

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

PHILLIP D. O'DONNELL,

a Justice of the Herkimer Village Court,
Herkimer County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
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 (Jill S. Polk, Of Counsel) for the Commission

Corrigan, McCoy & Bush, PLLC (by Scott W. Bush) for the Respondent

The respondent, Phillip D. O'Donnell, a Justice of the Herkimer Village Court, Herkimer County, was served with a Formal Written Complaint dated September 2, 2008, containing three charges. The Formal Written Complaint alleged that respondent

failed to schedule hearings in or dispose of 28 criminal cases in a timely manner and failed to keep accurate records of the proceedings, failed to report dispositions to the State Comptroller, and failed to disqualify himself in a case notwithstanding that his daughter was a friend of the defendant. Respondent filed a verified answer dated September 30, 2008.

On January 20, 2009, 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, recommending that respondent be censured and waiving further submissions and oral argument.

On January 28, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has served as a part-time Justice of the Herkimer Village Court since April 1, 1989. He was admitted to practice law in New York State in 1989 and maintains a private law practice in Herkimer.

As to Charge I of the Formal Written Complaint:

2. In the 28 criminal cases listed on Schedule A of the Formal Written Complaint and as set forth more fully in the Agreed Statement of Facts, respondent failed to schedule hearings or dispose of the cases for up to six years and five months, and failed to keep complete and accurate records of the proceedings. In four cases, respondent

failed to render decisions on motions to dismiss for periods ranging from two and a half to 17 months.

3. Respondent failed to supervise his court clerk and otherwise administer the court in an appropriate manner, resulting in, among other things, poor record keeping and poor case management. Most of the files for the 28 cases were kept in unorganized stacks on the clerk's desk and atop a file cabinet, or were misfiled. Case records did not include such important information as appearance dates or the reasons for adjournments. As a result, it is difficult to reconstruct complete case histories and status reports as to the matters.

4. For each of the 28 cases, there are no court notes or minutes contained in the file. The file contains no records whatsoever as to the arraignment procedure, or any document, record or notation which would confirm that the defendant was advised of his/her constitutional rights and that charges were read at arraignment. The file jackets contain several dates written on the cover which are crossed off, without notation as to the reason for the date or the cross out. It is not possible to determine from the contents of the files which, if any, attorneys or defendants appeared or what transpired, on many of the dates listed on the file jackets and Case History Reports. Many of the dates on the file jackets fail to correspond to the dates on the Case History Reports.

As to Charge II of the Formal Written Complaint:

5. In *People v. Dennis Harrigan*, in which the defendant was charged

with Assault in the Third Degree, respondent arraigned the defendant in 2003 and neither disqualified himself nor disclosed that his daughter was a friend and schoolmate of the defendant. From 2003 to 2007, respondent granted the defendant at least 15 adjournments for purposes of calculating restitution, allowing the matter to languish in his court without disposition.

6. Respondent did not believe there to be a conflict with his presiding over this case until the Commission inquired into the matter. Upon having an opportunity to re-examine his daughter's relationship with the defendant, respondent determined that he should recuse himself from the matter. In or about September 2007, after the Commission's inquiry, respondent disqualified himself. Although a defendant's friendship with a judge's child is not a specifically enumerated criterion for disqualification, on reflection respondent concluded that his impartiality might reasonably be questioned and there was an appearance of impropriety in his presiding over this matter.

As to Charge III of the Formal Written Complaint:

7. In the following six cases listed on Schedule A to the Formal Written Complaint, respondent delayed reporting final dispositions to the Office of the State Comptroller for periods ranging from eight months to three and a half years: *People v. Matthew O. Lambert*, *People v. Angela Celi*, *People v. Jeremy Robellard*, *People v. Clayton Sheffler, Sr.*, *People v. Mary Jane Reinhardt* and *People v. Vincent Pawlyshyn*.

Supplemental Findings:

8. As of October 2008, respondent had taken affirmative action on each of the cases cited above and most of the cases have now been finally disposed of.

9. Herkimer Village Court is a high volume court, and the total number of delayed cases represents less than two percent of the entire volume of cases handled by the court during the applicable time period.

10. Many of the files at issue had been misplaced or misfiled by the court clerk and became lost for court control purposes. Respondent acknowledges that it is his responsibility to supervise court staff and insure that the files are effectively monitored and that cases are disposed of in a timely fashion.

11. As a result of the Commission's inquiry, respondent has undertaken a review of his court's administrative procedures and has implemented case management controls aimed at eliminating the problems identified herein.

12. Respondent agrees with the Administrator's recommendation that the Office of Court Administration be asked to review respondent's case management procedures and make additional recommendations as may be appropriate to improve the administration of the court.

13. Respondent is remorseful and assures the Commission that lapses such as occurred in the cases here will not recur and agrees that, if the Commission accepts this Agreed Statement of Facts, Commission staff shall review his court records and files and report to the Commission approximately six months following the

Commission's determination in this case.

14. Respondent has been cooperative and forthright with the Commission and its staff throughout the investigative and adjudicative proceedings in this matter.

15. The parties to this Agreed Statement of Facts note that town and village court justices do not maintain or file regular administrative reports of all pending matters. Respondent therefore lacked a useful tool that may have identified some of the delays herein and alerted him to the dimension of the case management problem in his court.

16. The parties to this Agreed Statement of Facts also note that the cases herein are all criminal matters and that there were apparently no speedy trial issues raised by any defendant in any proceeding and apparently no applications or objections raised by a prosecutor regarding undue delay.

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(B), 100.2(C), 100.3(B)(1), 100.3(B)(7), 100.3(C)(1), 100.3(C)(2) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("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. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The record establishes that respondent had significant delays in disposing of criminal cases in his court. These delays were attributable in large part to respondent's failure to administer the court in an appropriate manner and to properly supervise court staff, resulting in misplaced files, poor record-keeping and poor case management. As respondent has acknowledged, it is his responsibility to supervise court staff and to insure that files are effectively monitored and that cases are disposed of in a timely fashion (Rules, §§100.3[B][7], 100.3[C][2]). In four cases, respondent also had significant delays in ruling on motions to dismiss.

The record also indicates a pervasive failure to maintain complete and accurate records of cases, making it difficult to reconstruct case histories and status reports as to the matters. Sections 107 and 2019 of Uniform Justice Court Act require a judge to keep legible and suitable records of all civil and criminal proceedings. Section 200.23 of the Recordkeeping Requirements for Town and Village Courts (22 NYCRR §200.23) requires the court to maintain case files that *inter alia* include papers filed, minutes or notes made by the court, and a record of the arraignment proceeding, including whether the defendant was advised of his or her rights and whether counsel was assigned. Respondent's disregard of these record-keeping requirements is a violation of his administrative responsibilities and, standing alone, constitutes misconduct. Rules, §100.3(C)(1); *see, Matter of Petrie*, 54 NY2d 807, 808 (1981); *Matter of Schiff*, 83 NY2d 689, 694 (1994).

In addition, respondent failed to disqualify himself in an Assault case in

which his daughter was a friend of the defendant. While a defendant's friendship with a judge's child is not a specifically enumerated criterion for disqualification (Rules, §100.3[E][1]), respondent himself concluded, after the Commission had inquired into the matter, that in view of the relationship his impartiality might reasonably be questioned, and he eventually disqualified himself. *See, Matter of Robert*, 89 NY2d 745 (1997) (judge presided over cases involving his friends); *Matter of Fabrizio*, 65 NY2d 275 (1985) (judge presided over case in which the defendant was his dentist). Prior to his disqualification, respondent had adjourned the case at least 15 times over four years and allowed the case to languish in his court, thereby creating the appearance of special consideration.

In considering the sanction, we note that respondent has been contrite and cooperative throughout the proceedings, has taken action in or otherwise disposed of all the delayed cases, and has assured the Commission that such lapses will not recur. Respondent has also taken steps to improve his procedures, including implementing case management controls aimed at eliminating the problems identified herein. We trust that these measures will insure that such problems will not recur in the future.

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 Konviser, Judge Peters and Judge Ruderman concur.

CERTIFICATION

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

Dated: February 5, 2009

A handwritten signature in cursive script that reads "Jean M. Savanyu". The signature is written over a solid horizontal line.

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