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

BRUCE M. KAPLAN,

a Judge of the Family Court, New York County.

Determination

THE COMMISSION:

Henry T. Berger, Esq., Chair
Helaine M. Barnett, Esq.*
E. Garrett Cleary, Esq.
Stephen R. Coffey, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Daniel F. Luciano
Honorable Juanita Bing Newton
Honorable Eugene W. Salisbury
Barry C. Sample
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Godosky & Gentile, P.C. (By Richard Godosky) for Respondent

The respondent, Bruce M. Kaplan, a judge of the Family Court, New York County, was served with a Formal Written Complaint dated October 31, 1994, alleging that he improperly intervened on behalf of a friend in an investigation of a child

*Ms. Barnett's term expired on March 31, 1996, and she was replaced by the Honorable Frederick M. Marshall. The vote in this matter was on March 14, 1996.

welfare matter. Respondent filed an answer dated December 9, 1994.

By order dated December 19, 1994, the Commission designated Daniel G. Collins, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 14, 20 and 21, June 6 and July 7, 1995, and the referee filed his report with the Commission on October 26, 1995.

By motion dated December 8, 1995, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, for a finding that respondent had engaged in misconduct and for a determination that he be censured. Respondent opposed the motion by cross motion on February 2, 1996. The administrator filed a reply on February 16, 1996. Respondent replied on March 6, 1996.

On March 14, 1996, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a judge of the New York City Family Court since December 1977.

2. In April 1992, respondent presided over a number of ex parte applications in a family offense proceeding involving Nancy Carol X and Joseph X. The case was eventually consolidated with another case involving the Xes in Supreme Court.

3. The Xes were divorced in March 1993. In July 1993, respondent met Ms. X at a party and began an intimate relationship with her that lasted until November 1993.

4. In 1993, the Xes lived on separate floors of a divided duplex apartment in Manhattan. Ms. X had custody of their children, a daughter who was 9 in October 1993, and a son who was then 7. Mr. X had visitation rights ordered by the Supreme Court.

5. On October 30, 1993, respondent was present in Ms. X's apartment when she called police and reported that her daughter, who was at a scheduled visitation with Mr. X, could be heard yelling in the apartment above.

6. After two police officers arrived at Ms. X's home, the daughter returned. Respondent was introduced to the officers as a family friend who was a Family Court judge. When a police sergeant arrived at the home, respondent introduced himself as a family friend who was a Family Court judge.

7. The police, Ms. X and respondent then took the daughter to Mount Sinai Hospital for examination. She was found to have abrasions, redness and tenderness about the neck, back and extremities.

8. The incident was reported to the Central Register of the State Department of Social Services as mandated by law and was reported to the Emergency Children Services unit of the New York City Child Welfare Administration. The unit is responsible for investigating and preventing imminent abuse of children. The

unit generally does not conduct field visits in cases in which the child is not in the physical custody of the alleged abuser and is not at "high risk" of continued abuse.

9. Yejide Ojo, a unit caseworker, spoke with the attending physician at the hospital, Dr. Donald Barton. Dr. Barton, whom respondent had advised that he was a Family Court judge, put respondent on the telephone with Ms. Ojo, who indicated that she did not intend to make a field visit that night. Respondent repeatedly challenged that decision. He stated that he was a Family Court judge with experience in child abuse cases and indicated that he knew the commissioner and deputy commissioner of Ms. Ojo's agency, the Human Resources Administration, and might have to call their attention to the case. He asked to speak with Ms. Ojo's supervisor.

10. Respondent then spoke with Celia Garrett, a casework manager, and identified himself as a Family Court judge. Respondent said that the daughter had been locked in a closet by the father and had been subjected to his continuing emotional and physical abuse. He repeated to Ms. Garrett that he was acquainted with her commissioner and deputy commissioner, as well as then-Mayor David Dinkins.

11. After speaking with respondent, Ms. Garrett discussed the matter with Ms. Ojo and a casework supervisor, who recommended that no emergency field visit be made. Ms. Garrett rejected the recommendation--the first time she had ever overruled the supervisor's decision--and ordered that an

emergency field visit be made. In making her decision, Ms. Garrett gave "credence" to respondent's opinion because he was a Family Court judge and was experienced in child abuse cases.

12. The Child Welfare Administration appears regularly in connection with matters in Family Court.

13. Ms. Ojo and James Mramor made an emergency field visit to Mount Sinai Hospital and spoke with respondent. Respondent described Mr. X as "violent." He said that he had previously presided over a proceeding involving the Xes and had learned that Mr. X had assaulted Ms. X. He relayed other derogatory information about Mr. X that he said he had learned from another judge's decision and from a newspaper report. Respondent urged the caseworkers to prevent Mr. X from visiting the children as scheduled for the following day. At the time, respondent knew that prior complaints of abuse of the children by Mr. X had been determined to have been unfounded.

14. In the early hours of October 31, 1993, the participants left the hospital and returned to Ms. X's apartment. Ms. Ojo told Ms. X and respondent that a supervisor had determined that, if the Xes could not reach an agreement concerning visitation scheduled for later in the day, the children would be removed from Ms. X's custody and placed in foster care. Respondent twice expressed disbelief that such a recommendation could be made.

15. At about 11:15 A.M., police officers came to Ms. X's apartment concerning the children's visitation with their father. Respondent introduced himself as a Family Court judge. One of the officers concluded that respondent was the judge presiding over the Xes' visitation matter. A police sergeant, Patrick McAndrews, arrived, and respondent again introduced himself as a Family Court judge. During the discussion of the children's scheduled visitation, Sergeant McAndrews sought respondent's opinion as to whether court-ordered visitation must be adhered to in all instances or whether a court order could be "superseded" in "exigent circumstances." Respondent indicated that circumstances could countermand a court order. Sergeant McAndrews then went to Mr. X's home and told him that he would not enforce visitation rights on that day.

16. The allegations in Paragraph 12 of Charge I are not sustained and are, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.2(c), and Canons 1, 2A and 2B of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

Although he may have been understandably concerned for Ms. X and her daughter, respondent's advocacy exceeded the limitations placed upon judges. He went beyond permissible advocacy when, having made himself known as a Family Court judge, he used the influence and prestige of that office to advance the cause of his friend and her daughter.

It was not improper per se for respondent to identify himself as a judge, even in a situation in which intervention by public officials was being sought, and, of course, respondent could not prevent others from making his judicial position known. But once he was so identified to authorities, respondent was obligated to be circumspect in his advocacy in order to avoid gaining an advantage for his friends' private interests because of his position. (See, Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.2[c], renumbered 100.2[C], eff. Jan. 1, 1996). This was especially so in his dealings with the personnel of the Emergency Children Services unit since it has regular contacts with respondent's court.

In attempting to persuade unit caseworkers to investigate Ms. X's claims of child abuse, respondent suggested that his views carried special weight because of his familiarity with child abuse cases and with this case in particular, and he attempted to assert influence by intimating that he might tell the caseworkers' superiors about their refusal to conduct a field visit. These remarks were improper. It was also wrong for respondent to tell the caseworkers that, as the judge who

presided over the family offense proceeding in this case, he had obtained negative information about Mr. X. Even if, as he now argues, he had independent knowledge of such allegations, respondent improperly created the appearance that he was using information obtained in court for private purposes. Moreover, even if he had been justified in imparting information that he had obtained as a judge, he should not have been one-sided in his presentation; he would have been duty-bound to disclose information favorable to Mr. X, as well, such as his knowledge that prior complaints of child abuse had been determined to have been unfounded.

The deference that a judge receives in such circumstances is illustrated by Ms. Garrett's decision to overrule the recommendation of two subordinates and order an emergency field visit when no apparent emergency existed. In Matter of Steinberg v State Commission on Judicial Conduct (51 NY2d 74, 81), the Court of Appeals held:

> Wherever he travels, a Judge carries the mantle of his esteemed office with him, and, consequently, he must always be sensitive to the fact that members of the public, including some of his friends, will regard his words and actions with heightened deference simply because he is a Judge.

That respondent may have lost sight of his ethical obligations because of his relationship with and concern for Ms. X and her daughter constitutes a mitigating factor affecting

the sanction to be imposed, but it does not excuse his wrongdoing. (See, Matter of Kiley v State Commission on Judicial Conduct, 74 NY2d 364, 370; Matter of Edwards v State Commission on Judicial Conduct, 67 NY2d 153, 155; Matter of Figueroa, 1980 Ann Report of NY Commn on Jud Conduct, at 159, 161). This is particularly so because respondent overstepped his bounds in a non-emergency situation. The child was in the custody of her mother and was in no imminent danger of abuse.

> [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, whether 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...Thus, any communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office. That is not to say, of course, that Judges must cloister themselves from the day-to-day problems of family and friends. But it does necessitate that Judges must assiduously avoid those contacts which might create even the appearance of impropriety.
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> Matter of Lonschein v State Commission on Judicial Conduct, 50 NY2d 569, 571-72

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Goldman, Judge Newton and Judge Salisbury concur.

Mr. Coffey dissents as to sanction only and votes that the appropriate disposition would be a confidential letter of dismissal and caution.

Judge Luciano, Mr. Sample and Judge Thompson dissent and vote that the Formal Written Complaint be dismissed.

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: May 6, 1996

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

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OPINION
BY MR. COFFEY

BRUCE M. KAPLAN,

a Judge of the Family Court, New York County.

I concur that respondent's conduct constituted a violation of the Rules Governing Judicial Conduct, but I give more weight than does the majority to the mitigating fact that his behavior was driven by his concern for the plight of the child, and I believe that a confidential letter of dismissal and caution would be sufficient redress.

I also feel that the majority goes too far in concluding, as it appears to, that respondent's conduct was especially egregious because no emergency situation existed. The child was returned to her mother crying and with abrasions and redness about her body. It seems to me that Ms. X and respondent might well have had a good-faith concern about the child being returned to the father for visitation the following day. While it might not have been the kind of life-or-death situation that the child welfare caseworkers were accustomed to dealing with, I do not believe that the Commission should fault respondent for perceiving it as a

serious situation that deserved a remedy. His only fault lies in his use of the prestige of his office to try to obtain that remedy.

Dated: May 6, 1996

Stephen R. Coffey, Esq., Member
New York State
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DISSENTING OPINION BY JUDGE THOMPSON

The majority concludes that the respondent's conduct gave the appearance that he was using his position in order to "gain[] an advantage for his friends' private interests" (maj opn at 7). I disagree. In my view, the respondent at all times acted appropriately and in good faith with the objective of obtaining assistance for Ms. X's 9 year old daughter based only upon what he believed to be the merits of the case.

The events of October 30-31 support the inference that the respondent reasonably believed that the child might be exposed to danger without some type of definitive intervention from the proper authorities. In this respect, the record before the Commission indicates that Ms. X heard her daughter yelling from her husband's apartment. As found by the referee, when the police arrived and prepared to enter Mr. X's apartment, the child came running into Ms. X's apartment in a dishevelled state and crying hysterically. Subsequently, when the respondent and Ms. X took the child to Mount Sinai Hospital for an examination, she was found to have abrasions, redness and tenderness about the neck, back and extremities.

Under these circumstances, the respondent understandably employed every reasonable effort to protect a child whom he believed could have been abused. These facts support the conclusion that the respondent was motivated by a sincere and overriding concern for the child's welfare, not by the desire to further a personal agenda through the use of his judicial office.

The majority concedes that it was not improper per se for the respondent to identify himself as a judge, but then narrowly concludes that he was not sufficiently "circumspect" in doing so (maj at 7). The majority's opinion, fashioned with the advantages of hindsight analysis, fails to assign proper weight to the relevant factors and draws an unwarranted inference of impropriety. In this respect I concur in the well-reasoned conclusion of the referee that the respondent's status as a judge was "legitimately relevant to the weight to be given to the conclusion[s] he expressed to Police, medical and child welfare personnel concerning [the daughter's] situation" (Ref opn at 14-15). As an experienced Family Court Judge, the respondent not only had considerable experience with matters concerning child abuse, he had previously observed and heard Ms. X when she had appeared before him seeking an order of protection. Moreover, based on his knowledge of Mr. X, the respondent had reason to believe that he could be volatile.

The fact that the child had been returned for that day to Ms. X does not establish that the respondent's subsequent efforts on behalf of the child were unnecessary or that they were personally motivated. It was reasonable for him, in light of the signs of

potential abuse, to take steps to ensure that any evidence of potential abuse was contemporaneously documented and assessed by the appropriate authorities at a time when it was still possible to do so. Moreover, the level of concern and urgency underlying the matter was heightened by the fact that the respondent could anticipate that Mr. X would be pressing for his scheduled visitation with the child the very next day. This consideration, taken together with the fact that Mr. X lived in the same building, justified respondent's sense of concern and desire to err on the side of caution with respect to the child's safety.

In sum, the respondent was confronted with what he reasonably believed to be a situation which merited action in order to ensure the safety of a child. I believe it is inappropriate to punish him merely because he maintained a personal relationship with the child's mother. Accordingly, I agree with the referee that the respondent's actions "represented a determined effort by a citizen, and a citizen who as a Family Court Judge was better informed than most citizens about the problems of child abuse, to protect what he believed were the best interests of a child" (Ref opn at 15-16).

Under the circumstances, I find no misconduct in the respondent's actions and vote to dismiss the complaint.

Dated: May 6, 1996

Honorable William C. Thompson, Member
New York State
Commission on Judicial Conduct