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

MORRIS SPECTOR,

A Justice of the Supreme Court, New York County.

COMMISSION PER CURIAM DETERMINATION

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PRESENT: Mrs. Gene Robb, Chairwoman
David Bromberg
Hon. Richard J. Cardamone
Dolores DelBello
Hon. Herbert B. Evans
Michael M. Kirsch
Victor A. Kovner
William V. Maggipinto
Hon. Felice K. Shea
Hon. Morton B. Silberman
Carroll L. Wainwright, Jr.

The respondent, Morris Spector, a Justice of the Supreme Court, New York County, was served with a Formal Written Complaint dated June 19, 1978 alleging four charges of misconduct, based upon the appearance of impropriety arising from a number of appointments of attorneys as guardians ad litem or as referee made by respondent of the following persons:

A partner of the law firm in which respondent's son was employed as an associate (Charge I);
The son of Justice Sidney Fine during a period when Justice Fine also appointed respondent's son (Charge II);
The son of Justice George Postel during a period when Justice Postel also appointed respondent's son (Charge III); and

The son-in-law of Justice Abraham Gellinoff during a period when Justice Gellinoff also appointed respondent's son (Charge IV)

In his Verified Answer dated August 15, 1978, respondent admitted all of the factual allegations of the Complaint relating to the appointments, but denied that any of the allegations asserted in the Complaint constituted misconduct or violations of any of the Canons of Judicial Ethics and denied that the motive for the appointments he made related in any way to the employment of respondent's son or to the appointments of respondent's son by the other justices.

On August 30, 1978, the Administrator of the State Commission on Judicial Conduct moved for summary determination of the pleadings and following response from respondent dated September 7, 1978, the Commission denied the motion for judgment on the pleadings on September 15, 1978.

Pursuant to order dated September 26, 1978, Bernard Meyer, Esq., was appointed as Referee to hear and report to the Commission with respect to the above entitled proceeding. After a hearing held on October 13, 1978, the Referee submitted his report dated November 14, 1978 which concluded that Charges I and IV had not been sustained, and that Charges II and III had been sustained in part.

On November 17, 1978, the attorney for the Commission

moved to confirm the findings of fact in the Referee's report and on November 22, 1978, the respondent cross-moved to confirm the Referee's report as to Charges I and IV and to disaffirm the Referee's report as to Charges II and III. On November 29, 1978, the attorneys for the Commission and the respondent argued both the motion and the cross-motion, and in addition argued the issue of sanctions, if any, to be imposed by the Commission in the event any of the charges were sustained. The respondent was present during the course of these arguments and was offered the opportunity to make a statement to the Commission.

Upon the record before us the Commission finds that between March of 1968 and November of 1974 respondent appointed the son of Justice Sidney Fine on two occasions, yielding aggregate fees of $3,400, while Justice Fine appointed the son of respondent on eight occasions, yielding aggregate fees of $9,393 (Charge II), and that respondent appointed the son of Justice Postel on ten occasions, yielding aggregate fees of $11,521 while Justice Postel had appointed respondent's son on five occasions, yielding aggregate fees of $6,867 (Charge III).

The Commission further finds that respondent was in fact aware of the appointments by Justices Fine and Postel at the time that he was making the appointments of the sons of said justices. The Commission further finds that these cross-appointments of sons of other Supreme Court justices, made with knowledge of

their appointments of respondent's son, were not made "with a view solely to [the appointees'] character and fitness" within the meaning of Canon 13 of the Canons of Judicial Ethics and thus said appointments gave "the appearance of impropriety" within the meaning of Canon 4 of the Canons of Judicial Ethics and the applicable portion of Section 33 of the Rules Governing Judicial Conduct. With respect to the appointments by respondent of Justice Postel's son, moreover, the Commission finds that, although there was no "quid pro quo" understanding between respondent and Justice Postel, the closeness of the number of appointments (four by respondent, five by Justice Postel) and the closeness in time of appointments by each to appointments of the other, suggest that appointments of each other's son were being made to avoid a charge of nepotism.

Charge I is dismissed.

While the Commission does not find that the appointment of the employer of respondent's son violated the Canons of Judicial Ethics (Charge I), it wishes to express its deep concern that appointments of employers of close relatives of the appointing members of the judiciary may in the future in some circumstances constitute an appearance of impropriety. In such cases, questions will arise as to the economic or professional benefit which may flow to the judge's relative.

Charge IV is dismissed.

In determining the sanctions to be imposed upon respondent, the Commission has considered the respondent's age (76) and imminent retirement, as well as his otherwise unblemished record as a member of the judiciary for 22 years and, in the light thereof, the Commission has determined that the appropriate sanction is that Respondent be admonished. Insofar as they are not inconsistent with the foregoing, the Commission accepts the findings of fact as set forth in the Referee's report.

The foregoing constitutes the findings of fact and conclusions of law required by Judiciary Law, Section 44, subdivision 7.

The following members of the Commission concur: MRS. ROBB, MR. BROMBERG, JUDGE CARDAMONE, MRS. DELBELLO, JUDGE EVANS, MR. KOVNER, MR. MAGGIPINTO and JUDGE SHEA.

MR. KIRSCH, MR. WAINWRIGHT and JUDGE SILBERMAN dissent in a separate opinion.

Lillemor T. Robb
Chairwoman

Dated: New York, New York
December 14, 1978

APPEARANCES:

Irving Anolik for Respondent

Gerald Stern for the Commission (Barry Vucker, Richard Granofsky, Of Counsel)

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COMMISSION ON JUDICIAL CONDUCT

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OPINION DISSENTING FROM COMMISSION
PER CURIAM DETERMINATION

Respondent is charged with having made judicial appointments on the basis of favoritism, giving the appearance of impropriety, in violation of the Canons of Judicial Ethics, and the later Code of Judicial Conduct, and the Rules Governing Judicial Conduct.

The appointments were conceded by the respondent, but the allegations of impropriety were denied, and the issues were submitted to former justice of the Supreme Court, Hon. Bernard S. Meyer, as referee to hear and report. The referee has reported with his findings and conclusions.

The charges are divided into four parts:

Charge I deals with two appointments made by the respondent of an attorney, as a receiver in 1968 and 1969, at a time when respondent's son, James Spector, was employed by the appointee. As to this the learned referee found that the appointments were made solely on the basis of merit, and that the charge was not sustained.

Charge II alleged that the respondent appointed one, Burton Fine, son of another Supreme Court justice, Sidney Fine, as a guardian ad litem in two cases, one in February 1971, and the other in October 1974, three and one-half years later, whereas during the period March 1968 through October 1974, a period of six and one-half years, Justice Fine had appointed respondent's son, James Spector, as a guardian, referee and conservator in eight cases. The referee found that the respondent had not discussed these appointments with anyone, and was satisfied that the appointee had the character and ability to perform the appointed tasks satisfactorily. He held, however, that while the appointments were made on merit and were not due to favoritism, nor would justify the impression that respondent may have been influenced by another, it could not be said, in the light of respondent's friendship with Justice Fine, that the appointments were made "solely" or "only" on the basis of character, fitness and merit, so as to be "free from...the appearance of impropriety" within the meaning of Canon 4 of the Canons of Judicial Ethics and free of the "appearance of impropriety" within the meaning of 22 N.Y.C.R.R. 33.2. Except as stated, the referee reported that Charge II was not sustained.

Charge III alleged similar appointments by respondent of one, Sanford Postel, son of a friend and colleague, Supreme Court Justice George Postel, in ten cases between March 1969 and November 1974, while Justice Postel appointed respondent's son, James Spector, in five cases between December 1969 and

September 1972. The referee found no relationship between the two; that respondent had never discussed his appointments with any other judge, and no other judge had discussed his appointments with respondent; and that respondent's appointments were made on the basis of character, fitness and merit. He found, however, that they were not "free from...the appearance of impropriety" in view of the friendship between the justices, as a result of which the appointments were not made "solely" and "only" on the basis of character, fitness and merit, within the meaning of Canon 4 of the Canons of Judicial Ethics and 22 N.Y.C.R.R. 33.2. Except as stated, Charge III was not sustained by the referee.

Charge IV alleged similar appointments by respondent of one Frederick Levy, son-in-law of his close personal friend and colleague, Supreme Court Justice Abraham Gellinoff, in seventeen cases (seven of which were without fee) over an eight year period, between December 1968 and December 1974, while Justice Gellinoff appointed respondent's son, James Spector, in five cases over a five and one-half year period, between June 1969 and November 1974. The referee reported that respondent knew Frederick Levy very well, as a very capable attorney of 25 years experience when first appointed, and as a man of integrity and ability; that they never discussed his appointments with this or any other judge, nor did they discuss theirs with him; and that during respondent's judicial service he had made thousands of appointments. He concluded that respondent's appointments were not made on the basis of favoritism, nor would they justify

the impression of favor, but that they were made solely on the basis of character and fitness, were "free from...the appearance of impropriety" within the meaning of Canon 4, were "only on the basis of merit" within the meaning of 22 N.Y.C.R.R. 33.3(b)(4), and "free of the appearance of impropriety" under 22 N.Y.C.R.R. 33.2. Charge IV was not sustained by the referee.

The learned referee is a highly experienced and respected former justice, whose findings and conclusions are entitled to great weight. I would adopt all of his findings of fact. However, I do not conclude that these findings constitute misconduct requiring the imposition of discipline.

Unfortunately, the record does not contain evidence of how appointments are customarily made by the judiciary. The ideal, of course, is that set forth in the Rules, that appointments be made only on the basis of merit. However, the fitness of the appointee is the responsibility of the appointing judge, and he should not be expected to assume that responsibility without knowing more about the prospective appointee. He should not therefore be criticized if such appointments are made from among those whom he knows to be well-qualified. Clearly, he can have more confidence in his judgment when he knows more about the individual, and can more safely rely upon those he believes he can trust. Literal or strict compliance with the Rules is, therefore, rarely attained or attainable.

In this case, among the thousands of appointments made by the respondent during his judicial service, there were two over a three and one-half year period to Burton Fine, son of Justice Sidney Fine (Charge II), and ten over a five and one-half year period to Sanford Postel, son of Justice George Postel. The appointees were found by the referee to be fully qualified, except that they were related to the other justices, friends of the respondent. Such a relationship should not, under the circumstances, penalize an otherwise qualified candidate for appointment, particularly where the appointments were made in relatively rare instances over a long period of time.

There is no question that respondent's personal relationship with the appointees enabled him better to know their character and ability so as to place his trust in them, rather than some stranger. Thus, the referee may have been technically correct in concluding that the appointments were not made "solely" and "wholly" on merit, and that the relationship may have been an influencing factor. However, an equally reasonable interpretation could lead to the conclusion that the relationship was an important factor enabling the respondent to better judge the candidate for appointment.

The respondent has an unblemished record of distinguished public service for over 38 years, as an assistant U.S. Attorney, an assistant District Attorney, as a City Court judge, and for the past 22 years as a Supreme Court justice, and he is due to retire on December 31, 1978, at age 76.

I would not determine that the acts charged and sustained by the learned referee warrant disciplinary action under Section 44, subdivision 7, of the Judiciary Law, and I therefore vote to dismiss the complaint pursuant to Judiciary Law Section 44, subdivision 6.

MICHAEL M. KIRSCH
Member, Commission on Judicial Conduct

CARROLL L. WAINWRIGHT, JR., CONCURRING
Member, Commission on Judicial Conduct

I concur in the dissent of Commission Member Kirsch. I would only add that until now there has been no prohibition against a judge making an appointment of a relative of another judge. If this is to constitute judicial misconduct, then it would seem to me that such sanction should apply prospectively, and not to appointments made by the respondent judge some four to ten years ago.

To admonish a judge who has served for 22 years for what the majority characterizes as an "appearance of impropriety" seems to me unfair. This is particularly so when this public sanction is imposed during the very last month of respondent's lengthy judicial career.

MORTON B. SILBERMAN
Member, Commission on Judicial Conduct

Dated: New York, New York
December 14, 1978