

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

BARRY D. SACK,

a Judge of the Hudson City Court,
Columbia County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Helaine M. Barnett, Esq.
Honorable Evelyn L. Braun
E. Garrett Cleary, Esq.
Lawrence S. Goldman, Esq.
Honorable Juanita Bing Newton
Honorable Eugene W. Salisbury
John J. Sheehy, Esq.
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the
Commission

Allen Chace Miller, Jr., David Seth Michaels and Cade &
Saunders, P.C. (Daniel J. Persing, Of
Counsel) for Respondent

The respondent, Barry D. Sack, a judge of the Hudson
City Court, Columbia County, was served with a Formal Written
Complaint dated August 21, 1992, alleging, inter alia, that he
was improperly involved in a matter in his court in which he was
representing one of the parties as an attorney. Respondent filed
an answer dated September 3, 1992.

By order dated September 23, 1992, the Commission designated Martin H. Belsky, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 21 and 22, 1992, and the referee filed his report with the Commission on May 25, 1993.

By motion dated July 14, 1993, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion. The administrator filed a reply to respondent's papers on August 25, 1993.

On September 8, 1993, the Commission adjourned, without date, oral argument on the motion.

On September 13, 1993, respondent was served with a second Formal Written Complaint alleging that he refused without cause to hold a scheduled preliminary hearing and that he appeared before another lawyer-judge in the same county on a case which had originated in respondent's court. Respondent answered that complaint on September 17, 1993.

By order dated October 5, 1993, the Commission designated Laurie Shanks, Esq., as referee in the second proceeding. A hearing was held on November 29 and December 6, 1993, and the referee filed her report with the Commission on April 18, 1994.

By motion dated June 6, 1994, the administrator moved to confirm the referee's report in the second proceeding. Respondent opposed the motion by cross motion dated June 16, 1994. The administrator filed a reply dated June 30, 1994.

On July 21, 1994, the Commission heard oral argument as to both motions. Respondent and his counsel appeared. Thereafter, the Commission considered the records of both proceedings and made the following findings of fact.

As to Charge I of the Formal Written Complaint dated August 21, 1992:

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

As to Charge II of the Formal Written Complaint dated August 21, 1992:

2. Respondent has been a part-time judge of the Hudson City Court since 1989. He also practices law in Hudson.

3. On October 29, 1991, Ellen Nelson filed a complaint in the Claverack Town Court, charging Robert DeVito with Aggravated Harassment, Second Degree. Respondent appeared as counsel for Mr. DeVito on October 30, 1991, in the Claverack Town Court. A temporary Order of Protection was issued in favor of Ms. Nelson and against Mr. DeVito.

4. On October 30, 1991, Mr. DeVito also filed a complaint against Ms. Nelson, alleging Aggravated Harassment, Second Degree. His complaint was filed in respondent's court. When respondent found the complaint among his paperwork, he placed it in a bin of papers reserved for his fellow judge, John Connor, Jr.

5. Respondent then called Ms. Nelson. Ms. Nelson, Mr. DeVito and respondent were members of the same bowling team. Respondent told Ms. Nelson that Mr. DeVito had filed a complaint against her in the Hudson City Court, which Ms. Nelson knew was where respondent sat as a judge. Respondent said that he could arrange it so that she could avoid the embarrassment of arrest if she would come to the court at 9:00 A.M. on November 6, 1991. In a subsequent telephone call, respondent's private secretary, at his direction, advised Ms. Nelson that Mr. DeVito would withdraw the charge if she would drop her allegations against him.

6. Respondent was not assigned to preside in court on November 6, 1991. Nevertheless, he was in chambers when Ms. Nelson arrived at 9:00 A.M. Mr. DeVito also arrived at that time. He gave Ms. Nelson a note, which he had signed, offering to withdraw his charge if she did the same. The note was in nearly identical language to that conveyed to Ms. Nelson by respondent eight days earlier. Ms. Nelson rejected the offer. Mr. DeVito then handed the note to someone inside the court and left.

7. Shortly thereafter, respondent came to Ms. Nelson and discussed the DeVito complaint. He gave a copy of the complaint to her.

8. Sometime after 8:30 A.M. on November 6, 1991, in chambers, respondent approached the prosecutor assigned to his court, Marlene Tuczinski. Respondent suggested that the matter could be resolved if both parties withdrew their respective

charges. Ms. Tuczinski said that she could not agree since another assistant district attorney was handling the case in the Claverack court. At some point, Ms. Tuczinski found the note signed by Mr. DeVito on her briefcase in the court. She asked respondent about it; he replied that it was for her "information."

9. The complaint came before Judge Connor, who recused himself. It was never transferred to another court, and Ms. Nelson never heard any more about it.

10. On November 12, 1991, respondent discussed the matter in the Claverack court with Assistant District Attorney James J. McGuire. Respondent suggested a mutual withdrawal of charges. Mr. McGuire also responded that he could not agree to withdraw a complaint in another court.

11. On March 25, 1992, Mr. DeVito was charged with violating the temporary Order of Protection issued on October 30, 1991. He was arrested on a charge of Criminal Contempt, Second Degree, and jailed in lieu of \$2,500 bail by Justice Robert Q. Moore.

12. Mr. DeVito called respondent, who then called Claverack Town Justice Thomas Gibbons without notice to the District Attorney's Office. Respondent gave Judge Gibbons general information about the charge, told him that he bowled with Mr. DeVito, said that he was a longtime Hudson resident who always appeared as scheduled in court and asked that he be released on his own recognizance.

13. Judge Gibbons ordered Mr. DeVito released. He testified that he would not have done so if he had been told that the allegations involved a violation of an Order of Protection.

As to Charge III of the Formal Written Complaint dated August 21, 1992:

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

As to Charge I of the Formal Written Complaint dated September 13, 1993:

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

As to Charge II of the Formal Written Complaint dated September 13, 1993:

16. On November 12, 1992, Bryan Cole was charged with Aggravated Harassment, Second Degree. The charge was filed in respondent's court. As an attorney, respondent had represented Mr. Cole. When he learned that the Aggravated Harassment charge was to come before him, he disqualified himself.

17. Judge Connor also disqualified himself. He and respondent signed a statement to that effect on December 7, 1992. The case was transferred to the Kinderhook Town Court, Columbia County, and was scheduled to come before Justice Joseph A. Cutro on April 27, 1993. Judge Cutro is a part-time justice who practices law in Kinderhook.

18. On April 27, 1993, Mr. Cole called respondent and asked him to appear with him that evening in the Kinderhook Town Court.

19. Respondent called Judge Cutro and asked that the matter be adjourned. Thereafter, he negotiated a plea to a reduced charge of Harassment. On June 8, 1993, respondent submitted to Judge Cutro a plea in writing to the reduced charge.

20. Respondent knew at the time that he was not permitted to appear as counsel on any matter that had originated in his court. Nonetheless, he took no action to determine whether the charge against Mr. Cole had originated in his court. He testified that he never saw the Information in the matter which clearly identifies it as having been filed in respondent's court, and he claimed that he did not remember disqualifying himself from a criminal case involving Mr. Cole five months earlier.

21. Respondent knew at the time of his representation of Mr. Cole that he was not permitted to appear before another part-time lawyer-judge in the same county. Nonetheless, he took no steps to determine whether Judge Cutro was licensed to practice law.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Judiciary Law §16; the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.2(a), 100.3(a)(1), 100.3(a)(4) and 100.5(f), and

Canons 1, 2, 2A, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charge II of the Formal Written Complaint dated August 21, 1992, and Charge II of the Formal Written Complaint dated September 13, 1993, are sustained, and respondent's misconduct is established. Charges I and III of the Formal Written Complaint dated August 21, 1992, and Charge I of the Formal Written Complaint dated September 13, 1993, are dismissed.

A judge who is permitted to practice law is required, nevertheless, to distinguish scrupulously between the judicial function and his or her role as advocate. (Matter of Jacon, 1984 Ann Report of NY Commn on Jud Conduct, at 99, 101). A part-time lawyer-judge may not practice law in his or her own court or in any court in the same county presided over by another part-time lawyer-judge. (Rules Governing Judicial Conduct, 22 NYCRR 100.5[f]). A judge may not accept employment as an attorney in any case which originated in the judge's court, whether or not he or she took any action as a judge. (Judiciary Law §16; Matter of Bruhn, 1988 Ann Report of NY Commn on Jud Conduct, at 133, 136; Matter of Feeney, 1988 Ann Report of NY Commn on Jud Conduct, at 159, 161). Respondent disregarded these limitations in the DeVito and Nelson matters and in the Cole case.

As a judge, respondent should have had no involvement in the DeVito and Nelson matters since the charge against Ms. Nelson was pending in his own court, he was representing Mr. DeVito and he had disqualified himself. As a lawyer

representing Mr. DeVito in the complaint brought by Ms. Nelson, respondent should not have approached the complaining witness in a criminal matter being prosecuted by the district attorney. Yet respondent summoned Ms. Nelson to the courthouse where, she knew, he presided as a judge, provided her with a criminal complaint bearing the court's caption and conveyed to her through his private secretary, rather than the prosecutor, a proposed settlement of the matter. Rather than carefully distinguishing between his roles as lawyer and judge, respondent confused them. Consequently, a reasonable person might question whether he was using his judicial office to benefit a client of his legal practice.

His ex parte call to Judge Gibbons was also improper. (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][4]).

In Cole, respondent made no effort to determine whether the case was the one from which he had earlier disqualified himself as a judge or whether Judge Cutro was permitted to practice law. Respondent clearly violated the Judiciary Law by representing a client in a case which had originated in his court and breached the Rules Governing Judicial Conduct by appearing before another judge of the same county who is permitted to practice law. Standing alone, such conduct might not warrant severe sanction. It is exacerbated, however, by the fact that it occurred after charges against respondent concerning the Nelson matter had been served and heard and were pending before this Commission. (See, Matter of Sims v State Commission on Judicial Conduct, 61 NY2d 349, 357).

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Newton, Judge Salisbury and Mr. Sheehy concur as to sanction.

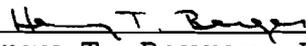
Mr. Cleary and Mr. Goldman dissent only as to the allegation in Paragraph 8 of Charge II of the Formal Written Complaint dated August 21, 1992, concerning respondent's ex parte telephone call to Judge Gibbons. While they believe that such an ex parte communication was improper, since the referee determined that ex parte telephone calls from an attorney to a judge with respect to bail applications are common in Columbia County, they do not believe that respondent's conduct constituted judicial misconduct.

Judge Thompson was 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: September 29, 1994


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