

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

DETERMINATION

BRIAN D. MERCY,

a Justice of the Glenville Town Court and
an Acting Justice of the Scotia Village
Court, Schenectady County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (S. Peter Pedrotty, Of Counsel) for the Commission

Robert P. Roche for the Respondent

The respondent, Brian D. Mercy, a Justice of the Glenville Town Court and
an Acting Justice of the Scotia Village Court, Schenectady County, was served with a

Formal Written Complaint dated March 12, 2012, containing one charge. The Formal Written Complaint alleged that respondent represented clients in seven cases before other part-time lawyer-judges in Schenectady County. Respondent filed a verified answer dated March 26, 2012.

On June 7, 2012, the Administrator, respondent's counsel and respondent 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, recommending that respondent be admonished and waiving further submissions and oral argument.

On June 14, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Glenville Town Court, Schenectady County, since January 1, 2011, and an Acting Justice of the Scotia Village Court, Schenectady County, since December 4, 2007. Each of these positions is part time. Respondent's term in the Glenville Town Court expires on December 31, 2014, and his current term in the Scotia Village Court expires on December 5, 2012.

2. Respondent was admitted to the practice of law in New York in 2001. At all times relevant to the matters herein, in addition to serving as a part-time town or village court justice in Schenectady County, respondent was engaged in the private practice of law in Schenectady County.

3. From in or about 2002 until in or about December 2008, respondent was an associate at the Law Offices of Kouray & Kouray, which maintains an office in

Schenectady, New York. In or about December 2008, respondent formed the Law Office of Brian D. Mercy, PLLC., which maintains an office at 514 State Street, Schenectady, New York.

4. Megan M. Mercy is an attorney who was admitted to the practice of law in New York in 2005. Megan M. Mercy is respondent's wife and an associate at Brian D. Mercy, PLLC.

5. At all times relevant to the matters herein, Stephen F. Swinton, Jr., and Paul S. Zonderman were part-time town court justices of the Niskayuna Town Court, Schenectady County, and attorneys engaged in the private practice of law in Schenectady County. Judges Swinton and Zonderman were admitted to the practice of law in New York in 2004 and 1977, respectively.

6. As set forth below, from in or about April 2008 to in or about April 2009, respondent represented private legal clients in seven cases in the Niskayuna Town Court, Schenectady County, before Judges Swinton and Zonderman, notwithstanding that Judges Swinton and Zonderman, like respondent, are part-time town court justices in Schenectady County who are also permitted to practice law, and notwithstanding a promulgated rule that prohibits a part-time judge from practicing law in a court in the county in which his or her court is located, before judges who are permitted to practice law.

7. Respondent acknowledges that his representation of clients in cases in the Niskayuna Town Court, before Judges Swinton and Zonderman, violated Section

100.6(B)(2) of the Rules Governing Judicial Conduct.

People v Sharran Sukhoo

8. On April 4, 2008, Sharran Sukhoo was charged by the Niskayuna Police Department with Speeding, in violation of Section 1180(d) of the Vehicle and Traffic Law (“VTL”). The traffic ticket was returnable in the Niskayuna Town Court on May 7, 2008.

9. On April 23, 2008, respondent wrote a letter to the Niskayuna Town Court advising that he represented Mr. Sukhoo on the violation, entering a not guilty plea on Mr. Sukhoo’s behalf and communicating that he intended to negotiate the disposition with the prosecutor by mail.

10. On April 23, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, advising that he represented Mr. Sukhoo, enclosing a copy of an auto repair order which, according to respondent, indicated that Mr. Sukhoo’s speedometer had been malfunctioning at the time of the infraction, and requesting that the People consent to a guilty plea to the reduced charge of violating Section 1110(a) of the VTL, which requires motorists to obey traffic control devices.

11. On May 7, 2008, a Memorandum of Negotiated Plea was prepared and signed by the Assistant District Attorney and Judge Zonderman, in which the People and the court agreed to accept a guilty plea to the reduced charge of violating Section 1110(a) of the VTL in exchange for a \$100 fine and \$55 surcharge. The Memorandum

was not signed by respondent or Mr. Sukhoo.

12. By letter dated August 21, 2008, Judge Swinton advised respondent that, in light of the failure to agree upon a disposition of the case, a trial on the original charge had been scheduled for September 29, 2008.

13. On September 29, 2008, after Mr. Sukhoo failed to appear for his trial, Judge Swinton convicted Mr. Sukhoo *in absentia* of violating Section 1180(d) of the VTL and sentenced him to pay a \$165 fine and \$55 surcharge.

14. On October 3, 2008, respondent called the Niskayuna Town Court and advised that Mr. Sukhoo was not responding to respondent's calls and letters. Respondent indicated that he would forward the fine notice to Mr. Sukhoo but did not expect a response from him. Mr. Sukhoo paid the fine and surcharge to the court on February 5, 2009.

People v Alyssa Singh

15. On April 7, 2008, Alyssa N. Singh was charged by the Niskayuna Police Department with Failure To Yield Right of Way at a Stop Sign, in violation of VTL Section 1142(a). The ticket was returnable in the Niskayuna Town Court on May 7, 2008.

16. On April 30, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, advising that he represented Ms. Singh and requesting a supporting deposition.

17. On July 15, 2008, respondent wrote a letter to the Niskayuna Town

Court, to the attention of the Assistant District Attorney, enclosing a copy of the supporting deposition and requesting that the People consent to an adjournment in contemplation of dismissal because the supporting deposition showed that “the officer has no first hand knowledge of the alleged infraction.”

18. On August 25, 2008, a Memorandum of Negotiated Plea was prepared and signed by the Assistant District Attorney and Judge Zonderman, in which the People and the court agreed to accept a guilty plea to the reduced charge of violating Section 1201(a) of the VTL, No Parking, in exchange for a fine of \$150.

19. In or about August or September 2008, respondent and Ms. Singh signed the Memorandum of Negotiated Plea.

20. On September 9, 2008, respondent’s colleague, Steven Kouray, wrote the Niskayuna Town Court a letter, enclosing an escrow check in the amount of \$150, representing Ms. Singh’s fine and the fully executed Memorandum of Negotiated Plea, signed by respondent and Ms. Singh.

People v David Pierpont

21. On August 8, 2008, David J. Pierpont was charged by the Niskayuna Police Department with Failure To Yield Right of Way at a Stop Sign, in violation of VTL Section 1142(a). The ticket was returnable in the Niskayuna Town Court on September 10, 2008.

22. On August 18, 2008, respondent wrote the Niskayuna Town Court a letter advising that he represented Mr. Pierpont on the charge and entering a not guilty

plea on his behalf. Respondent also communicated that he intended to negotiate a disposition with the Assistant District Attorney through the mail.

23. On August 18, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, advising that he represented Mr. Pierpont and requesting a supporting deposition.

24. On November 3, 2008, Judge Zonderman dismissed the charge against Mr. Pierpont. A handwritten note on the court's copy of the ticket states, "Dismiss – no supp dep." Underneath that note, in apparently different handwriting, appears the notation, "Looks like we never requested one," and is initialed, "PZ."

People v Katrina L. Dryer

25. On August 24, 2008, Katrina L. Dryer was charged by the Niskayuna Police Department with Disobeyed Traffic Control Device, in violation of VTL Section 1110(a). The ticket was returnable in Niskayuna Town Court on September 17, 2008.

26. On September 5, 2008, respondent wrote a letter to the Niskayuna Town Court advising that he represented Ms. Dryer, entering a not guilty plea on her behalf and communicating that he intended to negotiate a disposition with the Assistant District Attorney.

27. On September 5, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, advising that he represented Ms. Dryer and requesting the Assistant District Attorney's consent to a guilty plea to the reduced charge of violating VTL Section 1201(a), No Parking.

28. On September 28, 2008, a Memorandum of Negotiated Plea was prepared and signed by the Assistant District Attorney and Judge Swinton, in which the People and the court agreed to accept a guilty plea to the reduced charge of violating VTL Section 1201(a), No Parking, in exchange for a fine of \$150.

29. In or about September 2008 or October 2008, respondent and Ms. Dryer signed the Memorandum of Negotiated Plea.

30. On October 14, 2008, respondent wrote a letter to the Niskayuna Town Court, enclosing the fully executed Memorandum of Negotiated Plea, signed by Ms. Dryer and respondent, and a Plea by Mail Fine Notice with Ms. Dryer's credit card information filled in for payment of her fine.

People v Robert Pierpont

31. On January 15, 2009, Robert A. Pierpont was charged by the Niskayuna Police Department with Aggravated Unlicensed Operation in the Third Degree, in violation of VTL Section 511(1)(a), and Disobeyed Traffic Control Device, in violation of VTL Section 1110(a). The tickets were returnable in the Niskayuna Town Court on February 18, 2009.

32. On January 23, 2009, Mr. Pierpont signed a sworn affirmation in which he stated, *inter alia*, "I authorize my attorney, BRIAN D. MERCY, PLLC./MEGAN M. MERCY, ESQ. to enter a plea of guilty on my behalf." Respondent notarized the affirmation.

33. On February 18, 2009, Mr. Pierpont appeared in Niskayuna Town

Court and pleaded guilty to Facilitating Aggravated Unlicensed Operation, in violation of VTL Section 511-a(1). Judge Swinton accepted Mr. Pierpont's plea, convicted him of said charge in full satisfaction of all charges and sentenced him to pay a fine of \$200 and a surcharge of \$85.

34. On February 25, 2009, respondent sent a letter to the Niskayuna Town Court, addressed to "Your Honor," stating that "[o]n February 18, 2009, Mr. Pierpont appeared before you and entered a plea of guilty to facilitating aggravated unlicensed operation of a motor vehicle. The court has imposed a fine in the amount of \$285." Respondent enclosed a "Brian D. Mercy, PLLC. attorney escrow check" in the amount of \$285.

People v Phoolmattie Dehal

35. In or about January 2009, Phoolmattie Dehal was charged with Grand Larceny in the Third Degree, in violation of Penal Law Section 155.35, Petit Larceny, in violation of Penal Law Section 155.25, and two counts of Falsifying Business Records in the First Degree, in violation of Penal Law Section 175.10.

36. On January 22, 2009, respondent called the court and asked if the hearing would go forward as scheduled. He stated that his wife or Steven Kouray would represent Ms. Dehal.

37. On March 30, 2009, respondent sent a letter on his law firm letterhead by facsimile to the Niskayuna Town Court, addressed to "Your Honor." He wrote: "Ms. Dehal is scheduled to appear before you on 4/1/09. I have spoken with

ADA Laurie Hammond-Cummings and she has consented to an adjournment of one month while we determine a restitution figure.” Respondent went on to request an adjournment until April 29, 2009. As a result, Judge Swinton adjourned the matter to April 29, 2009.

38. On April 29, 2009, Ms. Dehal appeared in Niskayuna Town Court and pleaded guilty to Petit Larceny in full satisfaction of all charges. Judge Swinton sentenced Ms. Dehal to a conditional discharge upon the conditions that she pay restitution in the amount of \$10,920 and complete 70 hours of community service.

39. Respondent signed a check dated April 28, 2009, drawn on his IOLA Account and made payable to Niskayuna Consumer’s Co-Operative, Inc., in the amount of \$10,920. A handwritten note on the check states, “Dehal – Rest.”

People v John Thomas

40. In or about January 2009, John Thomas was charged with Outside Storage of Junk in violation of Section 220-16A(2)(f) of the Code of the Town of Niskayuna.

41. By criminal summons dated January 23, 2009, Judge Swinton directed Mr. Thomas to appear in the Niskayuna Town Court for an arraignment on February 4, 2009.

42. On February 4, 2009, Megan M. Mercy, respondent’s wife, appeared with Mr. Thomas at his arraignment before Judge Swinton at the Niskayuna Town Court. At the arraignment, Ms. Mercy gave the court respondent’s business card with “Megan

Mercy, esq.” handwritten across the top. After Mr. Thomas entered a not guilty plea, the matter was adjourned until March 4, 2009.

43. Megan Mercy appeared in the Niskayuna Town Court with Mr. Thomas again on March 4, 2009 and March 18, 2009. On March 18, 2009, Judge Swinton adjourned the matter until April 1, 2009, with a trial date of April 8, 2009.

44. On April 1, 2009, the town attorney appeared in the Niskayuna Town Court on the *Thomas* matter. Neither Mr. Thomas nor Ms. Mercy appeared in the court on that date. Judge Swinton scheduled a trial for April 8, 2009, at 9:00 AM.

45. On April 7, 2009, respondent telephoned the Niskayuna Town Court and requested that the trial scheduled for the following day be adjourned. Through a court clerk, Judge Swinton advised respondent that his request was denied, but that the trial would be moved from 9:00 AM to 12:00 PM.

46. On April 8, 2009 at 8:40 AM, respondent sent Judge Swinton a letter by fax advising that neither Ms. Mercy nor James E. Walsh, Esq., who had been scheduled to represent Mr. Thomas for trial, could appear on that date. Respondent went on to request that Judge Swinton reconsider his refusal to grant an adjournment.

47. On April 8, 2009 at about 12:00 PM, Mr. Thomas appeared in the Niskayuna Town Court without an attorney. Judge Swinton adjourned the matter to May 13, 2009.

48. On April 8, 2009 at 3:41 PM, respondent sent a letter to Judge Swinton by fax requesting a transcript of that day’s proceeding in the *Thomas* case.

49. On April 29, 2009, Judge Swinton sent a letter to respondent advising that, “pursuant to Section 100.6(B)(2) of the Rules Governing Judicial Conduct, this court will not act upon or otherwise respond to your letters of 08 April 2009.” Thereafter, Mr. Thomas retained other counsel, and respondent made no further communications to the Niskayuna Town Court regarding the *Thomas* matter.

Additional Factors

50. Respondent did not physically appear in the Niskayuna Town Court before Judges Swinton and Zonderman for any representation on the matters identified herein.

51. Respondent has not represented clients in the Niskayuna Town Court since in or about April 2009.

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

53. Respondent now appreciates that, as an attorney-judge, he has a responsibility to learn about and carefully adhere to the applicable restrictions on the practice of law. Respondent regrets his failure to abide by the Rules in this instance and pledges to accord himself with the Rules.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.6(B)(2) 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.

A part-time lawyer-judge may practice law subject to certain ethical restrictions designed to eliminate conflict and the appearance of any conflict between the exercise of judicial duties and the private practice of law. Among other restrictions, a judge may not practice law in any court in the same county before another judge who is permitted to practice law (Rules, §100.6[B][2]), although the partners and associates of the judge's law firm may do so (Rules, §100.6[B][3]; Adv Op 88-60, 93-71). *See, Matter of Sack*, 1995 Annual Report 130; *Matter of DeLollo*, 1980 Annual Report 149. The record establishes that respondent violated this well-established ethical rule by representing clients in seven cases in the Niskayuna Town Court before judges who, like respondent, are part-time lawyer-judges who are permitted to practice law.

Upon becoming an acting justice in 2007, respondent had a responsibility to learn about and adhere to the applicable restrictions on his practice of law. Thus, he should have recognized the impropriety of any involvement in these seven matters, which he handled in the 17 months after becoming a judge. Notwithstanding that he did not physically appear in the Niskayuna Town Court in connection with the cases (which included five traffic cases, a code violation, and two felony charges), respondent's involvement in each of these cases was inconsistent with the ethical mandates. The stipulated conduct (including requesting adjournments, entering pleas, and negotiating dispositions) clearly constituted the practice of law, which is prohibited by Rule

100.6(B)(2), and violated the letter and spirit of the ethical standards. The prohibition against the practice of law provides no exception for correspondence, telephone calls, or other aspects of legal representation. Nor does the rule exempt an acting justice, as respondent was at the time of these events.

We note that after Judge Swinton refused to respond to respondent's correspondence in the *Thomas* case, citing Rule 100.6(B)(2), respondent did not communicate again with the court in that case and never appeared again in the Niskayuna court. We also note that respondent has acknowledged his misconduct and pledges to adhere to the ethical rules in the future. Every part-time lawyer-judge is required to scrupulously abide by the applicable restrictions on the practice of law in order to avoid conduct that may create an appearance of impropriety.

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

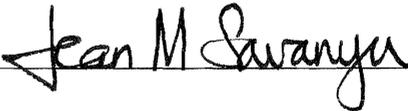
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore and Mr. Stoloff concur.

Judge Peters did not participate.

CERTIFICATION

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

Dated: June 22, 2012

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a stylized flourish at the end.

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