STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

DAVID A. PRINCE,

a Justice of the Pomfret Town Court
and Fredonia Village Court, Chautauqua
County.

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and Kathleen Martin, Of Counsel) for the Commission

Lipsitz, Green, Scime, Cambria, LLP (by Barry Nelson Covert) for the Respondent

The respondent, David A. Prince, a Justice of the Pomfret Town Court and Fredonia Village Court, Chautauqua County, was served with a Formal Written

Complaint dated October 31, 2013, containing two charges. The Formal Written Complaint alleged that during an arraignment on charges arising out of a domestic dispute, respondent failed to advise a defendant of his right to assigned counsel, made statements that appeared to prejudge the case, and made discourteous, inappropriate statements to the alleged victim.

On December 9, 2013, the Administrator, 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 admonished and waiving further submissions and oral argument.

On December 12, 2013, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Pomfret Town Court, Chautauqua County, since 1990, and a Justice of the Fredonia Village Court, Chautauqua County, since 1997. His current term as Pomfret Town Justice expires on December 31, 2015, and his current term as Fredonia Village Justice expires on April 1, 2017. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On January 30, 2012, R. G., the father of A. G., called the Fredonia Police Department regarding an alleged domestic dispute between Ms. G. and her live-in boyfriend, C. M. When Fredonia Village police officers arrived at Ms. G.'s home, Mr.

M. was no longer there.

3. Ms. G. signed a supporting deposition alleging that there had been an altercation in which Mr. M. screamed profanities, forced open a door to her room and later shoved her into the kitchen table.

4. Mr. M. was charged with Criminal Mischief in the Fourth Degree, in violation of section 145.00 of the Penal Law, and Harassment in the Second Degree, in violation of section 240.26 of the Penal Law.

5. On January 31, 2012, respondent signed an arrest warrant for Mr. M. in connection with the incident.

6. On February 26, 2012, Fredonia Village Police Officer Mike Hodkin arrested Mr. M. and gave him an appearance ticket for February 29, 2012.

7. On February 29, 2012, respondent presided over the arraignment of the defendant in *People v C. M.* At arraignment, respondent failed to advise Mr. M. of his right to assigned counsel and made statements in which he appeared to have pre-judged Mr. M.'s case, as indicated in the following paragraphs.

8. Respondent failed to advise Mr. M. of his right to assigned counsel as required by section 170.10(3)(c) of the Criminal Procedure Law.

9. Upon learning that Ms. G., who was present in court for the arraignment, did not wish to pursue charges against Mr. M., respondent called her to the bench and said:

> "You want to drop these charges now after what he's accused of doing? Why would you want to subject your children to that, or yourself, to that type of person?"

10. When Ms. G. told respondent that she did not think Mr. M. would cause any further violent incidents, respondent said:

> A. "Let me, let me just tell you something. I'm almost 70 years old. I've been doing this for 45 years and it doesn't stop. This is not going to happen to those kids."
>
> B. "If you don't want to put your children first, then we will. We're not dismissing the charges."

11. Shortly thereafter, when the defendant in an unrelated traffic matter thanked respondent for "helping them kids," respondent replied, "Isn't that terrible?" When the defendant then said, "Sickening. And … she just stands there and looks at … you," respondent replied, "Unbelievable."

As to Charge II of the Formal Written Complaint:

12. On February 29, 2012, in presiding over the arraignment in *People v C. M.* on charges stemming from an alleged domestic violence incident, respondent spoke to the alleged victim, A. G., in an angry and discourteous manner and threatened to take action to have the victim's children taken from her home, because of her expressed desire not to pursue the criminal charges.

13. Upon learning that Ms. G. did not wish to pursue charges against Mr. M., respondent called her to the bench and stated, in a harsh and angry tone:

> "Here's what bothers me. You have two children. Is that not true?
> ***
> "You've gone through a divorce, is that correct?
> ***
> "Now, you're subjecting your children, with this individual."

14. Referring to Ms. G.'s supporting deposition, respondent said to her, in a harsh and angry tone:

> "In your statement, let me read what it says in your statement. That during this confrontation, he called you an f'ing c, okay, and when you went into the bedroom—look at me when I'm talking to you, and when you went into the bedroom to check on your children, they were under the covers crying. Here's what's going to happen, if you're going to continue to subject those children to this type of environment, I'm turning you into the state authority for the protection of children. Do you understand me? Your first obligation is your kids. Do you understand me?"

15. Respondent then demanded of Ms. G., "Why would you want to subject your children to that, or yourself, to that type of person? Answer me."

16. Respondent also stated to Ms. G., "If you don't want to put your children first, then we will. We're not dismissing the charges."

17. When Mr. M. pleaded not guilty and indicated that he wanted to go to trial, respondent replied, "So, I am, it leaves me no choice but to contact child protection."

Additional Factors

18. Respondent has no previous disciplinary history over his lengthy career on the bench.

19. Respondent has been cooperative and contrite throughout the Commission inquiry.

20. Notwithstanding that he was motivated by concerns for the safety of Ms. G. and her children, respondent realizes that such concerns do not excuse his failure

to effectuate a defendant's rights and otherwise act fairly and impartially. He regrets his failure to abide by the applicable Rules in this instance and pledges henceforth to abide by them faithfully.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(3) and 100.3(B)(4) 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 and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

In handling the arraignment in *People v. C. M.*, involving charges arising out of a domestic dispute, respondent failed to advise the defendant of the right to assigned counsel, made statements that appeared to prejudge the case, and made harsh, discourteous comments to the complaining witness. Respondent's conduct violated basic tenets of fairness in the administration of justice and a judge's obligation to be an exemplar of neutrality and courtesy in court proceedings.

The right to counsel is a fundamental constitutional and statutory right, and it includes in all criminal cases the right to have an attorney assigned if the defendant is financially unable to retain counsel. At arraignment, a judge is required *inter alia* to advise a defendant of the right to assigned counsel and to "take such affirmative action as is necessary to effectuate" the defendant's rights (CPL §§170.10[3][c], 170.10[4][a]; *see Matter of Bauer*, 3 NY3d 158 [2005]). By ignoring this important responsibility,

respondent violated his ethical obligation to be faithful to the law (Rules, §100.3[B][1]).

Respondent also made statements in which he appeared to presume that the defendant had engaged in the conduct charged, including asking the complaining witness, "Why would you want to subject your children... or yourself, to that type of person?" At an arraignment, before a defendant's guilt or innocence has been adjudicated, a judge must be, and appear to be, impartial and avoid making any statements that convey the appearance of bias or prejudgment. As the Court of Appeals stated: "The ability to be impartial is an indispensable requirement for a judicial officer. Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property" (*Matter of Sardino,* 58 NY2d 286, 290-91 [1983]; *see also Matter of Austria*, 1996 NYSCJC Annual Report 51; *Matter of Wylie*, 1991 NYSCJC Annual Report 89).

Domestic violence is a serious social problem with major implications for the health and safety of women and children, and such cases present significant challenges for the courts.[1] A judge is required to protect the defendant's rights and to preside in each case as a neutral arbiter, not as an advocate or therapist, but is also required to be sensitive to the complex and difficult issues presented in such cases, including that the victim may be ambivalent or fearful about cooperating with the legal

[1] *See* Hon. Judith S. Kaye and Susan K. Knipps, "Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach," 27 Western St. Univ. L. Rev. 1 (1999-2000); *see also* Hon. Marjory D. Fields, "Practical Ideas for Trial Judges in Domestic Violence Cases," 35 *The Judges' Journal* 32 (1996).

process. Respondent's inappropriate statements about the complaining witness' desire not to pursue the charges were inconsistent with the dignity, patience and impartiality required of judges (Rules, §100.3[B][3]).

While it has been stipulated that respondent "was motivated by concerns for the safety" of the alleged victim and her children, it was not his responsibility either to align himself with the prosecutor against the defendant or to lecture or threaten the complaining witness in an angry, discourteous manner. Under the circumstances, telling her that abusive conduct "doesn't stop" and affects children in the household could only be perceived as biased and sharply disapproving of her choices. Explaining the procedures in a neutral, considerate way and indicating that she should discuss with the District Attorney's office her desire not to pursue the charges would have been far more appropriate than expressing his concerns in a harsh, angry tone and berating and threatening her in open court ("If you don't want to put your children first, then we will"). While it is entirely appropriate for a judge to make inquiries of a complaining witness to determine whether the witness' decision not to testify is voluntary and not the result of coercion, treating an alleged victim harshly for being reluctant to cooperate in the prosecution may have the effect of discouraging the individual from seeking protection from the criminal justice system in the future.

It has been stipulated that respondent now realizes that his concerns for the safety of the alleged victim and her children "do not excuse his failure to effectuate a defendant's rights and otherwise act fairly and impartially."

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

Mr. Belluck dissents and votes to reject the Agreed Statement on the basis that the proposed disposition is too lenient.

CERTIFICATION

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

Dated: December 18, 2013

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