

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

ROBERT E. WHELAN,

DETERMINATION

a Justice of the Supreme Court, 8th Judicial
District, Erie County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Honorable Robert E. Whelan, *pro se*

The respondent, Robert E. Whelan, a justice of the Supreme Court, 8th Judicial District, Erie County, was served with a Formal Written Complaint dated May 30, 2001. Respondent filed an answer dated June 18, 2001.

On November 19, 2001, the Administrator of the Commission and respondent counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On December 20, 2001, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Supreme Court, 8th Judicial District, since January 1, 1990.
2. On or about June 1, 2000, respondent contacted Richard S.F. Gallivan, Esq., and requested that he contact his clients, Richard Selig and Adrienne Nalbach, and intercede on behalf of respondent's wife, Mary Lou Mancuso, in an attempt to convince the clients to pay \$399.00 that Ms. Mancuso alleged the clients owed on a home warranty policy that Ms. Mancuso, a real estate agent, had procured in connection with a house that she was assisting the clients in selling. In the course of the conversation, based on a question by Mr. Gallivan, respondent confirmed that he was a judge.

3. When Mr. Gallivan advised respondent that his clients were not obligated to pay the \$399.00, respondent requested that Mr. Gallivan ask the clients to

“split” the bill with respondent’s wife. Respondent stated that he would personally appreciate Mr. Gallivan’s presenting this proposal to his clients.

4. On June 2, 2000, respondent again contacted Mr. Gallivan and asked whether he had contacted his clients about the matter. Mr. Gallivan responded that he had not yet spoken to the clients. Respondent repeated his request that Mr. Gallivan contact his clients about paying the home warranty bill. Respondent stated that he would appreciate a resolution of the matter.

5. On June 5, 2000, respondent again contacted Mr. Gallivan concerning payment of the home warranty bill. Mr. Gallivan reiterated that his clients were not obligated to pay any portion of the bill. Respondent replied that Mr. Gallivan should not “be so sure of” his legal defense and told Mr. Gallivan that, based on respondent’s review of the matter, the clients could be sued and were obligated to pay the claim based upon Richard Selig’s signature on the contract.

6. In these discussions, Mr. Gallivan referred to respondent as “judge,” although respondent did not advise Mr. Gallivan to refer to him in this way. When making these calls, respondent believed that his wife, Mary Lou Mancuso, would be personally obligated to pay the \$399.00 home warranty bill if it were not paid by the clients.

Upon the foregoing findings of fact, the Commission concludes as a matter

of law that respondent violated Sections 100.1, 100.2 (B) and 100.2(C) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's personal intervention into a business dispute involving his spouse was improper. Three times within five days, respondent contacted an attorney to urge the attorney to convince his clients to pay a bill related to a real estate transaction handled by respondent's spouse, a real estate agent. When the attorney responded that the clients were not obligated to pay, respondent first suggested that the clients "split" the bill with respondent's wife, then warned the attorney that, based on respondent's review of the matter, the clients were obligated to pay the bill and could be sued.

Because of respondent's inappropriate intervention in the matter, the attorney was placed in the awkward position of negotiating with a Supreme Court justice who was acting as an advocate for his wife's business interests. Although respondent did not explicitly invoke his judicial status, the attorney was aware of respondent's judicial position and referred to him as "judge" throughout the discussions. Respondent's heavy-handed efforts to negotiate a result that would benefit his spouse, a real estate professional who was presumably capable of negotiating on her own behalf, created the appearance that he was using the prestige of his judicial status to advance the private interests of another, in violation of the ethical standards (Section 100.2[C] of the Rules

Governing Judicial Conduct). As the Court of Appeals has stated:

[N]o judge should ever allow personal relationships to color his conduct or lend the prestige of his office to advance the private interests of others. Members of the judiciary should be acutely aware that any action they take, on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved. There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. [Citations omitted.]

Matter of Lonschein v. State Commn on Jud Conduct, 50 NY2d 569, 571-72 (1980); *see also* Matter of Ohlig (NY Commn on Jud Conduct, Nov. 19, 2001).

By advising the attorney that he had reviewed the matter, offering his opinion as to the clients' liability and reminding the attorney that he would "personally appreciate" a resolution of the dispute, respondent, whether intentionally or not, was implicitly drawing on the full power of his judicial status. His actions were inherently coercive and showed insensitivity to the special ethical obligations of judges.

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

Mr. Berger, Judge Ciardullo, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Marshall did not participate.

Mr. Coffey was not present.

CERTIFICATION

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

Dated: December 27, 2001

Henry T. Berger

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