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

HERBERT B. RAY,

a Judge of the Family Court, Broome County.

Determination

THE COMMISSION:

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

APPEARANCES:

Gerald Stern for the Commission

Thomas, Collison & Meagher (By Charles H. Collison) for Respondent

The respondent, Herbert B. Ray, a judge of the Family Court, Broome County, was served with a Formal Written Complaint dated October 8, 1998, alleging that he engaged in favoritism in the appointment of law guardians. Respondent filed an answer dated October 27, 1998.

On February 11, 1999, the administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further proceedings and oral argument.

On February 25, 1999, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Broome County Family Court since 1986. In the 1985 election, he ran against attorney William K. Maney.

2. In 1993 and 1994, respondent appointed Mr. Maney and his law partner, Edward Boncek, as law guardians in a disproportionate number of cases, in violation of the Rules of the Appellate Division, Third Department, 22 NYCRR 835.3(b)(4), in that:

a) in 1993, respondent gave Mr. Maney 18 percent of the law-guardian appointments in the court and Mr. Boncek 6.4 percent of the cases; and,

b) in 1994, respondent gave Mr. Maney 17 percent of the appointments and Mr. Boncek 5.4 percent.

3. In these years, there were approximately 90 attorneys on the panel of law guardians.

4. Respondent frequently appointed Mr. Maney or Mr. Boncek from the bench, bypassing the system by which the court clerk assigned law guardians on a rotating basis.

5. Early in respondent's tenure on the bench, the chief clerk and the deputy chief clerk had spoken to respondent about his practice of departing from the rotation of assignments; they advised respondent that they were receiving complaints from other attorneys that respondent was appointing certain attorneys, particularly Mr. Maney and Mr. Boncek, to a disproportionately high number of cases.

6. Beginning in the early 1990s, respondent received quarterly statements from the Appellate Division's Law Guardian Program which indicated that Mr. Maney and Mr. Boncek were receiving a disproportionately high number of assignments and a disproportionately high income from their work as law guardians in Family Court. In 1993, respondent awarded Mr. Maney $58,177 and Mr. Boncek $20,253 in fees. The average fee for all law guardians assigned by respondent that year was $4,434. In 1994, respondent awarded Mr. Maney $30,660 and Mr. Boncek $13,800; the average fee that year was $3,354.

7. By letter dated June 16, 1994, respondent's administrative judge questioned respondent's excessive appointments of Mr. Maney and Mr. Boncek. Judge Robert W. Coutant said that the pattern of excessive appointments might violate department rules and "suggests improper favoritism...."

8. In January 1995, Mr. Maney informed respondent that he would not oppose respondent for a new term as Family Court judge. Later, Mr. Maney and Mr. Boncek

offered to help respondent obtain the cross endorsement of the Democratic party for re-election. Respondent accepted their offer.

9. Through 1995, respondent routinely certified for payment vouchers submitted by Mr. Maney and Mr. Boncek without adequately examining them to ensure that they were "fair and just," as he was required to certify. Had respondent adequately examined the vouchers, it would have been apparent that the attorneys were overbilling, since they regularly disregarded the requirement that they bill in tenths of hours and, instead, billed in hourly increments. At one point prior to 1995, respondent had questioned Mr. Boncek as to why he billed more out-of-court hours than other attorneys but failed to require Mr. Boncek to justify the time billed.

10. Because of respondent's negligence in approving the vouchers, Mr. Maney and Mr. Boncek were paid thousands of dollars in public monies for work that they had not performed.

11. In January 1996, respondent instituted a procedure whereby court clerks accounted for in-court time spent by law guardians in cases before respondent.

12. In May 1996, the Office of Court Administration began auditing the vouchers submitted by Mr. Maney and Mr. Boncek. The audits revealed that--between April 1, 1992, and December 31, 1995--Mr. Maney and Mr. Boncek had submitted vouchers that grossly overstated the number of hours that they had spent on cases and which billed for proceedings that they did not attend or for cases in which they were not the assigned law guardians. Some of the vouchers double-billed for work on cases. On a number of

occasions, these attorneys submitted vouchers in which they billed for more in-court hours than the court was in session. The vast majority of the inflated vouchers had been approved by respondent.

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), 100.2(C) and 100.3. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

Respondent circumvented the normal procedure and appointed Mr. Maney and Mr. Boncek as law guardians in a disproportionate number of cases. He then failed to scrutinize their bills, permitting them to grossly inflate their charges and collect thousands of unearned dollars in public funds. The combination of these factors created the appearance that the lawyers were getting favored treatment from the judge.

Respondent is required to use his discretion in the appointment of law guardians in a "fair and impartial manner." (Rules of the Appellate Division, Third Department, 22 NYCRR 835.3[b][4]). The court had established a means of ensuring that

this standard was upheld: law guardians were designated on a rotating basis.* Instead, respondent often appointed Mr. Maney or Mr. Boncek from the bench; from a panel of 90 lawyers, he gave them more than 20 percent of the cases in 1993 and 1994.

Under such circumstances, respondent had a special burden to ensure that their charges were "fair and just," as he was required to certify on their vouchers. Yet -- despite complaints from others on the panel of law guardians and from his administrative judge -- respondent failed to carefully inspect the bills of these two lawyers. Had he done so, it would have been evident that they were sometimes billing for work on cases to which they had not been assigned, were double-billing in some cases and were occasionally billing more in-court hours than court was in session. Even though he noticed that Mr. Boncek was billing for more in-court hours than other law guardians, respondent did nothing more than question him about it; he did not require the lawyer to justify the time, and he did not inspect the vouchers more closely.

Moreover, such laxity, in view of the political relationship of respondent and Mr. Maney, creates the appearance that his serious lack of oversight may have been politically motivated. The two were adversaries in respondent's first run for Family Court. As a result of respondent's excessive appointments of Mr. Maney and his law partner, they received more than $75,000 in 1993 and more than $40,000 in 1994 in court-ordered fees.

* The rules allow for exceptions to be made by the judge when the merits dictate. The judge may consider the experience and qualifications of prospective law guardians, the nature and difficulty of the case or the need for continuity in successive proceedings involving the same minor or minors. (22 NYCRR 835.3[b][1], [2] and [3]). However, respondent has advanced no such justifications for assigning Mr. Maney and Mr. Boncek to a large proportion of the cases in his court.

This was followed by Mr. Maney's decision not to oppose respondent for a second term in 1995 and his subsequent offer of help in obtaining a cross endorsement when respondent came up for re-election. An appearance of favoritism in the making of judicial appointments "is no less to be condemned than is the impropriety itself." (Matter of Spector, 47 NY2d 462, at 466). Such an appearance undermines public confidence in the judiciary, and a judge must avoid creating such a situation. (Rules Governing Judicial Conduct, 22 NYCRR 100.2).

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

Mr. Berger, Ms. Brown, Mr. Goldman, Ms. Hernandez, Judge Joy, Judge Newton, Mr. Pope and Judge Salisbury concur.

Judge Marshall dissents and votes to reject the Agreed Statement of Facts and refer the matter to a referee for a hearing.

Mr. Coffey and Judge Luciano 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: April 26, 1999

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

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DISSENTING OPINION BY JUDGE MARSHALL

HERBERT B. RAY,

a Judge of the Family Court, Broome County.

I am disheartened and troubled by the majority's decision to approve the Agreed Statement of Facts in this case and to accept without a hearing the sanction of censure.

A referee should have been asked to take testimony under oath in order to assess the credibility of the respondent and to determine whether criminal acts were committed by respondent. The Agreed Statement of Facts and the Determination lend strong support to the conclusion that respondent was engaged in a scheme to defraud the State of New York (See, Paragraphs 9 and 12 of the Determination). If this were proven to the satisfaction of a referee, the appropriate sanction would be removal, in my opinion.

In any event, I would have preferred to have had a broader, more enlightened view of the evidence before making a determination on the appropriate sanction.

Dated: April 26, 1999

Honorable Frederick M. Marshall, Member
New York State
Commission on Judicial Conduct