

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

DAVID M. TRICKLER,

a Justice of the Birdsall Town Court,
the Burns Town Court and the Grove
Town Court, Allegany County.

DETERMINATION

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 David M. Duguay, Of Counsel)
for the Commission

Brian C. Schu for the Respondent

The respondent, David M. Trickler, a Justice of the Birdsall Town Court,
the Burns Town Court and the Grove Town Court, Allegany County, was served with a

Formal Written Complaint dated October 27, 2015, containing one charge. The Formal Written Complaint alleged that respondent engaged in impermissible *ex parte* communications with two defendants.

On November 30, 2015, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, 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 10, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Birdsall Town Court since January 1, 2002, a Justice of the Grove Town Court since November 1, 1994, and a Justice of the Burns Town Court since November 1, 1980. His current terms in the Birdsall Town Court and the Burns Town Court expire on December 31, 2017, and his current term in the Grove Town Court expires on December 31, 2015. He is not an attorney.

2. As set forth below, from January 2013 to November 2013, in the course of presiding over *People v Kenneth A. Jablonski* and *People v Donald R. Shelton* in the Birdsall Town Court, respondent engaged in *ex parte* conversations with the defendants and handled the cases in a manner that was contrary to the Rules Governing Judicial Conduct.

3. On December 18, 2012, Kenneth A. Jablonski and Donald R. Shelton were charged by Environmental Conservation Officer Ken R. Basile with trespass to hunt on posted property in violation of Section 11-2113(1) of the Environmental Conservation Law (“ECL”). Mr. Jablonski was additionally charged with hunting deer during muzzle-loader season without a muzzle-loading license, in violation of ECL 11-0703(6)(a)(2)¹.

4. On January 3, 2013, respondent presided in Birdsall Town Court and arraigned Mr. Jablonski and Mr. Shelton on the ECL charges. No prosecutor or Environmental Conservation Officer was present.

5. After respondent read to Mr. Jablonski and Mr. Shelton the supporting deposition of Cherie Button-Dobmeier, who accused the men of trespassing, Mr. Shelton said, “Here’s my version of the story,” and proceeded to recount to respondent certain facts related to the trespass charges. Mr. Shelton *inter alia* stated that he and Mr. Jablonski had gone with another hunter to help track a deer that the other hunter had wounded earlier in the day on state land, that he and Mr. Jablonski had gone into a roadside ditch tracking the wounded deer, and that Ms. Button-Dobmeier lied when she said that he and Mr. Jablonski were carrying guns. Respondent questioned Mr. Shelton about the name of the road where the alleged trespass occurred.

6. Respondent said that he would “bring” witnesses into court and “we’ll have a trial.” Mr. Shelton responded that he would “love it” because he was

¹ The accusatory instrument inaccurately cited the violation section as ECL 11-0703(6)(a)(3).

“toting no gun,” was not “trespassing” and had the right to “walk up to the posted sign to see who’s posted the land.” Respondent replied, “I would think so.”

7. At Mr. Shelton’s suggestion, respondent viewed a map of the alleged trespass area with the defendants. Mr. Shelton pointed out to respondent that the map indicated that more than a two-mile stretch on both sides of the road in the area where they allegedly trespassed was state land. Respondent asked Mr. Shelton, “Where’s, where’s this property [the witness] is saying?” Mr. Shelton responded by pointing out the area. Mr. Jablonski asked respondent if the area they were identifying was state land. Respondent replied, “Yeah, if that, that’s where you were.” Mr. Jablonski replied, “Standing right here, yeah, that’s where we were.”

8. Mr. Shelton again indicated that the map showed more than a two-mile stretch of state land on both sides of the road, and respondent stated, “You were probably right here.” Respondent asked, “Where did [the environmental conservation officer] give you the tickets? Right there?” Mr. Shelton showed respondent the location on the map where he and Mr. Jablonski had been stopped by Ms. Button-Dobmeier.

9. Respondent told Mr. Shelton and Mr. Jablonski that he would let them know by mail about a trial date and that it would “probably be a few weeks.”

10. Respondent failed to set a court date in the cases for about ten months. By letter dated July 10, 2013, Emmanuel Hillery, one of the allegedly aggrieved landowners, wrote to the court inquiring about the status of the cases. On September 21, 2013, respondent spoke to Mr. Hillery, who again inquired about the status of the cases.

On October 21, 2013, respondent sent letters to Mr. Jablonski and Mr. Shelton advising them to appear at the Birdsall Town Court on November 13, 2013, regarding the ECL charges.

11. On November 13, 2013, both Mr. Jablonski and Mr. Shelton appeared for trial without counsel. Their cases were being prosecuted by Allegany County Assistant District Attorney J. Thomas Fuoco.

12. Notwithstanding an error in the court address on subpoenas issued to Ms. Button-Dobmeier, she appeared at the Birdsall Town Court on November 13, 2013, prior to the commencement of the trial, accompanied by Mr. Hillery and Margaret Spittler, another allegedly aggrieved landowner in the ECL matters. Shortly after their arrival, they engaged in conversation with Mr. Fuoco in a room adjacent to the courtroom and expressed to him their dissatisfaction with various aspects of the impending trial, including Mr. Fuoco's decision not to call Environmental Conservation Officer Basile, Mr. Hillery or Ms. Spittler as witnesses. Ms. Spittler addressed Mr. Fuoco in a loud voice.

13. Respondent, upon hearing the conversation in the room adjacent to the courtroom, left the bench and went into the adjacent room, where he observed Mr. Fuoco, Ms. Button-Dobmeier, Mr. Hillery and Ms. Spittler engaged in discussion about the prosecution of the cases. Respondent heard Ms. Spittler questioning Mr. Fuoco about not calling Mr. Basile as a trial witness. Mr. Fuoco stated, in words or substance, "Nobody's going to tell me how to do my job," and said he would ask respondent to

dismiss the charges against both defendants.

14. Respondent, followed by Mr. Fuoco, returned to the courtroom and took the bench. Mr. Fuoco stated that Ms. Button-Dobmeier, the only witness he had intended to call, had appeared at the courthouse late due to an error on the subpoenas drafted by his office. Subsequently, the following exchange occurred:

MR. FUOCO: ... So, she arrived anyway, and she arrived also with the landowners, and all three of them proceeded to give me a hard time and tried to tell me how to do my job. I didn't appreciate it. So, I'm doing my job by asking the court to dismiss the charge against Donald Shelton. With regard to Kenneth Jablonski--

JUDGE TRICKLER: --Go ahead--

MR. FUOCO: --same facts apply. I'm asking the court to dismiss that charge as well.

JUDGE TRICKLER: Right, then all charges dismissed.

MR. JABLONSKI: Thank you, Your Honor --.

Additional Factors

15. Respondent has been cooperative with the Commission throughout its inquiry.

16. Respondent, in his 35 years of judicial service (including eight years serving concurrently in two town courts and 13 years serving concurrently in three town courts), was previously twice admonished for conduct in the Burns Town Court where he has served since 1980. In 2009 respondent was admonished for failing to timely remit fines and fees to the State Comptroller, report traffic convictions, issue receipts, and use

available means to punish defendants who had failed to appear to pay traffic fines. In 2010 respondent was admonished for failing to immediately disqualify himself in a harassment case despite knowing the parties and having personal knowledge of the underlying events.

17. Respondent recognizes his obligation to avoid improper *ex parte* communications. Respondent regrets his scheduling delay in this matter and avers that henceforth he will promptly and efficiently dispose of judicial matters.

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)(6) and 100.3(B)(7) 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. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

While arraigning two defendants charged with ECL violations, respondent listened to a defendant’s “version of the story,” reviewed a map of the alleged trespass site, identified locations on the map and discussed with the defendants whether they were public or private locations, asked the defendants about the events and listened to their explanations. As a judge for more than three decades, respondent should have recognized that allowing unrepresented defendants to give their “version” of events at an arraignment – for any reason – is strictly prohibited by the ethical rules. With no prosecutor present,

these were impermissible *ex parte* communications in violation of Rule 100.3(B)(6). Such communications can influence, or appear to influence, the judge who will be the trier of fact at a bench trial, and thus compromise the judge's impartiality. Moreover, questioning defendants at arraignment about the underlying events, as respondent did here, places the defendant in jeopardy of making incriminating admissions or other statements that might prejudice the defendant's position at trial. *See, e.g., Matter of Moore*, 2002 NYSCJC Annual Report 125; *Matter of Pemrick*, 2000 NYSCJC Annual Report 141.

Thereafter, respondent delayed the case by failing to set a court date for about ten months. The record indicates that he did so only after one of the landowners where the alleged trespass occurred had inquired twice about the status of the case. A judge is required to dispose of all judicial matters "promptly, efficiently and fairly" (Rules, §100.3[B][7]; *see Matter of Scolton*, 2008 NYSCJC Annual Report 209).²

In accepting the stipulated sanction of admonition, we note that respondent has been cooperative throughout the proceedings, recognizes his obligation to avoid improper *ex parte* communications, and avers that he will promptly and efficiently dispose of judicial matters in the future. We also note that respondent was previously disciplined in 2009 and 2010 for unrelated misconduct (*see* 2011 NYSCJC Annual Report 147; 2010 NYSCJC Annual Report 235).

² On the facts presented, we cannot conclude that respondent's subsequent decision to dismiss the charges based on the prosecutor's request constitutes misconduct even though it appears the prosecutor's application was not on the merits.

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

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

Judge Acosta was not present.

CERTIFICATION

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

Dated: December 17, 2015

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a solid horizontal line.

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