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

MARY ANNE LEHMANN,

a Judge of the Binghamton City Court,
Broome County.

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro[1]
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

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

Dreyer Boyajian LLP (by William J. Dreyer) for the Respondent

---

[1] Ms. DiPirro resigned from the Commission on October 30, 2008. The vote in this matter was taken on September 18, 2008.

The respondent, Mary Anne Lehmann, a Judge of the Binghamton City Court, Broome County, was served with a Formal Written Complaint dated June 15, 2007, containing one charge. The Formal Written Complaint alleged that respondent permitted her co-judge's law partners and associates to appear before her in the Binghamton City Court. Respondent filed a Verified Answer dated July 20, 2007. Respondent was served with a second Formal Written Complaint dated January 9, 2008, containing one charge. The second Formal Written Complaint alleged that respondent permitted the law partners and associates of her personal attorney to appear before her in the Binghamton City Court. Respondent filed a Verified Answer dated February 5, 2008.

On June 6, 2008, 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 and providing for written and oral argument on the issue of sanctions. The Commission accepted the Agreed Statement on June 18, 2008. Each side submitted memoranda as to sanction.

On September 18, 2008, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been an elected full-time Judge of the Binghamton City Court since 1997. She was admitted to the practice of law in New York in 1984.

As to Charge I of the Formal Written Complaint:

2. John T. Hillis was a full-time Binghamton City Court Judge for many years until his retirement in July 2004. He was succeeded by David F. Crowley, who served by appointment on an interim basis from July to December 2004.

3. William C. Pelella has been an elected, full-time Binghamton City Court Judge since January 1, 2005.

4. Robert C. Murphy was an appointed, part-time Binghamton City Court Judge from June 14, 2002, to June 14, 2008. During that time, he was in private practice as an attorney with a law office in Binghamton.

5. Throughout 2002, Robert C. Murphy and Kurt D. Schrader were of counsel to the law firm of O'Connor, Gacioch, Pope & Tait. Alan J. Pope and Jeffrey A. Tait were partners of the firm, and Linda Blom Johnson and Andrea Sarra were salaried associates of the firm.

6. On January 1, 2003, Judge Murphy and Messrs. Pope and Tait formed the law firm of Pope, Tait & Murphy, each as capital partners. Mr. Schrader was of counsel to the firm, and Ms. Sarra and Ms. Johnson were salaried associates of the firm. On July 7, 2003, James A. Sacco joined Pope, Tait & Murphy, of counsel. During 2003, the partners, members and associates of Pope, Tait & Murphy were persons connected in law business with Judge Murphy.

7. In January 2004 Mr. Tait became a Supreme Court Justice, and Ms. Sarra became his full-time law clerk.

8. During 2003, Mr. Pope, Mr. Schrader, Mr. Sacco, Ms. Johnson and Ms. Sarra generated revenue through the practice of law in the Binghamton City Court, and this revenue was included in the gross income of Pope, Tait & Murphy. Judge Murphy received a distribution of net income derived from the revenue generated by these attorneys through their practice of law in the Binghamton City Court.

9. On January 1, 2004, Judge Murphy and Messrs. Pope, Schrader and Sacco formed the law firm of Pope, Schrader & Murphy. Judge Murphy and Messrs. Pope and Schrader were capital partners, and Mr. Sacco was of counsel.

10. The gross income of Pope, Schrader & Murphy included 100% of all fees received for legal services performed. Each partner, including Mr. Sacco, was responsible for an equal share of common general overhead expenses. Each partner was also individually responsible for his own expenses incurred on behalf of the firm or on his own behalf or in connection with one of his cases, though the firm might advance sums for costs and disbursements.

11. The law firm of Pope, Schrader & Murphy remained in existence until June 1, 2006, when Murphy left the firm and became a sole practitioner. After that date, the firm became and remains the law firm of Pope, Schrader & Sacco.

12. From at least 2002 to about June 1, 2006, respondent knew Messrs. Pope, Tait, Schrader and Sacco professionally and knew that each was in the practice of law with Judge Murphy.

13. From in or about June 2002, when Judge Murphy became a judge,

until in or about March 2006, respondent permitted the partners and associates of Judge Murphy to appear before her in the Binghamton City Court in 81 criminal cases and nine civil cases, as set forth more fully in the Agreed Statement of Facts.

14. From July 25, 2002, to January 17, 2006, respondent assigned Mr. Sacco and/or Mr. Schrader to represent defendants before her in 45 cases, as set forth more fully in the Agreed Statement of Facts, notwithstanding that Mr. Schrader and Mr. Sacco were law partners of Judge Murphy.

15. At all times relevant to the matters herein, the process for assigning counsel in Binghamton City Court was as follows. Court staff would consult a list of attorneys who had declared themselves available for assignment and would telephone lawyers on that list in rotation until one was available to serve in the particular matter at hand. Respondent generally did not participate in this process, except to sign the assignment letter as to those cases on her docket where such assignment was necessary.

16. There is no indication that any of these assignments were made other than in the ordinary course, or that Mr. Schrader or Mr. Sacco was given preferential treatment over other attorneys who were receiving court assignments, or that either was reimbursed for his work in excess of reasonable and justifiable fees. Mr. Schrader's total compensation in these matters was $5,136.25. Mr. Sacco's total compensation was $3,648.23.

17. In *RPI Construction, Inc., v. A. Anthony Corporation*, the defendant's principal, Anthony Serdula, moved by letter dated December 20, 2005, to the Binghamton

City Court to reopen the matter after an arbitrator had issued a judgment in favor of the claimant. Judge Murphy placed a note in the file recusing himself as "Mr. Serdula has been represented by my partner." By letter dated January 26, 2006, the chief clerk wrote to District Administrative Judge Judith F. O'Shea, enclosing the letter requesting reopening of the case and stating:

> "Anthony Serdula, the President of A. Anthony Corp. is well known in Binghamton – Judge Lehmann knows him fairly well, Judge Pelella and he were neighbors and Judge Murphy's law firm has represented him in the past. Therefore, they have recused themselves from hearing this motion. I am not sure if Judicial Hearing Officer David F. Crowley will have a similar conflict of interest or not. Please advise."

Judge O'Shea designated Cortland City Court Judge Elizabeth A. Burns to hear the *RPI* matter. Judge Burns sent letters scheduling the matter for February 10, 2006, and again for March 22, 2006. On March 22, 2006, Mr. Pope appeared before Judge Burns, representing the defendant. Also on March 22, 2006, Mr. Schrader appeared before Judge Burns in the Binghamton City Court on behalf of the plaintiff in *Pope, Schrader & Murphy LLP v. Lown*, a commercial claim. Judge Burns adjourned both cases to review the issue of whether or not attorneys from Pope, Schrader & Murphy could practice law in the Binghamton City Court in light of Judge Murphy's status as a part-time judge of that court.

20. On March 24, 2006, Judge Burns entered an Order disqualifying Pope, Schrader & Murphy from representing the defendant in the *RPI* matter because Section 100.6 of the Rules Governing Judicial Conduct ("Rules") prohibits the law

partners and associates of a part-time judge from practicing law in that judge's court. Judge Burns directed the defendant either to appear *pro se* or to retain new counsel. On March 29, 2006, Judge Burns dismissed *Pope, Schrader & Murphy LLP v. Lown*, without prejudice.

21. As a result of Judge Burns' Order in the *RPI* matter, by letter dated March 30, 2006, respondent and Judge Pelella advised the attorneys at Pope, Schrader & Murphy that their firm was prohibited from practicing law in the Binghamton City Court, directed the firm to take steps to withdraw from any civil actions then pending in the court and to inform criminal defendants that the Pope firm could no longer represent them, and gave notice to the firm that new counsel would be assigned to criminal defendants whose cases had been assigned to the firm.

22. By letter dated May 4, 2006, respondent reported Judge Murphy's conduct to the Commission for, *inter alia*, allowing his partners and associates to practice law in the Binghamton City Court.

23. Notwithstanding that as early as June 2002, respondent was aware that Messrs. Pope, Schrader and Sacco had appeared in the Binghamton City Court and respondent later concluded that in doing so, they had likely committed substantial violations of Section 471 of the Judiciary Law and the New York Lawyer's Code of Professional Responsibility, respondent did not take appropriate action to prohibit these attorneys from practicing in the court until March 30, 2006, and did not act to refer the information to an appropriate lawyers' disciplinary or grievance committee.

24. Notwithstanding that respondent received information indicating a substantial likelihood that Judge Murphy had committed a substantial violation of the Rules by not prohibiting his law partners and associates from practicing in the Binghamton City Court, contrary to the requirements of Section 471 of the Judiciary Law and Section 100.6(B)(3) of the Rules, respondent failed to take appropriate action, such as referring the information to the Commission, until May 4, 2006.

As to Charge II of the Second Formal Written Complaint:

25. By letter dated May 16, 2006, the Commission's Administrator notified respondent that the Commission had received her complaint against Judge Murphy and that, on its own motion, the Commission had authorized an investigation of respondent for having permitted Judge Murphy's law partners and associates to practice law in the Binghamton City Court. By letter dated August 7, 2006, respondent was asked to respond in writing to the allegations. Respondent's written responses were sent to the Commission with a letter dated September 12, 2006, from John L. Perticone, a partner in the Binghamton law firm of Levene, Gouldin & Thompson ("the Levene firm"). The Levene firm consists of approximately 39 partners and approximately 17 associates or other attorneys.

26. Following its investigation, the Commission authorized the first Formal Written Complaint, which was served upon Mr. Perticone as counsel for respondent on June 21, 2007. On July 20, 2007, Mr. Perticone filed respondent's Verified Answer. By letter dated July 25, 2007, he demanded discovery from

Commission counsel.

27. Between July 2006 and September 2007, while she was represented by Mr. Perticone with regard to the Commission's inquiry, respondent allowed members of the Levene firm to appear before her on behalf of defendants in six criminal cases, as set forth below.

28. In *People v. William C. Balshuweit*, Judge Pelella arraigned the defendant on charges of Criminal Mischief in the Fourth Degree and Criminal Contempt in the Second Degree, remanded the defendant to jail in lieu of bail and referred the case to respondent's domestic violence court. By letter dated July 13, 2006, on the Levene firm letterhead, associate Jacinta M. Testa noted that firm's appearance as retained counsel for the defendant and requested an adjournment. On September 19, 2006, the defendant appeared before respondent with Ms. Testa and entered a guilty plea to Criminal Contempt, and in December 2006 respondent remanded him to jail to await sentencing. In February 2007 the defendant appeared with new counsel not affiliated with the Levene firm, and respondent sentenced the defendant to six months in jail. Respondent did not disclose to the District Attorney's office or the domestic violence resource coordinator that she was represented by the Levene firm.

29. In *People v. Trevor L. Gordineer*, respondent sentenced the defendant to a conditional discharge in March 2006 on a reduced charge of Harassment and ordered him to attend domestic violence court on May 16, 2006, and September 19, 2006. The defendant was represented by Dorian D. Ames, a partner in the Levene firm.

On September 22, 2006, respondent issued a bench warrant for the defendant's failure to appear on September 19, 2006.

30. In *People v. Derman K. Lewis*, the defendant was charged with Assault in the Second Degree in February 2005. He was represented by Scott R. Kurkowski, a partner in the Levene firm. In October 2005 the District Attorney's office amended the charge to a misdemeanor Assault. On February 17, 2006, the defendant appeared before respondent with Mr. Kurkowski and entered a plea of Not Responsible by Reason of Mental Disease or Defect. After the defendant was evaluated, by letter dated November 29, 2006, to Mr. Kurkowski, the assistant district attorney and the assistant attorney general, respondent scheduled a hearing for December 12, 2006. On that date, respondent disclosed on the record that she was represented by the Levene firm but did not provide any details of the nature of the representation. Respondent issued an order pursuant to Section 330.20 of the Criminal Procedure Law, requiring the defendant to, *inter alia*, attend outpatient treatment.

31. By letter dated November 14, 2006, on the Levene firm letterhead, associate Jacinta M. Testa informed the court that the firm had been retained to represent the defendant in *People v. Norman Rudin,* who was charged with Leaving the Scene of a Property Damage Accident. Respondent presided over a pretrial conference on February 26, 2007, and noted on the court's record, "set trial/parties may work it out." Respondent did not disclose to the District Attorney's office that the Levene firm was representing her. The case was later disposed of by the defendant's mail-in plea to a reduced charge,

which was authorized by Assistant District Attorney Michael Garzo and sent to the court by Ms. Testa. A fine was imposed by a court clerk pursuant to a uniform schedule.

32. By letter dated August 16, 2007, on the Levene firm letterhead, partner Kevin T. Williams noted the firm's appearance as retained counsel for the defendant in *People v. Christopher Bellingham*, who was charged with Driving While Intoxicated, Failing to Keep Right and Disobeying Traffic Control Device, and stated that he would appear with the defendant the following day for the scheduled arraignment. Mr. Williams appeared with the defendant for arraignment before respondent, who released the defendant on recognizance. By letter dated August 28, 2007, on the Levene firm letterhead and copied to the Binghamton City Court, Mr. Williams wrote to ADA Garzo, confirming a plea offer. On September 5, 2007, Mr. Williams, Mr. Garzo and the defendant appeared before respondent. At the outset of the proceeding, respondent stated:

> Levene, Gouldin & Thompson is my family attorney and...they are presently doing some litigation on my behalf and certainly the District Attorney has the right to have this case heard before a judge who is not represented by Levene, Gouldin & Thompson, so I want to place that on the record.

33. Respondent asked if Mr. Garzo had "any objection or concerns along those lines," and he said he did not. Respondent accepted the defendant's plea to a reduced charge of Driving While Ability Impaired in satisfaction of the charges and sentenced him to a one-year conditional discharge, attendance at the victim impact panel and a fine of $300 plus surcharge.

34. In *People v. Philip J. O.*, Judge Murphy had arraigned the defendant

on a charge of Patronizing a Prostitute. On August 28, 2007, the defendant appeared before respondent, represented by retained counsel Kevin T. Williams of the Levene firm. Also present was ADA Garzo. The defendant pled guilty to a reduced charge of Disorderly Conduct, and respondent sentenced him to a fine of $100, plus surcharge and a one-year conditional discharge. Respondent did not disclose to Mr. Garzo that she was represented by a member of the Levene firm.

35. By letter dated October 4, 2007, Judge Murphy filed a complaint with the Commission, alleging that respondent had allowed Mr. Williams, the law partner of her attorney John Perticone, to appear before her.

Supplemental findings:

36. Before Judge Burns issued her Order in *RPI Construction v. A. Anthony Corporation* in March 2006, respondent was not aware of Section 471 of the Judiciary Law or Section 100.6(B)(3) of the Rules. Respondent concedes that she was obliged to be aware of and to ensure compliance with the statutes and the Rules and that she failed to be so aware and compliant during the period at issue.

37. Judge Burns' action impressed upon respondent that it was improper for lawyers associated with the Pope law firm to appear in the Binghamton City Court. Respondent acted promptly thereafter to prohibit appearances in her court by lawyers of that firm.

38. There is no indication that respondent conferred any preferential treatment or special beneficial disposition, or unfavorable treatment, upon Judge

Murphy's partners and associates, or any of their respective clients, in any of the cases in which those attorneys appeared before her, or that she acted in those cases in any manner other than impartially and in the ordinary course. Respondent nevertheless recognizes that public confidence in the judiciary requires both impartiality and the appearance of impartiality and that her conduct did not satisfy this standard.

39. Respondent was not aware of the pertinent Opinions of the Advisory Committee on Judicial Ethics, which provide that a judge should not preside over cases in which the judge's personal attorney, or that attorney's firm, appears, for a period of two years following the representation. Respondent had not previously been represented by counsel in any matters. Respondent believed that her disclosure in the *Bellingham* case was sufficient notice to the District Attorney's office as to all cases that she was represented by the Levene firm.

40. There is no indication that respondent gave favorable consideration to the clients of the Levene law firm or acted in any manner other than impartially and in the ordinary course.

41. Respondent did not intend to violate the ethical Rules.

42. Respondent has been candid and cooperative with the Commission throughout this proceeding.

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(B)(1), 100.3(D)(1), 100.3(D)(2) and 100.3(E)(1) 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. Charge I of the Formal Written Complaint and Charge II of the Second Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

It is well-established that the law partners and associates of a part-time judge who is permitted to practice law are barred from practicing law in the judge's court (Jud. Law §471). This statutory prohibition is reflected in the ethical rules, which provide that such a part-time lawyer-judge "shall not permit his or her partners or associates," or those of a co-judge, to practice in the judge's court (Rules, §100.6[B][3]). Public confidence in the courts is diminished by the appearance of favoritism when a judge presides over a case in which a party is represented by the law partners of his or her judicial colleague.

For nearly four years, in 81 criminal cases and nine civil matters, respondent allowed to appear before her in the Binghamton City Court law partners and associates of her co-judge, Robert C. Murphy. In 45 of the criminal cases, she actively facilitated these improper appearances by assigning Judge Murphy's partner or associate to represent the defendants. By permitting these attorneys to appear before her though they were statutorily barred from doing so, respondent was complicit in persistent violations of the law. *See*, *Matter of Harris*, 56 NY2d 365 (1982); *Matter of Falsioni*, 1982 Annual Report 123 (Comm on Judicial Conduct).

The statutory prohibition (Jud. Law §471) is clear. It applies to all judges, making no distinction between appearances before part-time and full-time judges. Thus, although the Rule prohibiting a judge from sitting on a co-judge's partners' cases applies on its face only to part-time judges (§100.6[B][3]), the obligation to implement the statutory prohibition is not limited to part-time judges. *See*, Adv. Op. 05-124, 06-61.

It has been stipulated that respondent was unaware of these specific prohibitions regarding the appearances of her co-judge's partners and associates. Even without specific knowledge of the applicable law, it should have been readily apparent to respondent that such appearances not only would provide a direct financial benefit to her co-judge, but would create an unacceptable perception that parties represented by her co-judge's partners might receive special treatment. In this regard it is noteworthy that a visiting judge assigned to handle two cases involving Judge Murphy's firm immediately recognized the impropriety of such appearances, issuing an order disqualifying the firm from one case and dismissing the second case without prejudice. Moreover, as the Court of Appeals has stated, ignorance does not excuse violations of legal or ethical mandates since every judge is required to maintain professional competence in the law. *See*, *Matter of VonderHeide*, 72 NY2d 658, 660 (1988); *Matter of Kane*, 50 NY2d 360, 363 (1980); Rules, §100.3(B)(1). Further, since she was unaware of the applicable law, respondent did not bar the attorneys from appearing in the court or report the conduct of Judge Murphy to the Commission until the spring of 2006 (Rules, §100.3[D][1], [2]), thereby permitting the improper practice to continue for nearly four years.

The appearances by Judge Murphy's firm in the Binghamton City Court began during respondent's tenure as a judge, when Judge Murphy joined the court where respondent had been serving for five years. As an experienced judge, respondent should have immediately questioned the practice, rather than participating in it for the next four years. There is no indication in the record that, over that period, respondent ever considered whether the practice might be improper, notwithstanding that these attorneys personally appeared before her and corresponded with the court on law firm stationery that listed her co-judge as a partner.

After this systematic misconduct came to light, at a time when she was under investigation by the Commission, respondent failed to disqualify herself and permitted the partners and associates of the attorney who was then representing her before the Commission to appear before her in six criminal matters. By permitting her attorney's law firm to appear before her, respondent created an appearance of impropriety, conveyed the appearance that these attorneys were in a special position to influence her and failed to disqualify herself in cases where her impartiality might reasonably be questioned (Rules, §§100.2[A], 100.3[E][1]).

Under guidelines provided in numerous opinions of the Advisory Committee on Judicial Ethics, disqualification in matters involving the judge's personal attorney is required if the representation occurred within the past two years; where the attorney's partners or associates appear, disqualification is subject to remittal, which requires fully disclosing the relationship on the record (Rules, §100.3[F]) (Adv. Op. 92-

54, 93-09, 97-135, 99-67, 91-10). *See also*, *Matter of Merrill*, 2008 Annual Report 181 (Comm on Judicial Conduct); *Matter of Ross*, 1990 Annual Report 153 (Comm on Judicial Conduct); *Matter of Phillips*, 1990 Annual Report 145 (Comm on Judicial Conduct). There can be no substitute for fully disclosing such a conflict in order to ensure that the parties are fully aware of the pertinent facts and have an opportunity to consider whether to seek the judge's recusal.

In two cases of the six cases in which her attorney's firm appeared before her, respondent disclosed that the firm was representing her; in the remaining cases, she made no disclosure whatsoever of her relationship with the firm. We reject, as a mitigating factor, the suggestion that respondent believed that her disclosure in the Bellingham case "was sufficient notice to the District Attorney's office as to all cases that she was represented by the Levene firm" (Agreed Statement, par. 114). As the record makes clear, this disclosure occurred in September 2007, after the firm had already appeared before her, without disclosure, in four cases.

This misconduct occurred at a time when respondent, who was under investigation by the Commission, should have been especially sensitive to her ethical obligations. Given that the subject of the Commission's investigation focused on potential conflicts with attorneys appearing before her and the appearance of bias which flows therefrom, this continuing lapse of judgment on respondent's part is inexcusable and profoundly troubling.

This case presents the Commission with an extremely difficult and close

decision between removal and censure. Respondent's misconduct as documented and admitted is longstanding and severe. Appearances do matter. The appearance here is that the Murphy firm, because of its relationship with a judge of the City Court, had a unique and enviable status in that court. At the very least, it seems clear that the firm's connection to a judge of the court could be perceived as advantageous to the firm's clients. Certainly the firm, which frequently appeared in the court, would benefit from that perception, notwithstanding that there is no evidence in this record that the firm's clients were actually treated any differently from any other litigants. Respondent did nothing to redress this plain and obvious conflict of interest over a four-year period.

We note, however, various factors in mitigation. There is no indication that respondent conferred any preferential treatment upon Judge Murphy's associates or their respective clients in the cases cited herein. Moreover, when the impropriety of the appearances by the Murphy firm was brought to respondent's attention, she took prompt action to bar the firm from appearing in the court in the future and reported Judge Murphy's conduct to the Commission.

We also note that throughout this proceeding respondent has been cooperative and contrite and has forthrightly acknowledged her misconduct. *See*, *e.g.*, *Matter of LaBelle*, 79 NY2d 350, 363 (1992); *Matter of Allman*, 2006 Annual Report 83 (Comm on Judicial Conduct).

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Peters and Judge Ruderman concur.

Ms. DiPirro and Judge Konviser were not present.

CERTIFICATION

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

Dated: November 10, 2008

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