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

MARTIN B. KLEIN,

a Judge of the Civil Court of the City of New York, Bronx County, and Acting Justice of the Supreme Court, Bronx 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 (Karen Kozac, Of Counsel) for the Commission

Mordkofsky & Goldstein, P.C. (By Norman J. Mordkofsky) for Respondent

The respondent, Martin B. Klein, a judge of the New York City Civil Court, Bronx County, was served with a Formal Written Complaint dated January 11, 1984, alleging that he

altered a signed decision in a case after receiving ex parte communications from the defendant's counsel. Respondent filed an answer dated February 14, 1984, and an amended answer dated March 8, 1984.

By order dated February 17, 1984, the Commission designated Walter Gellhorn, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 9 and 10, 1984, and the referee filed his report with the Commission on May 21, 1984.

By motion dated May 25, 1984, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be censured. Respondent opposed the motion by cross motion on June 13, 1984. The Commission heard oral argument on the motions on June 22, 1984, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a judge of the New York City Civil Court and has been since 1977. In January 1982, respondent was designated an Acting Justice of the Supreme Court, Twelfth Judicial District.

2. On November 10, 1982, in CCM Holding Co. et al. v. Sasson Jeans, respondent heard argument on plaintiffs' motion for a preliminary injunction prohibiting defendant from taking

steps to terminate its contract with plaintiffs as defendant was seeking to do. Respondent reserved decision on the motion and, pending determination, he continued a temporary restraining order that had been granted earlier by another judge.

3. On June 2, 1983, respondent reviewed a draft decision in the case from a law assistant in a pool assigned to Supreme Court. Respondent cursorily read the draft decision and, without reading the motion papers, signed the draft decision. The decision denied plaintiffs' motion for a preliminary injunction.

4. Respondent returned the decision to his law assistant, Daniel Kalish, who had also done a cursory review of the pool assistant's draft without reading the motion papers in accordance with the practice permitted by respondent.

5. Mr. Kalish notified the defendant's counsel that the decision had been signed and told him that he could pick up a copy in chambers. Contrary to respondent's instruction, Mr. Kalish did not inform plaintiffs' counsel.

6. On June 3, 1983, Barry Kaplan, an attorney for the defendant, came to respondent's chambers to pick up a copy of the decision. Mr. Kaplan read the decision in chambers and told Mr. Kalish that the decision did not address the issue of the temporary restraining order.

7. Mr. Kalish relayed Mr. Kaplan's concern to respondent.

8. Based on this ex parte communication from Mr. Kaplan and without notifying the plaintiffs' attorney, respondent added to the decision in his own handwriting, "TRO is terminated."

9. Mr. Kalish returned the amended decision to Mr. Kaplan, who then expressed concern that the decision did not recite when the TRO was terminated and asked whether it was terminated "forthwith."

10. Mr. Kalish took the decision and Mr. Kaplan's comment back to respondent.

11. Respondent then wrote "forthwith" after the words "TRO is terminated" on the face of the decision.

12. Respondent testified before a member of the Commission on November 3, 1983, that the word "forthwith" had been suggested by defendant's counsel. At the hearing in this matter on April 9, 1984, respondent testified that he did not recall who proposed that language and indicated that he had been mistaken in his previous testimony.

13. After respondent added "forthwith" to the decision, Mr. Kalish returned to the outer office and gave Mr. Kaplan the newly-amended decision. Mr. Kaplan then expressed a concern with the last sentence of the decision which read in part, "Settle order for deposition...."

14. Mr. Kalish discussed Mr. Kaplan's concern with respondent. Respondent further amended the decision to read, "Settle order only for deposition...."

15. Respondent was aware that the suggestions coming to him through Mr. Kalish were offered by an attorney for the defendant without the knowledge of the plaintiffs' attorney.

16. During his appearance on November 3, 1983, respondent acknowledged that he was aware that the suggestions were being proposed by defendant's counsel. At the hearing on April 9, 1984, however, he denied knowledge as to which party the attorney represented and said that his previous testimony had been inaccurate.

17. Respondent made the changes in the decision without understanding their significance and without reading any of the motion papers in the case.

18. Respondent testified at the hearing that he had discussed with Mr. Kalish the significance of the added language and had concluded that there was none.

19. At Mr. Kaplan's suggestion and with respondent's concurrence, Mr. Kalish immediately delivered respondent's amended decision to the clerk of Special Term for filing on Friday afternoon, June 3, 1983.

20. On June 6, 1983, the plaintiffs' attorney, Michael Cardozo, obtained a copy of the decision from a clerk

for his law firm who had discovered it while searching decisions in Special Term.

21. Because of the inserted language, Mr. Cardozo was concerned that the temporary restraining order granted to his client may have been lifted when the decision was filed. To avoid the possibility of any adverse financial consequences to his client, Mr. Cardozo and his firm immediately prepared papers for the Appellate Division, which stayed respondent's decision and granted a new temporary restraining order.

22. At the hearing in this matter on April 9, 1984, respondent testified that in his view his communications with Mr. Kaplan through Mr. Kalish and the subsequent amendments to his decision were within his judicial discretion and did not constitute judicial misconduct.

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(b)(2) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(4) and 3B(2) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established. Respondent's cross motion is denied.

Respondent altered a signed decision after he had received and considered ex parte communications from one

attorney in the case without having notified or heard the other side. These communications were not authorized by law and clearly violate Section 100.3(a)(4) of the Rules Governing Judicial Conduct.

Respondent's misconduct is especially serious in view of the circumstances. He made and altered his decision some seven months after the matter had been argued before him without having read the motion papers and knowing that his law assistant would not have read them. Thus, he could not have fully appreciated the potential significance of the changes proposed by defendant's counsel. It was especially important under these circumstances that plaintiffs' counsel be afforded an opportunity to be heard. By his negligence, respondent disregarded ethical standards that require him to diligently perform his judicial duties. Section 100.3 of the Rules.

Respondent's failure to recognize that he was wrong further exacerbates his misconduct.

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

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

Judge Alexander, Mr. Cleary and Judge Shea dissent as to sanction only and vote that respondent be admonished.

Judge Rubin 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: August 30, 1984

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