

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

B. MARC MOGIL,

a Judge of the County Court, Nassau
County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Helaine M. Barnett, Esq.
E. Garrett Cleary, Esq.
Stephen R. Coffey, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Daniel F. Luciano
Honorable Juanita Bing Newton
Honorable Eugene W. Salisbury
Barry C. Sample
Honorable William C. Thompson

APPEARANCES:

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

Jacob R. Evseroff (Paul S. Clemente and James J.
McCrorie, Of Counsel) for Respondent

The respondent, B. Marc Mogil, a judge of the County
Court, Nassau County, was served with a Formal Written Complaint
dated May 15, 1995, alleging that he sent numerous harassing,
threatening, annoying or otherwise offensive communications to an
attorney and that he gave testimony during the Commission's
investigation that was false, misleading and lacking in candor.
Respondent filed an answer dated June 13, 1995.

By motion dated June 14, 1995, respondent moved to dismiss the Formal Written Complaint. The administrator of the Commission opposed the motion by affirmation dated June 16, 1995. By determination and order dated June 30, 1995, the Commission denied the motion.

By order dated June 26, 1995, the Commission designated the Honorable Matthew J. Jasen as referee to hear and report proposed findings of fact and conclusions of law. By letter signed by respondent and his attorneys and dated September 1, 1995, respondent waived confidentiality in this proceeding. A public hearing was held on September 11, 12, 13, 14, 15, 18, 19, 20, 21 and 22, 1995, and the referee filed his report with the Commission on December 15, 1995.

By motion dated December 15, 1995, the administrator moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on January 3, 1996. The administrator filed a reply dated January 4, 1996.

On January 11, 1996, the Commission heard oral argument in public session, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Nassau County Court since January 1991. He was a judge of the District Court, Nassau County, from 1987 to 1990.

2. Respondent and attorney Thomas F. Liotti have been critical of each other in an exchange of several pointed communications over various issues since 1991, including an invitation extended by Mr. Liotti to William Kunstler to address a meeting of the Criminal Courts Bar Association of Nassau County ("CCBA"). Respondent did not approve of this invitation.

3. Mr. Liotti became President of the CCBA for a one-year term in 1993 and 1994. During that time, respondent criticized Mr. Liotti's policies and practices as CCBA President and advised Mr. Liotti and others that he was suspending his participation in the CCBA during Mr. Liotti's term of office.

4. On December 6, 1993, Mr. Liotti sent a letter to respondent's administrative superiors, Supreme Court Justices Leo F. McGinity and Marie G. Santagata, in which he sharply criticized respondent's conduct and his mental and professional fitness to serve as a judge.

5. Judge Santagata thereafter met with respondent and showed him a copy of the letter from which Mr. Liotti's name and letterhead were redacted. Nevertheless, respondent recognized the letter as being from Mr. Liotti.

6. On December 30, 1993, Mr. Liotti sent a second letter to Judges Santagata and McGinity which criticized respondent and alluded to him as "dangerous."

7. On January 4, 1994, Mr. Liotti spoke at induction ceremonies for the newly elected judges of respondent's court. Between 300 and 500 people attended, including respondent. In a speech containing 13 points on how to avoid being a bad judge, Mr. Liotti, inter alia, criticized respondent, albeit without mentioning him by name, for outfitting his car with a "vanity" license plate reading "GUILTY."

8. About January 14, 1994, Mr. Liotti received an anonymous, one-page letter, signed by the "Wyatt Earp Association," which, inter alia, referred to Mr. Liotti as a "Donkey-turd" who thinks of himself as a "defense superstar," criticized Mr. Liotti for his recent induction speech, called him a "motor mouth," alleged certain personal and unprofessional activities by Mr. Liotti in Denver, called Mr. Liotti a "traffic court jerk" and a "LAUGHING-STOCK," referred to Mr. Liotti's "idiotic and laughable brickbat letters sent behind our backs," asked whether Mr. Liotti's family or Newsday or "disciplinary commissions" would like to learn about his "Bimbos and Feds and threats" in Denver, and warned Mr. Liotti that "People in glass houses should be VERY careful...."

9. On January 29, 1994, Mr. Liotti received an anonymous, two-page facsimile, the first page of which was written in German and, inter alia, referred to Mr. Liotti as a

"Motor-Mund," and the second page of which purported to be a "Certificate of Upgrade to Complete Asshole" signed by "Wyatt Earp." Respondent studied German in college.

10. On March 3, 1994, Mr. Liotti received an anonymous, one-page facsimile from "A Long Islander," which, inter alia, referred to Mr. Liotti's "mug" being in the newspaper "with your baby killer and translator," asked "How did the Newsday photographer KNOW exactly when to show up," asked whether it was because of a "LEAK" to the press, and asked whether "Trying your case in the press and getting yourself publicity" isn't "unethical."

11. About March 16, 1994, Mr. Liotti received an anonymous post-card, which contained a decal of a leprechaun and a telephone number belonging to the CIA. Respondent has directly or indirectly alluded to his purported ties to the U.S. intelligence community. He told Newsday that he may have been affiliated with U.S. intelligence; in a 1993 letter to court officers, he boasted that his previous "affiliation" with "federal agencies" qualified him to train court officers in anti-terrorism, and he has alluded to once having been "a U.S. intelligence agent."

12. In mid-March 1994, Mr. Liotti received an envelope from an anonymous sender bearing a phone number belonging to the CIA and four decals of a leprechaun and containing three pills. The pills were Prozac, Diazepam (Valium)

and Anafranil. Respondent was at the time a daily prescription user of Prozac, and he has had a prescription for Valium.

13. About March 16, 1994, Mr. Liotti received an anonymous, one-page letter and an accompanying business card which stated, inter alia, "HAVE MOUTH, WILL TRAVEL," bore Mr. Liotti's name, and referred to him as "Superstar." The letter, inter alia, stated that the business card would be "in the hands of EVERY lawyer in Nassau County..." and said that the business card was produced in a " 'private' printshop in Virginia." CIA headquarters is located in Langley, Virginia.

14. About March 31, 1994, Mr. Liotti received an anonymous, one-page letter, which, inter alia, referred to a Newsday photo of Mr. Liotti with clients and stated, "DO YOU SEE HOW EASY IT IS TO DISAPPEAR FROM THE FACE OF THE EARTH, TOMMY BOY?"

15. On May 2, 1994, Mr. Liotti received an anonymous, one-page facsimile from "W.E. Assn," which, inter alia, referred to Mr. Liotti as a "PUTZ" and to his "call" for assistance from the FBI, "Sniff dogs" and others. The fax also included decal-like representations of the American flag and a cartoon character known as the "Tasmanian Devil."

16. On June 16, 1994, respondent signed and sent to Mr. Liotti a one-page RSVP for the bar association's annual golf outing and dinner event. The facsimile included handwritten comments by respondent, including: "I wouldn't miss this night for the world!" The fax also included identical representations

of the American flag and Tasmanian Devil as appear on the anonymous fax of May 2, 1994.

17. On June 23, 1994, at the bar association's annual dinner, respondent made available for distribution 50 copies of a four-page statement which he had drafted and typed himself on court stationery, entitled "13 SUGGESTIONS FOR 'CONFRONTATIONAL' OR INTENTIONALLY OFFENSIVE CRIMINAL DEFENSE ATTORNEYS." The document was interpreted by several readers, including Mr. Liotti, as containing numerous, indirect criticisms of Mr. Liotti. Respondent's statement bore decal-like representations of the American flag on each page. It discussed "leaks" by attorneys who play to the press. The "13 Suggestions" referred to lawyers who are "nihilistic" and "[n]arcissists" and consider themselves as "superstar[s]." The statement threatened lawyers against "grossly contrived complaints" against the judiciary. It referred to "19th Century Tombstone, Arizona," the F.B.I and an "official who may to your surprise have once been a U.S. intelligence agent." Respondent denigrated village courts and suggested that their justices are lower on the "food chain" than other judges. His statement alluded to "medications." Among the "13 Suggestions" was one which warned against "antics" in "Montana," a reference which respondent acknowledges was "inspired in part" by remarks that he had heard concerning Mr. Liotti's behavior in Denver.

18. On June 24, 1994, respondent sent to Mr. Liotti a two-page facsimile which, inter alia, contained an ad for the movie "Wyatt Earp," a handwritten message signed by respondent

which states that "Earp was a real character who never let up until someone coming after him was FINISHED," and a printed message stating "DON'T SAY I DIDN'T WARN YOU..." on top of the ad.

19. On August 18, 1994, Mr. Liotti received an anonymous, one-page facsimile from the "Wyatt Earp Assn." which, inter alia, claimed credit for distributing the mock business card at the June 23 bar association event, stated that the card was printed "at our Langley HQ" and asserted that Mr. Liotti is still a "vociferous letter writer, and attacker of the innocent." The fax also contains an identical depiction of the Tasmanian Devil as appears on the anonymous fax of May 2, 1994, and on respondent's June 16 RSVP.

20. In September 1994, Mr. Liotti received an anonymous, one-page facsimile, which purports to be "THE LIOTTI GAZETTE" and, inter alia, contains mock articles about Mr. Liotti being "investigated" for child abuse and under inquiry by the IRS in connection with his trip to Denver.

21. Also in September 1994, Mr. Liotti received an envelope from an anonymous sender containing a document with a street map of Garden City with an "x" marking the spot where Mr. Liotti's office is located and a street map of Westbury with a circle marking the spot where Mr. Liotti's home is located. The stamps on the envelope had not been cancelled by the post office.

22. There are numerous similarities in language, tone, style and references between the anonymous communications and

respondent's speech to the bar association and the communications that he acknowledges sending on June 16 and 24, 1994. These, as well as the other factors and circumstances of this case, lead the Commission to find that respondent sent the anonymous communications to Mr. Liotti.

As to Charge II of the Formal Written Complaint:

23. The document that respondent distributed at the June 23, 1994, CCBA event was written on his judicial stationery, identified him as a County Court judge, was printed on multi-colored paper and had an American flag decal affixed to the top of each page.

24. Respondent's statement called the "Victim Rage" defense "quixotic, obtuse and moronic," notwithstanding that he knew that it was a strategy being considered by the defense in People v Colin Ferguson, a highly publicized case then pending before another judge of respondent's court.

25. Respondent warned attorneys about the consequences of making complaints against or otherwise offending judges. He stated, for example, that it is "axiomatic that one never...writes paranoid or grossly contrived complaints about or

against a colleague, adversary or judge." Respondent further warned complaining attorneys:

a) that their "target" will find out, "despite your desire to remain anonymous;" they "will be identified"; and,

b) to "remember" that "swords have two blades, and every action has an equal and opposite reaction."

26. Respondent's statement declared that making an unfounded complaint against a judge would provoke retaliation by the judge's colleagues, who would be "galvanize[d]... against you..." "Risking professional problems will be the least of your possible difficulties...." Respondent underscored this point by describing "Mogil's Law": if your "first figurative blow" does not "put the person 'down for the count'... you've had it!"

27. Respondent's statement said that an "offended official" could "find out more about you than your mother knows," and he threatened to raise embarrassing questions about lawyers who offend public officials:

a) "Is there anything in your background that you would prefer your colleagues or loved ones not know?";

b) "How are your tax returns for the last several years?";

c) "Are you taking any medications you would prefer remain a private matter?"; and,

d) "Would you like to see every item charged for the last 10 years on your credit cards scrutinized by the Feds?"

28. Respondent threatened complaining lawyers with exposure in The New York Times for extra-marital liaisons, "alcoholic over-indulgences" and other behavior. He also warned lawyers that making a complaint may "unwittingly trigger the wheels of a deadly serious defensive scenario."

29. Respondent's statement called some lawyers "sociopathic," "traitorous" and "[n]arcissists," and it called cases adjudicated in village courts "trivial." Mr. Liotti is a part-time village justice.

As to Charge III of the Formal Written Complaint:

30. On April 22, 1994, respondent opened an account with America Online, through which he sends and receives messages electronically ("e-mail"), via a modem in his personal computer. The "screen name" that he uses for his e-mail messages is "JUDGEMOJO." In order to access his account, he must use, not only his screen name, but a self-selected secret password; the password is typed but is not visible on the computer screen. The only person to whom respondent ever confided his password was his secretary, Patricia Riehl, who never used it and never revealed it to anyone.

31. On September 16, 1994, at 10:59 A.M. Eastern Daylight Time, respondent sent an e-mail message from "JUDGEMOJO" of America Online to President Clinton, and it was received on the White House e-mail system. The body of the message specifically stated that the sender was "Judge B. Marc Mogil" of

Great Neck. Respondent was "logged on" to the American Online e-mail system at the time that the message to the White House was sent and received. The text of the message contained critical comments about President Clinton and his policy toward Haiti. In response, the White House sent an acknowledgment letter to respondent, with the President's signature, on October 3, 1994.

32. In the second week of October 1994, respondent gave the White House letter to Nassau County Police Detective Robert Tedesco and claimed that he had never communicated with the President on any subject. Respondent said someone had communicated to the White House in his name, and he specifically mentioned Thomas Liotti as a possibility.

33. In a letter to staff counsel on November 8, 1994, respondent falsely stated that he had not communicated with the White House and that someone else had done so fraudulently in his name.

As to Charge IV of the Formal Written Complaint:

34. On January 24, 1995, respondent gave testimony in the course of the Commission's investigation of this matter.

Respondent falsely testified that:

a) he never communicated in any manner with President Clinton or the White House on any subject;

b) he did not send President Clinton an e-mail message;

c) he did not know how the White House came to have his name and home address;

d) he did not know why President Clinton sent him the letter; and,

e) some other person sent a communication in his name to the President.

As to Charge V of the Formal Written Complaint:

35. On June 24, 1994, respondent sent a two-page facsimile to Mr. Liotti's office containing a handwritten message and a movie ad about Wyatt Earp. The fax was addressed to respondent's former secretary, Bonnie Nohs, who was then working in Federal District Court in Brooklyn. Ms. Nohs had never been employed by Mr. Liotti, nor had she ever received faxes or other communications via Mr. Liotti's office. Respondent and his secretary knew where Ms. Nohs was working, and, on previous occasions, respondent had faxed documents to Ms. Nohs at her own fax number. Respondent had never before sent any communications to Ms. Nohs in care of Mr. Liotti's office.

36. On January 24, 1995, during the Commission's investigation of the matters herein, respondent falsely testified that:

a) at the bar association event on June 23, 1994, Ms. Nohs asked him for a movie recommendation and said that her husband liked westerns, to which respondent replied by mentioning the movies "Wyatt Earp" and "Tombstone";

b) respondent told her at the bar association event that he would fax her information the next day about the particular movie that he was recommending;

c) respondent sent the two-page fax to Mr. Liotti's office because he expected Mr. Liotti to forward the document to Ms. Nohs, notwithstanding the absence of any cover memo or request for such a referral from respondent to Mr. Liotti;

d) he did not add the words "DON'T SAY I DIDN'T WARN YOU..." above the movie ad;

e) he wrote the words, "I've heard Earp was a real character who never let up until someone coming after him was FINISHED", not as a message to Liotti, but to Bonnie Nohs;

f) he had his secretary look up Mr. Liotti's fax number and send the fax to Mr. Liotti's office because he and his secretary were so busy with a homicide trial before a jury that day that they did not have the time to look up Ms. Nohs's fax number; respondent's official court calendar shows that no jury trial was scheduled for June 24, 1994, that all six cases on his docket for the day were adjourned and that no cases of any type were heard; and,

g) the ad and the message were not intended for Mr. Liotti and respondent did not intend for Mr. Liotti to see or know about the fax.

As to Charge VI of the Formal Written Complaint:

37. The charge is not sustained and is, therefore, dismissed.

As to Charge VII of the Formal Written Complaint:

38. The charge is not sustained and is, therefore, dismissed.

As to Charge VIII of the Formal Written Complaint:

39. During the Commission's investigation of this matter, respondent falsely testified on January 24, 1995, that Mr. Liotti was the only person other than his doctor and his family who knew that respondent was taking the drug Prozac.

40. Respondent testified that:

a) in June or July 1993, he caught Mr. Liotti in chambers, alone, standing next to the full flight suit which respondent keeps hanging in chambers;

b) Mr. Liotti had unzipped the top of the flight suit to uncover a medical alert tag which respondent kept tucked inside the flight suit; and,

c) Mr. Liotti was reading the tag, which indicated that respondent used Prozac.

41. Respondent produced a tag at his investigative appearance which he said was the tag, bearing the word "Prozac," which Mr. Liotti had seen in June or July 1993. However, Prozac was not prescribed for respondent until June 26, 1993; he did not

order the tag until July 20, 1994, and he did not receive it until September 1994, more than a year after he originally claimed that Mr. Liotti had seen it.

42. At the hearing before the referee, respondent testified that it was not the tag that he had previously produced, but an earlier tag, that Mr. Liotti had seen. Respondent had been issued a medical alert tag by the same company in 1991, but respondent was not taking Prozac in 1991.

43. Mr. Liotti did not examine respondent's flight suit in June or July 1993, did not read his medical alert tag and did not know the medications that respondent was taking.

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(a) and 100.3(a)(6), and Canons 1, 2A and 3A(6)* of the Code of Judicial Conduct. Charges I, II, III, IV, V and VIII of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charges VI and VII are dismissed.

The evidence clearly demonstrates that respondent engaged in a vituperative campaign against a lawyer with whom he

*The Formal Written Complaint erroneously refers to Section 100.3(b)(6) and Canon 3B(6). These are apparently typographical errors. The charges are hereby amended to reflect the appropriate sections.

had a personal feud by sending numerous harassing, threatening and disparaging anonymous communications to the lawyer and disseminating widely a speech in which he impliedly disparaged the attorney. Such disreputable conduct demeans the judiciary as a whole and impairs public confidence in respondent's integrity and judgment. His extensive fabrications in testimony before this Commission further demonstrate that he is not fit to be a judge.

On and off the bench, judges are held to "higher standards of conduct than members of the public at large and [] relatively slight improprieties subject the judiciary as a whole to public criticism and rebuke." (Matter of Aldrich v State Commission on Judicial Conduct, 58 NY2d 279, 283). Respondent's pernicious attacks on Mr. Liotti--whatever the provocation--were offensive, hateful and intimidating. His behavior fell well below that expected of any citizen; coming from a judge, it was inexcusable.

Judges have been sanctioned for abusive and threatening remarks and actions off the bench (see, Matter of Kuehnel v State Commission on Judicial Conduct, 49 NY2d 465), including those directed at attorneys (see, Matter of Mahar, 1983 Ann Report of NY Commn on Jud Conduct, at 139; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133) and others (see, Matter of Smith, 1995 Ann Report of NY Commn on Jud Conduct, at 137; Matter of Gloss, 1994 Ann Report of NY Commn on Jud Conduct, at 67).

Respondent's public dissemination of the 13 points criticizing the criminal defense bar compromised his impartiality. (See, Paragraphs 25-29, supra). He publicly criticized a defense being raised in a pending proceeding before his court (see, Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][6]; Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135) and graphically threatened attorneys against bringing complaints against judges (see, Matter of Sullivan, 1984 Ann Report of NY Commn on Jud Conduct, at 152, 156).

Furthermore, respondent's false report to a police official and the series of elaborate untruths that he advanced during the investigation of this matter constitute serious misconduct. Such deception "is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." (Matter of Myers v State Commission on Judicial Conduct, 67 NY2d 550, 554).

Our review of the record of this proceeding, consisting of 77 exhibits and 1,651 pages of testimony from 42 witnesses, including character witnesses called on respondent's behalf, during a ten-day hearing, convinces us that respondent's misconduct was established by a preponderance of the evidence (see, Commission's Operating Procedures and Rules, 22 NYCRR 7000.6[i]; Matter of Seiffert v State Commission on Judicial Conduct, 65 NY2d 278, 279-80). Among the reasons for this conclusion are the striking and numerous similarities in language, tone, style and references between the anonymous

communications to Mr. Liotti and the three documents that respondent admits to preparing. Respondent's argument that Mr. Liotti sent the anonymous communications to himself, presumably to fabricate evidence against respondent; is implausible; eight of the communications were received before respondent circulated his "13 Suggestions" letter, which covers many of the same themes in similar language. Had Mr. Liotti been sending bogus communications to himself, he certainly could not have mimicked in January, March and May attacks that respondent did not make publicly until June.

Taken as a whole, respondent's attacks toward Mr. Liotti, his criticisms and threats against the criminal defense bar in general, his false report to the police and his false testimony to the Commission constitute conduct prejudicial to the proper administration of justice warranting removal. This is so regardless of respondent's reputation in the legal community. (See, Matter of Gelfand v State Commission on Judicial Conduct, 70 NY2d 211, 213; Matter of Shilling v State Commission on Judicial Conduct, 51 NY2d 397, 399).

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur.

Ms. Barnett and Mr. Goldman dissent only as to the majority's findings that respondent sent the communication

referred to in Paragraph 4R of Charge I [reflected in Paragraph 21 of the findings herein] and that he falsely testified as to the statement in Paragraph 13(i) of Charge V [reflected in Paragraph 36(a) of the findings herein] and vote that those allegations be dismissed.

Ms. Crotty dissents only as to the majority's finding that respondent sent the communication referred to in Paragraph 4R of Charge I and votes that that allegation be dismissed.

Judge Salisbury dissents only as to Paragraph 13(i) of Charge V and votes that that allegation be dismissed.

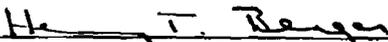
Mr. Sample was not present.

Judge Luciano was not a member of the Commission when the vote was taken in this matter.

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: February 13, 1996



Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct