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

MERRILL R. ZAPF, SR.,

a Justice of the Clayton Village Court and the Clayton Town Court, Jefferson County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
John J. Bower, Esq.
David Bromberg, Esq.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

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

Swartz, Evans, Dickinson & Parmeter, P.C. (By Daniel S. Dickinson, III) for Respondent

The respondent, Merrill R. Zapf, Sr., a justice of the Clayton Town Court and acting justice of the Clayton Village Court, Jefferson County, was served with a Formal Written Complaint dated October 2, 1986, alleging that he engaged in

certain improper practices with respect to small claims cases. Respondent filed an answer dated October 24, 1986.

On May 5, 1987, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for in Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on May 21, 1987.

The administrator and respondent submitted memoranda as to sanction. Oral argument was waived. On June 18, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Clayton Town Court and has been since January 1982. He is also acting justice of the Clayton Village Court and has been since April 1983.

2. Respondent, a retired State Police sergeant, is not a lawyer. He has successfully completed all courses for non-lawyer judges required by the Office of Court Administration since becoming a judge.

3. On June 5, 1986, respondent testified before a member of the Commission that in more than four years as a town justice he had not read the Uniform Justice Court Act and did

not have available a copy of the law governing procedures in his court.

4. Between January 1, 1982, and May 20, 1985, it was respondent's practice in civil and small claims cases to send to the alleged debtor, before issuing a summons and initiating a proceeding, a letter on court stationery that attempted to coerce payment of the debt alleged without the necessity of a court hearing. The letters stated:

> I am writing relative a bill that _____ allege that you owe them since _____.
>
> I received this complaint today, but before issuing a summons to settle the matter in Small Claims Court, I wanted to give you an opportunity to either pay the bill or make some arrangements to do so, if in fact, you do owe it. This would save you the added expense of a civil suit, which would be added to your bill in the event there was a judgement rendered against you.
>
> If the bill is incorrect, payment has been made, or any other discrepancies, and it can not be straightened out prior to _____, I shall issue a summons for your appearance in Small Claims Court to argue the matter and render a decision.

5. Between March 18, 1982, and June 18, 1985, Cerow Agency, Inc., a corporation doing business as a general insurance agency, commenced 20 small claims cases in respondent's court, as denominated in Exhibit 5 of the agreed statement of facts, in violation of Section 1809 of the Uniform Justice Court Act. Each of the 20 cases resulted in a settlement or judgment in favor of the corporation.

6. The president of Cerow Agency, Inc., is Gordon E. Cerow, Jr., who is also the Clayton town supervisor and has been

since 1960. Mr. Cerow is a member of the same political party as respondent and encouraged respondent to seek judicial office.

7. Between February 1982 and October 1985, respondent accepted for filing and directed service of 133 additional small claims brought by 16 other corporations, as denominated in Exhibit 5 of the agreed statement of facts,* in violation of Section 1809 of the Uniform Justice Court Act. Each of the claims resulted in a settlement or judgment in favor of the corporation.

8. Between May 1983 and March 1984, respondent accepted for filing and directed service of 38 small claims summonses outside the geographic jurisdiction of his court, as denominated in Exhibit 187 of the agreed statement of facts, in violation of Section 1801 of the Uniform Justice Court Act.

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*Exhibit 5 and the agreed statement of facts indicate that there were 137 claims brought by the other corporations. However, the court records appended to the agreed statement of facts do not substantiate that figure. Three of the claims were brought in the names of individuals who are principals in the corporations [Ed Corbett v. Hubbell (Ex. 43), Charles Wingerath v. Fitchette (Ex. 144), and Charles Wingerath v. Schneider (Ex. 148)], and the record does not establish that the plaintiffs were suing on behalf of their corporations rather than individually. A fourth claim listed in Exhibit 5 was brought not in the name of the corporation listed but in the name of another business, Phinney's Service Station, (Ex. 131), which is run by a principal in the corporation listed. The record indicates that Phinney's Service Station is not a corporation (Ex. 186, p. 13) and, thus, is not precluded from bringing a small claims action by Section 1809 of Uniform Justice Court Act.

9. Between October 1982 and April 1985, respondent granted default judgments against defendants in 16 small claims cases, as denominated in Exhibit 189 of the agreed statement of facts, despite having been presented with proof that the defendants had not been properly served with a summons to appear in court, in violation of Section 1803 of the Uniform Justice Court Act.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1) and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent has engaged in a series of legal errors in the filing and disposition of small claims cases that collectively convey the impression of favoritism toward business interests and prejudice against alleged debtors. Such an appearance of partiality is contrary to the role of a judge. Sections 100.2 and 100.3(a)(1) of the Rules Governing Judicial Conduct.

Contrary to law, respondent sent letters attempting to coerce the payment of debts outside of any legal proceedings, allowed corporations to bring small claims in his court, handled claims against defendants who were outside his jurisdiction and

granted default judgments against defendants who had not been properly served with notice of the proceeding. Such a series of fundamental procedural errors--all to the benefit of business-plaintiffs and to the detriment of debtor-defendants--creates the appearance of favoritism. Such appearance is no less to be condemned than the impropriety itself. Matter of Spector v. State Commission on Judicial Conduct, 47 NY2d 462, 466 (1979).

In mitigation of this misconduct, we note that respondent ceased these practices upon notice of the Commission's investigation and has at all times been candid and cooperative in the investigation. Matter of Kelso v. State Commission on Judicial Conduct, 61 NY2d 82, 87 (1984); Matter of Sandburg, 1986 Annual Report 157, 161 (Com. on Jud. Conduct, June 6, 1985).

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

Mrs. Robb, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Judge Ostrowski and Mr. Sheehy concur.

Mr. Kovner and Judge Shea dissent as to sanction only and vote that respondent be censured.

Mr. Bromberg and Judge Rubin were 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: July 24, 1987

Lillemor T. Robb, Chairwoman
New York State
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DISSENTING OPINION BY MR. KOVNER IN WHICH JUDGE SHEA JOINS

The use of a coercive letter on judicial stationery, standing alone, constitutes misconduct (Matter of Adams, 1979 Annual Report 73, 74 [Com. on Jud. Conduct, Nov. 29, 1978]), and, in my opinion, would warrant admonition. When combined with the ultra vires acts of assertion of jurisdiction over claims outside the geographic jurisdiction of the court and other serious misconduct, more severe discipline is warranted. I believe censure to be the appropriate sanction.

Dated: July 24, 1987

Victor A. Kovner, Esq., Member
New York State
Commission on Judicial Conduct