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

MARY H. SMITH,

a Judge of the County Court, Westchester County.

Determination

THE COMMISSION:

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

APPEARANCES:

Gerald Stern for the Commission

Mancuso, Rubin & Fufidio (By Andrew A. Rubin) for Respondent

The respondent, Mary H. Smith, a judge of the County Court, Westchester County, was served with a Formal Written Complaint dated December 18, 1997, alleging three charges of misconduct. Respondent did not answer the complaint.

On March 11, 1998, the administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On March 12, 1998, the Commission approved the agreed statement and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Westchester County Court during the time herein noted.

2. On February 29, 1996, respondent presided over People v Moses Noel Blasini, in which the defendant was charged with Murder. Mr. Blasini was represented by Lawrence A. Porcari.

3. While Mr. Porcari was out of the courtroom, respondent had an ex parte conversation with the defendant in which she attempted to persuade him to plead guilty.

4. When two prosecutors present in the courtroom questioned respondent's conduct in speaking to a defendant when his lawyer was not present, respondent directed the prosecutors to leave the courtroom. One of the prosecutors again asserted

that such discussion was improper, but respondent maintained that it was proper. She continued to suggest to the defendant, in the absence of his counsel, that he plead guilty.

5. In open court, respondent stated that the defendant had indicated a desire to plead guilty, and, in the defendant's presence, she said that she was concerned that Mr. Porcari was not acting in accordance with his client's wish. She disregarded Mr. Porcari's requests that she not speak directly to his client.

6. At one point, Mr. Porcari allowed his client to address the court but instructed him not to respond to respondent. Respondent told Mr. Porcari not to interfere. She persisted, and the defendant said that he did not believe that his bullet had struck the murder victim. This statement was subsequently suppressed by respondent.

7. Respondent encouraged the defendant to speak to her directly, even after Mr. Porcari reminded her that she was undermining the confidence that the defendant should have in his attorney.

As to Charge II of the Formal Written Complaint:

8. On December 15, 1995, respondent presided over People v Kent McDonald. Respondent had an ex parte conversation with the defendant while his attorney was not in the courtroom. Respondent indicated to the defendant that the plea

that he and his attorney sought was a good plea and that he should accept it if he was guilty. She reiterated the point when the defendant's attorney returned to court.

As to Charge III of the Formal Written Complaint:

9. Between January 1, 1995, and March 31, 1997:

a) in some cases pending before her, respondent made inappropriate quips and other comments of misplaced humor to attorneys in chambers that appeared to minimize charges brought by the District Attorney's Office;

b) on one occasion, respondent would not allow an assistant district attorney to make a complete record of a recusal application based on respondent's ex parte conversation with defense counsel, and, after giving the prosecutor until 4 P.M. to file a written motion, respondent commenced the non-jury trial at 2:40 P.M.; the prosecutor completed and filed his motion papers by 4 P.M. but later withdrew them because the trial was in progress;

c) respondent made a statement in court which, even though it was not meant to be critical of a particular ethnic group, could reasonably be interpreted as being critical of that group, and her comments implied that, because of the conduct of one defendant, other defendants who were members of that ethnic group might suffer in the future; while evaluating the case in chambers, she also stated that the alleged victims were probably illegal aliens who, either would not testify, or would not be believed if they did because of their status;

d) on one occasion, as she was entering the courtroom, respondent had a brief ex parte conversation with defense counsel under the mistaken belief that counsel had already discussed the subject with the prosecutor; eventually, the prosecutor and defense counsel agreed upon the disposition that was the substance of the ex parte conversation;

e) in a case in which the defendant was accused of forcible sodomy and wished to plead guilty while maintaining his innocence, respondent advised defense counsel not to enter a plea of guilty unless the prosecutor could prove the charges, and she opined that it was unlikely that the alleged victim would appear at trial; respondent repeated her advice after the prosecutor asserted that the alleged victim would appear; respondent then said that she would not accept a guilty plea unless the victim appeared in court, notwithstanding that the alleged victim had moved to North Carolina and had recently given birth; respondent eventually allowed a guilty plea after receiving an affidavit from the alleged victim; and,

f) on one occasion, after defense counsel was given a pre-sentence report to read, respondent prohibited the prosecutor from reading the pre-sentence report because she was angry with him for requesting the opportunity to read the report when the sentence had been agreed upon by the parties.

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, 100.3(B)(3) and its predecessor, Section 100.3(a)(3) and 100.3(B)(6) and its predecessor, Section 100.3(a)(4) [renumbered eff. Jan. 1, 1996], and the Rules Concerning Court Decorum of the Appellate Division, Second Department, 22 NYCRR 700.5(a) and 700.5(e). Charges I, II and III of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

Respondent has engaged in a pattern of inappropriate behavior that compromised the rights of the parties and created the appearance of partiality.

It was improper for respondent to speak to defendants whom she knew to be represented and urge them to enter guilty pleas, especially outside the presence of their attorneys. In Blasini, she persisted in this conduct, even after prosecutors repeatedly reminded her that this was inappropriate. When the lawyer returned, she continued to address the defendant, even though the lawyer had advised him not to respond. A judge should not interfere in the relationship between a lawyer and a client. (See, Matter of Finley, 1981 Ann Report of NY Commn on Jud Conduct, at 123, 128).

Respondent's ill-placed humor, minimizing charges before her, and her remarks concerning the reliability of prosecution witnesses created the appearance of bias against the prosecution. Comments by a judge indicating ethnic bias or appearing to indicate such bias are undesirable, inappropriate and inexcusable. (See,

Matter of Ain, 1993 Ann Report of NY Commn on Jud Conduct, at 51, 53; Matter of Sweetland, 1989 Ann Report of NY Commn on Jud Conduct, at 127, 130). In addition, a judge should not suggest that the conduct of one member of an ethnic group reflects on all members of that group. (See, Matter of Cunningham, 1995 Ann Report of NY Commn on Jud Conduct, at 109, 110).

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

Mr. Berger, Ms. Brown, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Ms. Crotty 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: June 29, 1998

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