves", respondent publicly questioned whether there ever was a rape or whether the victim had consented to the sexual intercourse--without having any supporting facts for his comments. The comments that this was "...not like a rape on the streets..." and was not a situation "...of the poor girl in the park dragged into the bushes", when taken with the previous statements, further underscore respondent's lack of sensitivity and understanding of the situation.

Respondent's statements were humiliating and demeaning to the victim of the rape, in no small measure because respondent was, in effect, publicly stating that she had probably consented to the sexual intercourse. The burden upon the victim of such gratuitous observations is obvious.

Moreover, such comments have the effect of discouraging complaints of rape and sexual harassment. The

impact upon those who look to the judiciary for protection from sexual assault may be devastating.

Respondent's conduct violates the basic tenets of fairness in the administration of justice and brings the administration of justice into public disrepute.

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

Mrs. Robb, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Shea and Mr. Sheehy concur.

Mr. Bower dissents as to sanction only and votes that the appropriate disposition would be to issue a letter of dismissal and caution.

Judge Alexander and Judge Rubin were 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: October 25, 1984

Lillemor T. Robb, Chairwoman
New York State
Commission on Judicial Conduct

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DISSENTING OPINION
BY MR. BOWER

I dissent with respect to the sanction imposed. I find that it is excessive and it is not consistent with any standard of sanction for errant judges.

The litmus test of justice in a democratic society is equality: equality of rights; equality of opportunity and equality in the imposition of sanctions. In my judgment, the majority erred in denying such equality to respondent.

The degrees of sanction are set forth by the Judiciary Law (Section 44). From the harshness of removal through censure and admonition to dismissal with a letter of caution, the Commission is vested with discretion in applying sanctions. The appropriateness of the penalty requires fairness, common sense and consistency. When there is no consistency, there are no standards. It is for that reason that we best review what are, in effect, proper sanctioning standards.

Removal is for cases of great severity. While there is no hard-and-fast rule as to what conduct will result in the penalty of removal, a review of the cases decided by the Commission shows that it is sparingly applied and only in cases of truly extreme nature. The misconduct to merit removal must have been truly egregious. Examples are shady dealings with public or private funds, repeated persistent violations of litigants' legal rights or serious infractions of the Canons and Rules bordering on unethical conduct and transgressing on the moral sense of the community. Removal has also been applied in cases where the conduct severely damaged or destroyed the public's confidence in the judge or his ability to continue to sit because his acts degraded the judicial system. Obviously, the sanction of removal is greatly damaging to one's career and reputation.

Admonition and censure are frequently regarded as one and the same by members of the judiciary because they are both public. Aside from their non-private nature, they are indeed unalike.

Admonition is the mildest form of public sanction. By definition, it is to put someone in mind of his duties or to counsel against wrong practices or to give authoritative warning

advice.[1] It is truly a reminder to the recipient that his conduct was substandard and to refrain from a repetition. Because it is a public warning or reminder, it usually results in widespread publicity. Its admonitory effect is frequently lost because of this feared publicity and in the mind of most judges, it is simply and purely a form of punishment. This makes its warning, rather than punitive purpose, nugatory.

Conduct on <u>one</u> occasion that violates a Rule or Canon but does not result in the deprivation of a legal right and does not tend to bring the judiciary and the court system into disrepute, should usually be dealt with by way of admonition.

Censure, on the other hand, is far more severe than admonition and should be reserved for cases which almost but not quite come up to the standard of conduct which normally results in removal. The very dictionary definition of "censure" shows that it is far more extensive than admonition. It is "a condemnatory judgment", it is "criticism", it is "an adverse judgment, unfavorable opinion, hostile criticism; blaming, finding fault with, or condemned as wrong; expression of disapproval or condemnation."[2] It is not a reminder of a duty breached by an occasional errant judge, it is a severe critical

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[1] <u>Oxford English Dictionary</u>

[2] <u>Ibid.</u>

appraisal and condemnation short of removal. As such, it should be (and sometimes is) used to sanction conduct which is serious, often repetitive or which tends to result in public disrespect for the courts and our system of justice.

One does not need an exhaustive review of the cases decided by the courts and this Commission and resulting in either censure or admonition in order to highlight the impropriety of the sanction of censure meted out to respondent. Illustrative examples will suffice.

In Matter of Mertens, 56 AD2d 456, 392 NYS2d 860 (1st Dept., 1977), there were over 100 instances of complaints of undignified, oppressive, rude, injudicious and intemperate instances of behavior in open court of which 33 were sustained. There had been a prior "sharp" admonition four years prior to Judge Mertens which seemed to have gone unheeded by him. His pattern of behavior ranged through the gamut of improper demeanor. It resulted in embarrassment, ridicule and shame, not to mention financial loss to lawyers and litigants alike. He was censured.

In Matter of Sena, unreported (Com. on Jud. Conduct, Jan. 18, 1980), there were 38 charges of extremely intemperate, rude and injudicious behavior of which 27 were sustained. The sanction was censure.

Matter of Whalen, unreported (Com. on Jud. Conduct, Jan. 20, 1983), involved a judge who presided in 37 matters in

which his employer was one of the parties. His sanction was censure.

In Matter of Sullivan, unreported (Com. on Jud. Conduct, April 22, 1983), a judge failed to disqualify himself in several cases involving his law firm. The sanction was censure.

In Matter of Sims, unreported (Com. on Jud. Conduct, May 16, 1983), the judge was censured for signing orders in ten cases in which the defendants were clients or former clients of hers or her husband's. (Interestingly enough, upon her appeal to the Court of Appeals, the censure was modified and she was removed from office.)

In Matter of Roncallo, unreported (Com. on Jud. Conduct, Jan. 6, 1983), a judge presided over the merits of a case which involved an insurance commission-sharing practice by the Republican party leaders in Nassau County. He was not inhibited in hearing the case even though he, himself, was participating in the commission-sharing scheme. His punishment was censure.

As to how admonitions have been applied, another representative sample will serve a useful purpose:

In Matter of Sharpe, unreported (Com. on Jud. Conduct, June 6, 1983), a judge cited for contempt an assistant district attorney for the lateness of a police officer not under his control and ordered him detained. He was put in a detention

room with the very prisoners whom he was prosecuting that morning. The sanction imposed was admonition.

In Matter of Certo, unreported (Com. on Jud. Conduct, Feb. 11, 1983), the respondent was a participant in a fund-raising testimonial where $10,000 was raised and given to him for his personal use. The sanction was admonition.

The underlying facts of the case at bar demonstrate the inappropriateness of censuring the respondent.

Judge Fromer is generally regarded as a hard-working, able and fair judge. Nonetheless, in the case at bar he chose to discuss a pending case after a plea bargain had been effected but sentence had not been pronounced, with a newspaper reporter. It was improper for this discussion to be held in a pending case. It was improper for Judge Fromer to have repeated the sense of what the defense counsel alleged at the plea-bargaining session as the facts of the case. It was, in short, defense counsel's contention that the defendant, who knew the complainant, entered into her apartment wearing a stocking mask and threatened her unless she consented to have sexual intercourse with him. Thereafter, the defendant allegedly fell asleep and it was the complainant who woke him and they had intercourse again. During this recitation of the defense counsel, the prosecutor stood silent. The majority construes this as lack of assent to this version. It seems, however, that this bizarre story, if it did not carry some convincing value in

the prosecutor's mind, would have prompted some expression of dissent. Right or wrong, Judge Fromer construed the silence as most ordinary people would, as not being contradictory of this version. He unwisely, nay foolishly, synthesized the implications of the story and repeated it to the newspaper reporter. I have no doubt that in the mind of the victim Judge Fromer's words spoken to the press must have caused some distress. I would venture to guess, however, that under the circumstances, the indictment for Rape, Third Degree, and plea bargain struck, with the mild sentence to be imposed, carried a far greater degree of discomfort to the complainant. Very little of what Judge Fromer said to the reporter could have added to the resentment already felt by the complainant on the heels of the way that the case had been handled and the disposition to be effected.

Respondent has never been the object of discipline. From the moment that this Commission expressed an interest in his remarks concerning the Hickey case, he has acknowledged his misconduct and has expressed sincere contrition. It was truly a foolish statement, erroneously made, for which I am sure Judge Fromer would have been glad to apologize to the complainant.

Instead, the Commission imposed the penalty of censure. The vote to censure came at the same meeting where the Commission also dealt with the matter of Judge Myers, of the

Norfolk Town Court in St. Lawrence County. It is worthwhile to compare the facts in that case with the one at bar. In Myers, the operative facts as found by the Commission showed that the respondent hung a dart board in his chambers and offered defendants an opportunity to throw a dart to determine their fines. In one instance, he indicated that if a defendant missed the board, she would be sentenced to seven days in jail. He used a printed release form which recited that:

> I of my own free will would like to toss a dart at the board to decide the amount of fine which will be charged to me for my conviction of the violation with which I have been charged. I do not hold the Judge responsible for this opportunity to decide on the amount of fine, and I resolve [sic] all interested parties from this act, I do it on my own free will.

Several defendants were solicited to throw darts, resulting in such witty remarks as: "Sure, bend over." Surely, the throwing of darts and comments of the above nature are not conducive to respect for the law and the decorum of the judicial process. These repeated instances of unjudgelike conduct caused this Commission to impose only the sanction of admonition on Judge Myers (with two members dissenting in favor of a harsher penalty).

The disparity of treatment accorded to Judge Myers and to Judge Fromer demonstrates the need for consistent standards of judgment. To admonish one who, with his dart board and

repeated clowning games and banter, must have been the laughing stock of the community while censuring a worthwhile capable and serious-minded judge, defies my sense of balanced judgment and points out the majority's excessively severe view of Judge Fromer's conduct.

In meting out a proper sanction in this case, I would take into account the following factors:

1. Was anyone deprived of a substantial legal right by the respondent? I believe that the answer is in the negative.

2. Was there the slightest semblance of moral turpitude or improper ethics involved in the conduct? The answer is in the negative.

3. Was the conduct of such a nature that future litigants in respondent's court will lose confidence in the fairness of the judge or the proceedings? The answer is in the negative.

4. Was the dignity of the court or the judicial system degraded by the conduct? The answer is in the negative.

5. Does respondent's past conduct require that he be made an example of for public discipline? The answer is in the negative.

6. In the absence of public discipline, would the conduct be likely to be repeated? The answer is in the negative.

7. Is there a compelling need for public discipline in this one isolated case of a gauche remark and improper discussion of a case still pending? Not only is the answer in the negative but any beneficial effect of a confidential letter of caution will be dissipated by the overkill of the public censure.

A consideration of these factors leads me to conclude that either censure or admonition is far too severe for disciplining the respondent for a one-time, foolish remark. I believe that this would be a proper case for a dismissal with a strongly worded letter of caution.

Dated: October 25, 1984

John J. Bower, Esq., Member
New York State
Commission on Judicial Conduct