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

EUGENE M. HANOFEE,

a Judge of the County Court, Sullivan County.

THE COMMISSION:

Victor A. Kovner, Esq., Chair
Honorable Myriam J. Altman
Henry T. Berger, Esq.
John J. Bower, Esq.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores Del Bello
Mrs. Gene Robb*
Honorable Isaac Rubin
Honorable Eugene W. Salisbury
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian and Cathleen S. Cenci, Of Counsel) for the Commission

Barton Denis Eaton for Respondent

The respondent, Eugene M. Hanofee, a judge of the County Court and Surrogate's Court, Sullivan County, was served with a Formal Written Complaint dated July 14, 1988, alleging

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*Mrs. Robb resigned on October 20, 1989. The vote in this matter was on August 18, 1989.

that he made inappropriate remarks in five cases, that he refused to permit a lawyer to make a motion, that he did not permit another lawyer to practice in his court after the lawyer objected to respondent's remarks in a court proceeding, that he requested favoritism from another judge and that he attempted to interfere with the Commission staff's investigation of a complaint. Respondent filed an answer dated August 24, 1988.

By order dated September 9, 1988, the Commission designated the Honorable Catherine T. England as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 5, 6, 8, 9, 12, 13, 14, 15 and 21, 1988, and the referee filed her report with the Commission on May 26, 1989.

By motion dated June 13, 1989, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. On July 13, 1989, respondent cross moved to disaffirm the referee's report and to dismiss the complaint or, alternatively, for a new hearing before a different referee.

On August 18, 1989, 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.

As to Charge I of the Formal Written Complaint:

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

As to Charge II of the Formal Written Complaint:

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

As to Charge III of the Formal Written Complaint:

3. Respondent has been the sole judge of the Sullivan County Court and Surrogate's Court since June 5, 1984. He was a judge of the Sullivan County Family Court from January 1, 1977, to June 5, 1984.

4. On February 11, 1988, Miguel Cuesta appeared before respondent in County Court for sentencing on a charge of Criminal Sale Of A Controlled Substance, Fourth Degree. The following exchange took place between respondent and Mr. Cuesta's attorney, John Ferrara of the Legal Aid Society:

> THE COURT:...Apparently Mr. Cuesta does feel he is suffering some injustice at the hand of our legal system. I am just wondering how he would be treated if he appeared in Cuba on the same charge.
>
> MR. FERRARA: He says he doesn't know because he came into this country 18 years ago.
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THE COURT: He is still an alien, though.... It's very upsetting to the Court when you read something like that in the probation report and it usually comes from--another one coming up here. Someone from Guatemala, Cuba, Colombia. All unhappy when they get caught and convicted of crime, you know. It really bothers this Court tremendously.

MR. FERRARA: Judge, I hesitate to distinguish between my clients who are Hispanic and my clients who are not, and their views as to the legal system. Quite frankly, I think that's an improper approach for this Court or anybody else.

THE COURT: It's what?

MR. FERRARA: To distinguish between the Hispanics and the Anglos and the Blacks, and I would ask the Court not to do that.

THE COURT: I am talking about individuals and talking about Mr. Cuesta as an individual. He is an alien here and unhappy with our justice system. I am saying, perhaps he should go back to where he came from. This is what the Court is saying. It's very inappropriate, and I take task with you by indicating that this Court is bias to anybody coming from any particular country, or area, or whatever. That's an outrageous statement if that's what you are saying. I think you should apologize to the Court.

5. Mr. Ferrara refused to apologize, and respondent adjourned the matter for a week and remanded Mr. Cuesta to jail. He ordered counsel to meet with him in chambers and said to Mr. Ferrara, "You can begin thinking about it, and I ask that you be relieved from appearing in this court on this matter."

6. Mr. Ferrara's supervisor, Carl J. Silverstein, executive director of the Legal Aid Society, heard about the incident and came to respondent's court. Respondent told Mr. Silverstein that Mr. Ferrara was "persona non grata" in respondent's court and that he would not hear any more of Mr. Ferrara's cases. Mr. Silverstein suggested that they let the matter "cool down" over the upcoming weekend.

7. Without further discussion, respondent issued a letter to Mr. Silverstein on February 16, 1988, stating, "I am disqualifying myself on all matters in which John Ferrara has appeared or will be appearing."

8. Mr. Ferrara had 25 cases pending before respondent at the time--approximately a quarter of the court's criminal caseload. The 25 cases included three in which the defendants had pled guilty and were awaiting sentence, one in which a pretrial hearing was in progress, four in which decisions on pretrial motions were pending, four in which pretrial hearings were to be scheduled and one in which respondent's decision after a pretrial hearing was pending. Twenty-one of the defendants were jailed.

9. Mr. Ferrara testified in this proceeding that his cases "lingered" after respondent refused to allow him to appear. Mr. Silverstein testified that he could not reassign the cases because it would have created an imbalance in the caseload of the five lawyers on his staff. The district attorney, Stephen F. Lungen, testified that Mr. Ferrara's cases

were in "limbo" as the result of respondent's decision and that he was concerned that they might have to be dismissed for failure to provide a speedy trial.

10. On February 22 and 24, 1988, Mr. Ferrara wrote to Edward S. Conway, the administrative judge for the 3d Judicial District, and asked him to assign other judges to preside in the 25 cases.

11. Judge Conway replied that it would be "impossible" to re-assign all of the cases and urged Mr. Ferrara and respondent to resolve their differences promptly. By letter of March 8, 1988, Judge Conway said, "There is no way that the judicial system can tolerate the present circumstances of having the single court judge in a one-judge county disqualified in all criminal cases in which the chief trial counsel... is assigned or will be assigned in the future."

12. On March 9, 1988, respondent wrote to Mr. Silverstein "to clarify" his February 16 letter. Respondent said, "I have not and am not disqualifying myself from any Legal Aid cases. It is only John Ferrara that is disqualified from appearing before me."

13. On March 23, 1988, Judge Conway assigned Family Court Judge Anthony V. Kane to handle "the large number of cases on the Sullivan County Court criminal calendar" in which Mr. Ferrara was counsel. Judge Conway also directed respondent to sit in Family Court while Judge Kane was required to be in respondent's court.

14. Judge Conway told respondent that he felt that respondent had no authority to prevent Mr. Ferrara from appearing before him. Deputy Chief Administrative Judge Robert J. Sise also told respondent, "I do not think a judge can prevent a lawyer from practicing in his court."

15. Between February and May 1988, respondent met with Mr. Silverstein and several members of the board of directors of the Legal Aid Society to discuss the controversy.

16. Respondent and an attorney for Mr. Ferrara exchanged several drafts of a joint statement in which they proposed to resolve their differences, but no agreement was reached.

17. On May 10, 1988, respondent wrote to the chief clerk of the court and directed him to restore Mr. Ferrara's cases to his calendar. Respondent was scheduled to appear the following day to give testimony concerning this matter before a member of the Commission. His appearance was subsequently adjourned to May 25, 1988.

As to Charge IV of the Formal Written Complaint:

18. On March 5, 1987, respondent was visited in chambers by Joseph P. Famighetti, a Nassau County lawyer with whom respondent had worked while on assignment there.

19. Mr. Famighetti was scheduled to appear that day before Justice Perry E. Meltzer in the Thompson Town Court, about a mile from respondent's court.

20. During the visit, respondent called Judge Meltzer, whom he had known for years and who was scheduled to appear before respondent as a lawyer the same day.

21. Respondent told Judge Meltzer that Mr. Famighetti was a "nice" person and that Judge Meltzer "should be nice to him."

22. Judge Meltzer told respondent that he would treat Mr. Famighetti as he treats all lawyers appearing before him. He then disclosed the call to the assistant district attorney who was appearing in the case in which Mr. Famighetti was counsel and offered to recuse himself.

As to Charge V of the Formal Written Complaint:

23. Respondent was notified by letter dated May 13, 1988, that the Commission had authorized an investigation into a complaint that he had an ex parte communication with defense counsel in People v. Eskenazi in May 1985.

24. After he received the letter, respondent summoned defense counsel in the case, David Cohen, to his chambers.

25. Respondent told Mr. Cohen that Commission staff was investigating the case and that Mr. Cohen would be called as a witness.

26. Respondent and Mr. Cohen discussed the case in an effort to reconstruct what had occurred. At one point, respondent said, "You remember that we never had any ex parte conversation."

27. Mr. Cohen replied that he did not and that if he were asked to testify, he would tell the truth. Respondent said, "Don't hurt me." There was further conversation, and, as Mr. Cohen was leaving, respondent said, "I know you are not going to do anything to hurt me."

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(a)(4) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 2B, 3A(4) and 3B(1) of the Code of Judicial Conduct. Charges III, IV and V of the Formal Written Complaint are sustained, and respondent's misconduct is established. Charges I and II are dismissed. Respondent's cross motion to dismiss or for a new hearing is denied.

It was inappropriate, unreasonable and arbitrary for respondent to refuse to hear Mr. Ferrara's cases for 88 days after the lawyer had made remarks which offended him. Respondent had appropriate means for dealing with Mr. Ferrara's conduct if he thought that it was improper. He could have held him in contempt if he thought the remarks were contemptuous, or he could have complained to the grievance committee if he thought the lawyer's conduct violated the Code of Professional Responsibility.

Instead, respondent barred Mr. Ferrara from his courtroom in an obvious attempt to extract an apology or punish him for making the remarks. By doing so, he placed in jeopardy the expeditious administration of justice and failed to facilitate the performance of the administrative responsibilities of other judges and court officials. See Section 100.3(b)(1) of the Rules Governing Judicial Conduct.

While respondent must disqualify himself in any case in which his impartiality might reasonably be questioned (Section 100.3[c][1] of the Rules), he also has an obligation to try to put aside his personal feelings about a lawyer and act impartially toward the lawyer's clients. Sections 100.1 and 100.2 of the Rules.

Respondent's call to Judge Meltzer conveyed the clear impression that he was seeking favoritism for Mr. Famighetti or his client. "[A]ny communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office." Matter of Lonschein v. State Commission on Judicial Conduct, 50 NY2d 569, 572 (1980).

Respondent's conversation with Mr. Cohen, in which he stated, "You remember that we never had any ex parte conversation," and, "Don't hurt me," were clearly designed to influence any testimony by Mr. Cohen before the Commission and, thus, constituted an attempt to interfere with the Commission's discharge of its lawful mandate. See Matter of Fabrizio v.

State Commission on Judicial Conduct, 65 NY2d 275 (1985); Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 553-54 (1986); Matter of White, 1987 Annual Report 153, 156 (Com. on Jud. Conduct, Aug. 8, 1986).

By reason of the foregoing, the Commission records the following votes:

Charge I is dismissed (Mr. Kovner, Judge Altman, Judge Ciparick and Mrs. Del Bello dissent and vote that the charge be sustained);

Charge II is dismissed (Mrs. Del Bello dissents and votes that the charge be sustained);

Charge III is sustained (Judge Altman dissents and votes that the charge be dismissed);

Charge IV is sustained;

Charge V is sustained (Judge Altman, Mr. Bower and Mr. Cleary dissent and vote that the charge be dismissed).

The Commission determines that the appropriate sanction is censure.

Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Robb, Judge Rubin and Judge Salisbury concur as to sanction.

Mr. Kovner and Mrs. Del Bello dissent as to sanction and vote that respondent be removed from office.

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: October 27, 1989

Victor A. Kovner, Esq., Chair
New York State
Commission on Judicial Conduct

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

EUGENE M. HANOFEE,

OPINION BY JUDGE ALTMAN, DISSENTING IN PART

a Judge of the County Court, Sullivan County.

I concur in the dissent of Judge Ciparick and find misconduct on Charge I and dissent and vote to dismiss Charge III.

On February 16, 1988, respondent stated, "I am disqualifying myself on all matters in which John Ferrara has appeared or will be appearing." Thereafter, on March 9, 1988, respondent wrote, "I have not and am not disqualifying myself from any Legal Aid cases. It is only John Ferrara who is disqualified from appearing before me."

If respondent was so hurt by Mr. Ferrara's comments that he could not be fair in his cases, no one can challenge his right to disqualify himself. His subsequent statement that "It is only John Ferrara who is disqualified from appearing before me," can be read simply as clarification of the parameters and limitations of respondent's disqualification.

I am not convinced by a preponderance of the credible evidence that respondent's actions regarding Mr. Ferrara were

for a patently improper purpose. While the opinions of the administrative judges should be given serious consideration, they were not legally binding on respondent, and he had every right to exercise his own independent judgment on the disqualification issue. To respondent's credit, he finally put his own feelings aside in order to facilitate the orderly administration of justice.

Dated: October 27, 1989

Myriam J. Altman

Honorable Myriam J. Altman, Member
New York State
Commission on Judicial Conduct

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

EUGENE M. HANOFEE,

a Judge of the County Court, Sullivan County.

OPINION BY JUDGE CIPARICK, IN WHICH MR. KOVNER AND JUDGE ALTMAN JOIN, DISSENTING IN PART

I dissent as to the dismissal of Charge I and concur as to sanction.

In its majority opinion, the Commission has dismissed charges against respondent which inter alia allege that "...respondent made ethnically derogatory, prejudicial and otherwise inappropriate remarks about Hispanic, Jamaican or South American people while presiding over sentencing proceedings..." in five different matters in 1987 and 1988. The referee in this matter, after a full hearing, found misconduct on this charge.

The Honorable Sol Wachtler, Chief Judge of the State of New York, in creating the New York State Judicial Commission on Minorities stated:

> We are concerned with a growing perception among lawyers, court employees and the public that minorities are not treated fairly in our courts... If a significant segment of society loses faith in the fairness of our system of justice, society will be in grave danger.

Thus, one of the chief mandates of the Commission on Minorities is to address the perception of racial and ethnic bias and to specifically study the issue of courtroom treatment of minorities. One would hope that the mistreatment of minority litigants is not widespread. However, even if it exists in one courtroom in this state, all efforts should be made to eliminate it.

Respondent's statements and demeanor during the sentencing of the five defendants in question certainly rise to the level of misconduct and cannot be tolerated. Not only were individual litigants subject to humiliation and scorn, but also the perception of racial and ethnic bias was such that it prompted witnesses, non-minority attorneys and court personnel to come forward and testify at the hearing before the referee. It appeared to them that respondent displayed an anti-Hispanic bias.

It is unequivocal in New York law that expressions of racial or ethnic bias by judges will not be tolerated. Matter of Cerbone v. State Commission on Judicial Conduct, 61 NY2d 93 (1984); Matter of Aldrich v. State Commission on Judicial Conduct, 58 NY2d 279 (1983); Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465 (1980); Matter of Bloodgood, 1982 Annual Report 69 (Com. on Jud. Conduct, June 11, 1981); Matter of Sweetland, 1989 Annual Report 127 (Com. on Jud. Conduct, Nov. 21, 1988).

Respondent's behavior, not only evinced ethnically derogatory and otherwise improper conduct, it also undermined an essential part of his role as a judge; that is, to be and appear impartial. (Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286 [1983]).

Accordingly, I find misconduct as to Charge I. I have voted with the majority on Charges II, III, IV and V and concur in the determination insofar as it sustains the three latter charges and also concur in the determination insofar as it finds that the appropriate sanction is censure.

Dated: October 27, 1989

Hon. Carmen Beauchamp Ciparick, Member
New York State
Commission on Judicial Conduct

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

EUGENE M. HANOFEE,

DISSENTING OPINION
BY MRS. DEL BELLO

a Judge of the County Court,
Sullivan County.

I dissent as to the dismissal of Charge I and as to sanction.

The Commission's dismissal of Charge I suggests that it is perfectly proper for a judge to make ethnically derogatory statements about Hispanic, Jamaican or South American defendants.

When one defendant, who was about to be sentenced to prison, asked about the return of photos of his children, he was greeted by the insensitive, callous comment that he should not worry too much about the photos since he may be seeing his children soon in Colombia. The judge's explanation of his obviously snide comment was that he wanted to make the defendant feel good.

Four other Hispanic or South American defendants were told that they could go back where they came from. Remarkably, the precipitating factor for his hostile comments in some instances was their so-called criticism of the American system of justice. The respondent's explanation was that he did not

direct the defendants to go back to their countries of origin; he only "suggested" that they do so.

In an age of continuing world-wide racial and ethnic strife, it is not too much to expect that judges will avoid giving the appearance of being prejudiced or unduly concerned with the ethnic backgrounds of defendants. If we do not have understanding and ethnic impartiality inside our courtrooms, then what can we expect outside of our courtrooms?

For the Commission to conclude that these comments by a judge in an American court of law do not rise to the level of misconduct is astounding.

One young, legal aid lawyer risked the judge's wrath by respectfully expressing his disagreement with the judge's comments to the lawyer's client. Although the Commission properly sustained Charge III relating to respondent's banishment of that lawyer from the judge's courtroom for several months, it has failed to find improper the very conduct that prompted the lawyer to speak out in court. Dismissing Charge I is a terrible message to that lawyer and to all those who believe that the judge's ethnic comments were improper.

At the hearing, respondent was asked by his attorney about the chances that one of the defendants will lead a productive life. Respondent testified that the defendant "was not Hispanic looking;" his physical appearance was "American," and he was "clean-cut" and "good looking." The respondent's conclusion was that the defendant had "great potential."

That is disturbing testimony in a case such as this. When joined with his inappropriate comments about the defendants and their countries of origin, it appears that respondent has problems dealing with defendants from certain other countries.

I find it especially outrageous that he cloaks his remarks in patriotism and, in a most un-American manner, he maintains that criticism of the American court system by foreign-born defendants is an affront to him. Their "criticism" was nothing more than complaints about delays, pressure to plead guilty and, in one instance, about not receiving a medical examination in jail.

I would sustain Charge I and remove the judge from office. His conduct as to Charges I, III, IV and V show a lack of fitness for judicial office, and his expressed attitude in these proceedings did nothing to demonstrate otherwise.

Dated: October 27, 1989

Dolores Del Bello

Dolores Del Bello, Member
New York State
Commission on Judicial Conduct