

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

ROBERT A. KELLY, JR.,

a Justice of the Westhampton Beach Village
Court, Suffolk County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Edward Lindner, Of Counsel) for the Commission

Stillman, Friedman & Shechtman, P.C. (by Paul Shechtman) for the
Respondent

The respondent, Robert A. Kelly, Jr., a Justice of the Westhampton Beach
Village Court, Suffolk County, was served with a Formal Written Complaint dated July

19, 2010, containing four charges. The Formal Written Complaint alleged that: (i) respondent represented clients before the Westhampton Beach Building and Zoning Department, which enforces the local building code, over which respondent's court has jurisdiction; (ii) respondent's name appeared on papers filed by his law firm in connection with lawsuits against the Village of Westhampton Beach; (iii) respondent failed to disqualify himself in two cases involving a party who was a client or former client of his law firm; and (iv) respondent made or permitted political contributions through his law firm. Respondent filed a verified answer dated September 8, 2010.

On March 10, 2011, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On March 17, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Westhampton Beach Village Court, Suffolk County since 1996. He was admitted to the practice of law in New York in 1990 and has been in private practice at the law firm of Kelly & Hulme, P.C., in Westhampton Beach, New York, since that time.

As to Charge I of the Formal Written Complaint:

2. Pursuant to sections 70-48 and 197-56 of the Village of Westhampton Beach Municipal Code, the Westhampton Beach Village Court has jurisdiction over local building and zoning ordinance violation cases.

3. The Westhampton Beach Building and Zoning Department (“Building Department”) enforces and administers the Westhampton Beach Village Building Code. The Westhampton Beach Building and Zoning Administrator reviews all applications for building permits and certificates of occupancy and has the authority to grant or deny such applications.

4. The Westhampton Zoning Board of Appeals hears appeals of the Building and Zoning Administrator’s denial of an application for a building permit or certificate of occupancy. The Board may reverse, affirm or modify the Building and Zoning Administrator’s determination.

5. Between August 1999 and February 2007, in four cases set forth below, respondent represented private clients in matters before the Building Department, seeking non-ministerial determinations as to building permits and certificates of occupancy.

The 2007 Anderson Representation

6. On February 27, 2007, respondent filed an application to the Building Department on behalf of George and Elvira Anderson for an updated certificate of occupancy for a residential property in Westhampton Beach. The Building Department

denied the application on March 1, 2007, and notified the Andersons that a lawn area installed on the property violated provisions of the Village Laws dealing with Coastal Erosion Management.

7. On March 2, 2007, respondent met with Bridget Napoli, the Village Ordinance Enforcement Officer, and Paul Houlihan, the Village Building and Zoning Administrator, concerning the alleged violations. At the meeting, respondent asserted that the lawn area did not encroach upon the dune and, therefore, was not subject to dune restrictions.

8. On April 3, 2007, Ms. Napoli issued an Order to Remedy the alleged violations to the Andersons.

9. On April 9, 2007, Mr. Houlihan sent respondent a letter advising that the New York State Department of Environmental Conservation agreed with his interpretation of the dune area. Mr. Houlihan recommended that the Andersons revise their application or request a variance from the Zoning Board of Appeals.

10. On April 17, 2007, respondent wrote to Mr. Houlihan and requested that he modify two "factual errors" in his April 9th letter "so that there will be a clear record for the Zoning Board of Appeals and the courts for appeals that may take place with respect to these matters." Mr. Houlihan denied respondent's request in a letter dated April 20, 2007.

11. On April 18, 2007, respondent sent Ms. Napoli a letter requesting a stay of enforcement of the Order to Remedy so that the Andersons could submit an

application for a variance to the Zoning Board of Appeals.

12. On May 9, 2007, respondent's partner, James Hulme, Esq., submitted an application in the name of the Andersons to the Zoning Board of Appeals, seeking a coastal erosion variance and interpretation of a zoning ordinance. Respondent did not participate in preparation of the zoning board application and did not appear before the Zoning Board on the matter.

The 2001-2002 Anderson Representation

13. Respondent represented the Andersons in December 2001 and January 2002 in connection with their application for a building permit to construct an access walkway and a set of front entry stairs on the same property as above.

14. On December 11, 2001, respondent met with Paul Houlihan concerning the application. Mr. Houlihan told respondent that the proposed walkway was not permitted. On December 12, 2001, respondent sent Mr. Houlihan a three-page letter arguing that the new walkway had been previously approved.

15. Mr. Houlihan denied the Anderson application on January 8, 2002. On January 18, 2002, respondent sent Mr. Houlihan a letter re-submitting the building permit application without the walkway.

The 2001 Weiss/Chandler Representation

16. In 1999 respondent represented Louis and Alice Weiss in the sale of a residential property in Westhampton Beach to Jordan Chandler.

17. Thereafter, on January 3, 2001, respondent sent a letter to then-

Building Inspector Fred Showers on behalf of Mr. Chandler, in which he enclosed copies of a building permit and certificates of occupancy, provided his recollection of the events surrounding the issuance of the certificates, and requested that Mr. Showers revise the most recent certificate of occupancy to include a tennis court.

The 1999 Gizang Representation

18. In August 1999 respondent represented Michael Gizang in connection with his application to the Building Department for a building permit to construct a walkway at a residential property in Westhampton Beach.

19. Respondent sent two letters dated August 2, 1999, and September 22, 1999, to Mr. Gizang's neighbors requesting their consent to construct the walkway.

20. On December 9, 1999, respondent personally executed an affidavit, which he submitted to the Building Department, in which he stated: (1) that he had contacted Mr. Gizang's neighbors and that they refused to consent to the construction of a walkway, and (2) that he had filed a title certification with the Village establishing that Gizang had the right of way to construct a walkway.

21. The Administrator withdraws the specifications set forth in paragraphs 9, 11 and 12 of the Formal Written Complaint regarding respondent's representation of Dana Seymour, Tim Presutti, Fourth Generation, LLC, Peter Colucci and Georgia Malone. Upon review of respondent's Answer and upon further reflection, the Administrator agrees that the decisions of the Building Department in those cases were largely ministerial and that respondent's representation of those parties in the

Building Department does not rise to the level of misconduct.

22. Respondent acknowledges that Opinion 89-44 of the Advisory Committee on Judicial Ethics (“Advisory Committee”) provides that a part-time judge who presides over zoning and planning matters should not represent private clients before the zoning or planning boards in the community served by his or her court. Respondent now recognizes that his conduct created the appearance of impropriety by seeking discretionary determinations to approve building permits and certificates of occupancy from the Building Department on behalf of private clients. Respondent has agreed that he will not apply for any Building Permits in the Village of Westhampton Beach in the future.

23. Advisory Opinion 89-44 does not expressly address whether a part-time judge may apply for building permits or certificates of occupancy on behalf of clients. After Commission staff contacted respondent during the investigation of the conduct described in the Formal Written Complaint, respondent requested an opinion from the Advisory Committee on Judicial Ethics as to whether a part-time judge may assist clients seeking “building permits *** need[ed] to obtain a certificate of occupancy” where the client is “entitled to the permits ‘as of right’ without the exercise of any discretion.”

24. On October 28, 2010, in response to respondent's request, the Advisory Committee issued Opinion 10-149, which restates the need for part-time judges practicing law in the municipalities where they sit to avoid conduct which lends the

prestige of their judicial office to advance the private interests of others, to act at all times in a manner that promotes public confidence in the judiciary and to avoid the appearance of impropriety in their representation of private clients. The opinion advises that it is permissible for a judge to apply for an updated certificate of occupancy or building permit where the approval is “ministerial,” provided that “the judge must withdraw from representing the client in the matter” “if a particular application is contested.”

As to Charge II of the Formal Written Complaint:

25. Between April 1998 and December 2008, respondent’s name appeared on submissions made to the Suffolk County Supreme Court by his law firm, Kelly & Hulme, in six lawsuits filed against Westhampton Beach Village, including but not limited to the submissions set forth below.

A. In *Hoffman v. Village of Westhampton Beach*, respondent’s law firm filed a petition for a small claims assessment review, dated April 29, 1997. Respondent’s name was listed on the petition in a space provided for designating a representative to act on behalf of the petitioner in the proceeding.

B. In *Rila Realty Corp. v. Bean et al.*, respondent’s law firm filed an Article 78 petition seeking to annul a determination of the Village Zoning Board of Appeals. Respondent’s name appeared on his law firm’s letterhead on three letters submitted to the court: (i) a cover letter, dated July 24, 2001, accompanying the petition, (ii) a letter dated May 13, 2001, requesting an adjournment of the petition return date, and (iii) a cover letter dated December 14, 2001, accompanying a Memorandum of Law in

support of the petition.

C. In *Little v. Bean*, respondent's law firm filed an Article 78 petition seeking to annul a determination of the Village Zoning Board of Appeals. Respondent's name appeared on his law firm's letterhead on a cover letter, dated June 1, 2004, accompanying a Memorandum of Law in support of the petition.

D. In *Malone v. Village of Westhampton Beach*, respondent's law firm succeeded as the attorney of record in an Article 78 proceeding seeking to annul a determination of the Village Zoning Board of Appeals. Respondent's name appeared on his law firm's letterhead on three letters submitted to the court: (i) a cover letter dated November 27, 2007, accompanying an Affirmation and Memorandum of Law in support of the Article 78 petition; (ii) a letter dated August 23, 2006, requesting an adjournment of the return date of the petition, and (iii) a letter dated September 26, 2006, requesting a second adjournment.

E. In *East End Concrete & Stone Products, Inc. v. Josephine Carnevale, et al.*, respondent's law firm filed a cross-claim against the Village of Westhampton Beach as a third-party defendant. Respondent's name appeared on his law firm's letterhead on two letters submitted to the court: (i) a cover letter dated February 20, 2007, accompanying a Verified Answer with Counterclaim and Cross-Claim, and (ii) a letter dated March 13, 2007, concerning an adjournment request made by one of the defendants.

F. In *Denihan v. Village of Westhampton Beach Zoning Board of*

Appeals, respondent's law firm filed an Article 78 petition seeking to annul a determination of the Village Zoning Board of Appeals. Respondent's name appeared on his law firm's letterhead on a cover letter dated February 27, 2008, accompanying the petition.

26. In the six cases listed above, and in one additional case, *Szafran v. Village of Westhampton Beach*, respondent shared in the fees earned by his law firm from the lawsuits.

27. Respondent was aware that his law firm did not have separate letterhead without respondent's name for use in litigation against the Village and in matters before the Zoning Board of Appeals. He was not aware of Advisory Opinion 99-184, which provides that a part-time judge should not allow his/her name to appear on submissions made to a court, in connection with a lawsuit brought by the judge's law firm against the municipality in which the judge's court is located.

28. Respondent did not appear in court in these matters and did not sign any of the letters submitted to the court in these cases. Respondent acknowledges that although his law partner handled the actual representation in these cases, which is permitted, he should not have allowed his name to appear on documents submitted to the courts.

29. Respondent was also aware that he received a share of the fees earned from lawsuits against the Village of Westhampton Beach. Respondent and his law partner divided profits equally and did not maintain a separate accounting for fees

generated by these lawsuits. Respondent was not aware of Advisory Opinions 94-32 and 93-68 which state that a part-time judge who practices law may not share in the profits earned from lawsuits against the town in which the judge sits.

30. As a result of the Commission's investigation, respondent's law firm created stationery without respondent's name for use in litigation against the Village and in matters before the Zoning Board of Appeals.

31. As a result of the Commission's investigation, respondent's law firm instituted a new fee sharing policy to ensure that respondent does not share in fees generated by his firm in litigation against the Village.

As to Charge III of the Formal Written Complaint:

32. The Administrator withdraws the specifications set forth in paragraphs 24 through 35 of the Formal Written Complaint regarding respondent's failure to disqualify himself in two cases involving a party who was a current client of his law firm.

33. Respondent affirmatively states that the summonses in these two cases were issued by a court clerk using respondent's signature stamp and that respondent did not personally sign the summonses or direct his clerk to issue them.

34. Respondent acknowledges that he must disqualify himself in any case in which a client of his law firm appears as a party and affirmatively states that it is now his regular practice to have the administrator in his law firm check the calendar for client conflicts before taking the bench, that he continues to check the calendar himself

and that he will disqualify himself in all cases involving a client of his firm.

35. Upon review of respondent's Answer and upon further reflection, the Administrator agrees that respondent's involvement in the two cases set forth in Charge III of the Formal Written Complaint was negligible and that any violation of the Rules was *de minimis*.

As to Charge IV of the Formal Written Complaint:

36. Between May 2006 and June 2009, respondent's law firm, Kelly & Hulme, made \$925 in contributions to political candidates and organizations using firm checks issued from the firm business account, as follows:

A. \$200 to the campaign of Chris Nuzzi, a candidate for Town Council in the Town of Southampton, Suffolk County, on May 10, 2006.

B. \$300 to the campaign of Skip Heaney, a candidate for Town Supervisor in the Town of Southampton, Suffolk County, on May 22, 2006.

C. \$200 to the campaign of Sundry Schermeyer, a candidate for Town Clerk in the Town of Southampton, Suffolk County, on June 24, 2006.

D. \$100 to the Southampton Town Republican Committee in Suffolk County, on August 11, 2008.

E. \$125 to the campaign of Chris Nuzzi, a candidate for Town Council in the Town of Southampton, Suffolk County, on May 26, 2009.

37. Before the Commission's investigation, respondent was not aware that his law firm's checking account was used to make political contributions.

Respondent acknowledges that this practice is prohibited by Section 100.5(A)(1)(h) of the Rules Governing Judicial Conduct (“Rules”). Respondent acknowledges that Advisory Opinion 96-29 provides that a judge may not permit political contributions to be made from his law firm’s account. Respondent concedes that he was obliged to comply with the Rule and that he failed to do so.

Additional Finding:

38. There is no evidence that the judge committed misconduct with respect to the disposition of any case in his court.

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(C), 100.3(A), 100.4(A)(1), 100.4(A)(3) and 100.5(A)(1)(h) of the Rules and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I, II and IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent’s misconduct is established. Charge III is not sustained and therefore is dismissed.

A part-time judge may practice law subject to certain ethical restrictions designed to eliminate conflict and the appearance of any conflict between the exercise of judicial duties and the private practice of law. *See, Matter of Aison*, 2010 Annual Report 62; *Matter of Miller*, 2003 Annual Report 140 (Comm on Judicial Conduct). Every

lawyer-judge must scrupulously observe the applicable ethical standards in order to avoid conduct that may create an appearance of impropriety and impugn the integrity of judicial office. As set forth in this record, respondent's conduct showed inattention to his ethical responsibilities and, in particular, to the special ethical obligations of judges who are permitted to practice law.

The ethical standards provide that a judge must conduct his or her extra-judicial activities so that they are not incompatible with judicial office and do not cast reasonable doubt on the judge's capacity to act impartially or interfere with the proper performance of judicial duties (Rules, §100.4(A), subd [1], [3]). The Advisory Committee on Judicial Ethics has held that a part-time judge who presides over zoning and planning matters should not represent private clients before the zoning or planning boards in the municipality served by his or her court (Adv Op 89-44/89-60). As the Advisory Committee explains, such representation may create an appearance of impropriety (Rules, §100.2[A]) since a judge who presides over zoning violation matters may appear to be an integral part of the town's zoning enforcement scheme. By advocating for his private clients with the Village Building Department seeking non-ministerial determinations as to building permits and certificates of occupancy, respondent created a similar appearance of impropriety.

For example, in the 2007 Anderson representation, after the Building Department denied respondent's client an updated certificate of occupancy because of alleged violations, respondent met with enforcement officials and sent a letter to the

Building and Zoning Administrator contesting “factual errors” in the Administrator’s letter and requesting that the errors be modified “so that there will be a clear record for the Zoning Board of Appeals and the *courts* for appeals that may take place with respect to these matters” (emphasis added). After respondent had advocated for his client in the matter, respondent’s law partner then did so before the Zoning Board of Appeals.

The Building Department not only issues building permits, but enforces the Village Building Code. At the very least, respondent’s requests of the Building and Zoning Administrator create the appearance that the judge is in a special position to secure favors for his clients since the Administrator knows that respondent’s court has jurisdiction over building and zoning ordinance violation cases. It is incumbent upon respondent to avoid such employment, which creates a clear conflict with his judicial duties.

It was also improper for respondent’s name to appear on papers filed by his law firm in Suffolk County Supreme Court in connection with lawsuits against the Village where respondent’s court is located, and for respondent to share in the fees earned by his firm from these lawsuits. Such conduct is incompatible with judicial office in that it places the prestige of judicial office and the private interests of the judge and the judge’s law firm in direct conflict with the interests of the municipality where the judge sits. While another attorney from a judge’s law firm is permitted to represent a client in such litigation, it is improper for the judge to participate in any way in the lawsuit or to share in the profits earned from such litigation, as the Advisory Committee has stated

(Adv. Op. 99-184, 94-32, 93-68). We note that as a result of the Commission's investigation, respondent's law firm has created stationery without his name for use in litigation against the Village and has instituted a new fee-sharing policy to ensure that respondent does not share in fees generated by his firm in litigation against the Village.

Finally, it was improper for respondent's law firm to make five political contributions over a three-year period. Such conduct is contrary to Section 100.5(A)(i)(h) of the Rules, which prohibits contributions by a judge to political organizations or candidates. *See, Matter of DeVaul*, 1986 Annual Report 83; Adv Op 96-29. Although respondent was not aware that his law firm's checking account was used to make such contributions, this does not excuse the impropriety. The onus was on respondent to ensure that his law firm was in compliance with the ethical rules.

In considering the appropriate sanction, we note that respondent has acknowledged that his actions were inconsistent with the relevant ethical standards. We note further that, as indicated above, respondent has taken significant steps to ensure that these transgressions are not repeated.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Belluck, Mr. Harding, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Cohen and Mr. Emery did not participate.

CERTIFICATION

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

Dated: March 31, 2011

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a solid horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct