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

DOUGLAS E. Mc KEON,

a Justice of the Supreme Court, 12th Judicial District, Bronx County.

Determination

THE COMMISSION:

Henry T. Berger, Esq., Chair
Jeremy Ann Brown
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Juanita Bing Newton
Alan J. Pope, Esq.
Honorable Eugene W. Salisbury
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Alan W. Friedberg and Jean M. Savanyu, Of Counsel) for the Commission

Seiff & Kretz (By Eric A. Seiff) for Respondent

The respondent, Douglas E. Mc Keon, a justice of the Supreme Court, 12th Judicial District, was served with a Formal Written Complaint dated November 26, 1997, alleging three charges of misconduct. Respondent did not answer the Formal Written Complaint.

On March 10, 1998, the administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4) and stipulating that the Commission make its determination based on the agreed upon facts. The Commission approved the agreed statement by letter dated March 13, 1998. Each side submitted memoranda as to sanction.

On June 18, 1998, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Supreme Court since December 1989.

2. In October 1992, respondent was assigned to preside exclusively over civil cases in which the City of New York was a party. Eugene Borenstein was chief of the torts division of the city Department of Law. The torts division had thousands of cases pending before respondent, and Mr. Borenstein appeared regularly before respondent.

3. In October 1992, a former employee of the Supreme Court was hired as a legal assistant in the torts division but was working as a volunteer pending her placement on a salary line. The employee was a single mother whose youngest child was asthmatic. The woman told respondent that she was concerned about not having health insurance.

4. In October 1992, respondent asked Mr. Borenstein to expedite the hiring of this woman. Mr. Borenstein asked respondent to put his request in writing to the corporation counsel.

5. On October 26, 1992, respondent sent a letter on judicial stationery to O. Peter Sherwood, who was then corporation counsel and chief executive of the city Department of Law. The letter stated:

> I am writing to urge the expeditious hiring of [name deleted] as a law clerk in the Tort Division, Bronx County.
>
> I have known [name deleted] for many years. She was formerly employed by the Office of Court Administration as a court clerk at the Supreme Court, Bronx County. She is a highly qualified and gifted young woman; indeed, she is respected by the Justices who sit in the Bronx.
>
> In truth, your office is fortunate to have obtained the services of this talented employee. I understand that [name deleted] has been working as a volunteer pending her formal appointment as a salaried member of the staff. However, [name deleted] is a single parent and law student who cannot afford a prolonged period of no income.
>
> As you know, I preside over the several thousands of cases which comprise the City Part. I know how desperately your office in the Bronx needs qualified individuals to help with this enormous case load. Therefore, I implore you to use your good offices to expedite the appointment of a young woman with proven skills in the Bronx courthouse.

6. As a result, the woman was placed on a salary line and began receiving health insurance coverage sooner than she would have had respondent made no request on her behalf.

7. From November 1, 1992, to December 31, 1992, respondent engaged in a close, personal relationship with this woman.

8. In June 1993, Mr. Borenstein told respondent that the woman was going to be discharged from her position with the torts division. Respondent said that he felt bad for her and asked Mr. Borenstein, "Gene, you wouldn't consider giving her a second chance?" Mr. Borenstein replied that the decision was final. Respondent asked whether her discharge could be delayed one week until the administrative judge returned. As a result of respondent's request, Mr. Borenstein agreed to postpone the discharge for one week.

As to Charge II of the Formal Written Complaint:

9. On March 8, 1996, respondent received a telephone call from Adam Nossiter, a New York Times reporter who requested a summary of the court proceeding a few hours earlier in School Board Seven v Crew, which was then pending before respondent. The case concerned a challenge of the suspension of a Bronx community school board by Chancellor Rudolph Crew.

10. On March 9, 1996, the Times reported that respondent was interviewed after presiding over a hearing in the case and that he was concerned about using the poor performance of schools as a basis for suspending a school board. Respondent was accurately quoted as saying:

> I felt a degree of uneasiness about using standards of academic achievement as some kind of criteria about whether the board should remain in office. Simply to say things haven't gotten better, and laying that at the doorstep of people who are

> unsalaried and meet several times a month, that disturbs me.

11. The Times also reported that respondent stated that he wanted the chancellor's attorneys to offer examples of how the school board had failed to take specific steps to improve academic performance:

> On Wednesday I want them to be more specific in what they were referring to. I just don't want to take generalities.

12. The Times reported that respondent's "remarks could provide a clue about how he might rule in the case."

As to Charge III of the Formal Written Complaint:

13. By letter dated August 9, 1996, the Commission cautioned respondent concerning remarks to the newspaper concerning School Board Seven v Crew. Respondent was reminded that the Rules Governing Judicial Conduct provide, "A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories."

14. On nine occasions between September 17, 1996, and January 23, 1997, respondent appeared on the television program "Good Day New York" and discussed the civil case against O. J. Simpson that was then pending in California.

15. Respondent commented on the quality of proof, the effectiveness of the strategies employed by the attorneys and the credibility of witnesses, including Mr. Simpson. Among other things, respondent said:

> Take, for instance, the domestic violence concerning his ex-wife. To this day he insists that he's never punched his wife. Yet we have photographs which if someone looked at would certainly support the notion that punches were involved.
>
> ***
>
> It's interesting and rather incredible that he would be so adamant in his denial of punching her.
>
> ***
>
> I think he failed in the direct examination to avail himself of certain opportunities, for instance, to inject into the case that the blood was planted. I mean, he was asked an open question: "Can you explain why your blood was found in the Bronco?" Logically, he could have answered that someone else put it there, but he didn't.
>
> ***
>
> Well, of course a jury, has to be affected by the fact that the closest people in his life have come forward and contradicted him in certain ways. Of course the ultimate end to be achieved by that from the perspective of the plaintiff is to say, "Well, if he's lying about this, you might assume he's lying about more significant things that are at issue in the case. I think you're right, Jim, I think that when a girlfriend and a lifelong friend step up and are forced to admit that he's been less than candid, it has a rather significant effect on the jury.
>
> ***

> I think perhaps jurors may be reluctant to brand him as a murderer when they know his children are now living in the same house with him.
>
> ***
>
> [A defense attorney] in an opening statement brought up the lie detector test. That was a mistake, and now Judge Fujisaki had to do something about it. And I suspect that if there's an appeal by Simpson that will be one of the principal points.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2 and 100.3(B)(8). Charges I, II, and III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent should not have reached out to a lawyer who regularly appeared before him to seek a favor for a former court employee. His request of Mr. Borenstein to "expedite" putting the woman on the payroll was more than a job reference. Indeed, the woman already had the job; respondent was seeking a salary and benefits for her so that she could support her family. His motives may have been worthy ones, but he improperly used the prestige of his office to advance private interests. This was compounded when respondent attempted to prevent, then delay, her discharge.

> Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved [citation omitted]. There must also be recognition that any actions taken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary.

> Thus, any 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. That is not to say, of course, that Judges must cloister themselves from the day-to-day problems of family and friends. But it does necessitate that Judges must assiduously avoid those contacts which might create even the appearance of impropriety.
>
> Matter of Lonschein,
> 50 NY2d 569, at 572

(See also, Matter of Kaplan, 1997 Ann Report of NY Commn on Jud Conduct, at 96; Matter of Wright, 1989 Ann Report of NY Commn on Jud Conduct, at 147.)

The fact that Mr. Borenstein asked respondent to put his request in writing after respondent had made an oral appeal does not make it a response to a solicitation.

It was also improper for respondent to make public comments on cases pending before his and other courts. "A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories." (Rules Governing Judicial Conduct, 22 NYCRR 100.3[B][8]). It is wrong for a judge "to make any public comment, no matter how minor, to a newspaper reporter or to any one else, about a case pending before him." (Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135, 137) (emphasis in original). A judge should not attempt to repeat or summarize out of court what was said in the courtroom. Standing alone, respondent's comments to the newspaper reporter would not warrant public sanction.

However, his television appearances went well beyond explanations of the law and the legal system. Although a judge may "speak, write, lecture, teach..." (Rules Governing Judicial Conduct, 22 NYCRR 100.4 [B]), respondent commented on the merits of the Simpson case, the credibility of witnesses, the strategies of attorneys and the likely reactions of jurors. He clearly violated Section 100.3(B)(8). That he did so repeatedly, only months after being cautioned by this Commission to adhere to the rule, exacerbates his misconduct. (See, Matter of Lenney, 71 NY2d 456, 459).

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

Mr. Berger, Ms. Brown, Judge Luciano, Judge Marshall, Judge Newton, Judge Salisbury and Judge Thompson concur as to sanction.

Judge Marshall dissents only as to Charge II and votes that the charge be dismissed.

Mr. Goldman dissents as to Charge II and votes that the charge be dismissed and dissents as to sanction and votes that respondent be admonished.

Mr. Coffey and Mr. Pope were 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 6, 1998

Henry T. Berger, 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

DOUGLAS E. McKEON,

a Justice of the Supreme Court, 12th Judicial District, Bronx County.

DISSENTING OPINION BY MR. GOLDMAN

I agree with the majority's finding with respect to Charge I that respondent committed misconduct in his requests to Corporation Counsel for favorable treatment of an employee. Although respondent's actions appeared to be motivated by human concern and were not heavy-handed, a judge should not solicit any favorable job treatment for an acquaintance or friend from an attorney who appears before him.

I also agree with the majority's finding with respect to Charge III that respondent committed misconduct in his public comments on the television show "Good Day New York." Section 100.3(B)(8) of the Rules Governing Judicial Conduct contains a broad prohibition severely limiting a judge's freedom to make public statements: "A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories." Thus, even though there appears little possibility that statements by a New York judge on a local television station would have any effect on the outcome of a California proceeding, the rule clearly applies to proceedings in other jurisdictions. Respondent was well aware of the broad scope of the prohibition, and the

remarks he made went beyond permissible explanations of law and procedure and included his opinions of how the jurors would evaluate the evidence and of the attorneys' strategies. Respondent has provided no justifiable reason for having violated the rule.

I disagree, however, with the majority's finding with respect to Charge II that respondent committed misconduct in his comments to the New York Times. In view of the First Amendment implications of the restriction on speech and for practical reasons, I would narrowly define the term "comment" in Section 100.3(B)(8) as a "remark or observation made in criticism or as an expression of opinion" so that it does not include an accurate factual recitation of what occurred in open court. I believe that in this era where certain segments of the media, without a full understanding of the facts and legal principles involved, sometimes deride judicial decisions as "junk justice," a judge should be permitted to respond to a press inquiry to the limited extent of relating accurately what transpired in open court, particularly when the judge has been accused of acting improperly or injudiciously. Although it might be a better practice for a judge merely to provide the reporter with a transcript of the court proceedings, transcripts often cannot be made available for the reporter to consider before the deadline for the story.

I believe on balance that censure is too harsh a sanction. Although respondent's conduct in seeking favorable treatment for an employee from an attorney who regularly appears before him was clearly improper, his approach was gentle and his motivation appears benign. Although some of his statements on television about the

Simpson civil case were improper, I view this misconduct as considerably less serious than if respondent had made them with respect to a pending case in this state or metropolitan area. I believe an admonition is a sufficient sanction.

Dated: August 6, 1998

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