

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

DONALD R. MAGILL,

a Justice of the Maine Town Court,
Broome County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

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

Hinman, Howard & Kattell, LLP (by Philip J. Kramer) for Respondent

The respondent, Donald R. Magill, a Justice of the Maine Town Court,
Broome County, was served with a Formal Written Complaint dated July 17, 2003,

containing three charges. Respondent filed an answer dated August 12, 2003.

By Order dated September 11, 2003, the Commission designated A. Vincent Buzard, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 2 and 3, 2003, in Syracuse, New York, and the referee filed his report dated May 10, 2004, with the Commission.

The parties submitted briefs with respect to the referee's report. On August 5, 2004, the Commission heard oral argument, at which respondent and his attorney appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Maine Town Justice since the late 1980s. He has attended and successfully completed all required training sessions for judges, as well as some additional courses.

As to Charge I of the Formal Written Complaint:

2. On January 1, 2001, respondent's wife, Patricia Magill, received a telephone call from Mary Abell that was allegedly harassing; Ms. Abell made accusations concerning Ms. Magill's daughter. Respondent listened to part of the telephone call on an extension in their home. He called the police, and a sheriff's deputy came to respondent's home. Respondent's wife signed a complaint charging Ms. Abell with Aggravated Harassment, a misdemeanor. The deputy issued an appearance ticket to Ms. Abell, returnable in the Maine Town Court on January 25, 2001.

3. Respondent called Marcy Cox, the supervising Assistant District Attorney for the local courts, to inquire as to how the case should be handled. Ms. Cox advised respondent to send a letter to her saying that the case should not be in his court. Respondent sent a letter to her as requested.

4. The District Attorney moved pursuant to Section 170.15(3) of the Criminal Procedure Law for the removal of the *Abell* case from the Maine Town Court. By order dated January 12, 2001, signed by Broome County Court Judge Patrick H. Matthews, the case was transferred to the Endicott Village Court.

5. After the County Court ordered that the *Abell* case be transferred, respondent personally delivered the case file to the Endicott Village Court on January 17, 2001, and gave the file to the court clerk, Kathy Sangiouliano. Ms. Sangiouliano noted on the file that it had been delivered by respondent, whom she knew to be a judge of the Maine Town Court.

6. When he delivered the *Abell* file, respondent gave the Endicott court clerk his judicial business card, on which respondent had written a request for an Order of Protection in favor of his wife and her daughter.

7. The court clerk advised the Endicott Village Justice, Debra Jo Harter, that respondent had delivered the *Abell* file and had left his business card with a request for an Order of Protection.

8. On January 31, 2001, respondent telephoned the Endicott Village Court to ask about the status of the case and inquired of the court clerk, Kristen

McNamara, why an Order of Protection had not been issued. Ms. McNamara informed respondent that Judge Harter does not normally issue Orders of Protection unless someone had been threatened and that Judge Harter had issued a strong verbal warning to the defendant not to have any contact with any member of the victim's family. Respondent replied by strongly requesting a written Order of Protection and said that he would contact the district attorney's office. Ms. McNamara noted respondent's reply on the case file.

As to Charge II of the Formal Written Complaint:

9. In the fall of 2001, Michelle McPherson, who was then around 19 years old, and her fiancé visited Ms. McPherson's mother, Maine court clerk Seanne McPherson, at the court offices. In the presence of respondent and his co-judge, Michelle mentioned that she and her fiancé were planning to go to a local theater. Respondent stated that the theater had been a "porn" theater, known for having shown the movie "Deep Throat." In response to a question by Michelle about the movie's plot, respondent described the movie's plot in graphic terms. Respondent also told Michelle to "watch out for the sticky floors" in the theater.

As to Charge III of the Formal Written Complaint:

10. The charge is not sustained and is therefore dismissed.

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) and 100.4(A)(2) of the

Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22 of the New York State Constitution and Section 44(1) of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings, and respondent's misconduct is established. Charge III is not sustained and is therefore dismissed.

On two occasions respondent interjected himself and his judicial prestige into a case in which his wife was the complaining witness. Such conduct violates well-established ethical standards prohibiting a judge from lending the prestige of judicial office to advance private interests (Section 100.2[C] of the Rules Governing Judicial Conduct).

After the case was transferred from his own court, respondent was obliged to refrain from any conduct that might convey an appearance that he was attempting to curry special treatment because of his judicial status. Instead, he personally delivered the case file to the transferee court and gave the court clerk his judicial business card, on which he had written a request for an Order of Protection for his wife and daughter. Under the circumstances here, his personal delivery of the file could reasonably be construed as demonstrating his personal interest in the outcome of the case. That interest was reinforced by respondent's use of his judicial business card on which he noted a request for an Order of Protection. That request – which was not contained within the file itself – should properly have come from respondent's wife or her attorney. Coming from respondent, it appeared to be a blatant assertion of judicial influence for the benefit

of his relatives, conduct that is expressly barred by Section 100.2(C). As a non-attorney, respondent could not act as his wife's legal advocate; and even a lawyer-judge may not act as an attorney in a case that had originated in the judge's own court (Jud Law §16).

Several weeks later, respondent again interjected himself into the case by calling the transferee court and expressed displeasure to the court clerk that an Order of Protection had not been issued. The court clerk noted respondent's comments on the case file. We agree with the referee's conclusion that respondent's call "was part of an overall transaction in which he made clear that he was a judge and was attempting to help his wife" (Rep. 5).

As the Court of Appeals has stated, "[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*, 50 NY2d 569, 572 (1980). As an experienced judge, respondent should have recognized that his conduct constituted an improper assertion of his judicial influence and could be perceived as an implicit request for favorable treatment. It is not an excuse that respondent was simply trying to assist his wife in connection with the case, since any such "assistance" is patently impermissible when the power and prestige of judicial office are invoked. *See, e.g. Matter of Edwards*, 67 NY2d 153 (1986) (judge initiated several *ex parte* contacts with a judge who was presiding over his son's traffic case); *Matter of Ohlig*, 2002 Annual Report 135 (Comm'n on Jud Conduct) (judge's conduct towards an attorney who was involved in a fee dispute with the judge's wife created the appearance that he was using his judicial status to

advance his wife's interests).

As to respondent's comments in the court office about a pornographic movie, we find that they were injudicious and are deserving of rebuke. Respondent should not have initiated a discussion about the movie, and he should have recognized that his remarks might cause embarrassment and discomfort and thus were inappropriate for the work environment.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur, except as follows.

Mr. Goldman, Mr. Coffey and Judge Peters dissent as to Charge II, paragraph 7, with respect to the conclusion that respondent's comments about the movie and theater constitute misconduct, and vote that the allegations be dismissed.

Mr. Felder and Ms. Hernandez dissent as to Charge II, paragraph 8, and vote that the allegation be sustained.

Mr. Coffey dissents, in part, as to Charge I, paragraph 4(B) and votes to sustain the allegation only insofar as respondent's delivery of the file and note created an appearance of impropriety, and dissents as to the sanction on the basis that the disposition is too harsh.

Judge Luciano was not present.

CERTIFICATION

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

Dated: October 6, 2004


Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct

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DISSENTING OPINION
BY MR. GOLDMAN,
IN WHICH MR. COFFEY
AND JUDGE PETERS
JOIN

I respectfully dissent from the Commission's finding that respondent's comments about the film and theater are misconduct. The remarks were made off the bench (but in the courthouse), and not in the judge's official capacity, to a young adult with whom the judge was acquainted in the presence of her fiancé and others. The young woman was neither offended nor upset.

While the remarks were in questionable taste, I do not believe that, under the circumstances, they rise to the level of judicial misconduct.

Dated: October 6, 2004



Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct