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

NANCY E. SMITH,

a Justice of the Appellate Division,
Fourth Department.

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, Of Counsel) for the Commission

Geiger and Rothenberg, LLP (by David Rothenberg) for the Respondent

The respondent, Nancy E. Smith, a Justice of the Appellate Division, Fourth Department, was served with a Formal Written Complaint dated March 12, 2013, containing one charge. The Formal Written Complaint alleged that respondent sent a

letter on judicial stationery to the New York State Division of Parole expressing her support for an inmate's release on parole.

On May 9, 2013, 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 6, 2013, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Appellate Division since 1999, serving in the Fourth Department since 2004 and in the Second Department from 1999 to 2004. She has been a Supreme Court Justice since 1997 and served as a Judge of the Monroe County Court from 1993 to 1997. Her current term expires on December 31, 2025. Respondent was admitted to the practice of law in New York in 1982.

2. Craig Cordes was sentenced to state prison on May 14, 2008, after being convicted for vehicular manslaughter, first degree (a class C felony), for driving a boat into another boat on Skaneateles Lake, resulting in the death of two people. Mr. Cordes was then a law student who had recently completed his second year of law school. His maximum sentence expiration date is April 21, 2018. His conditional release date is December 21, 2014. He became eligible for parole on August 21, 2011. Mr. Cordes filed an initial request for parole, and a hearing was scheduled for April 19, 2011.

3. Respondent has never met Mr. Cordes. She played no role in his

criminal case. She became acquainted with his situation after his incarceration, through her brother-in-law's sister, who is a friend of Mr. Cordes's mother. Respondent spoke with Mr. Cordes's mother about Mr. Cordes's case and incarceration.

4. Respondent began communicating with Mr. Cordes by letter and, over time, formed the opinion that Mr. Cordes recognized the gravity of his crime, had gained insight as to the harm he had caused, and was genuinely contrite. At the request of his mother, respondent agreed to write to the New York State Division of Parole on Mr. Cordes's behalf.

5. On January 27, 2011, respondent signed and sent a letter on her judicial stationery to the Division of Parole on behalf of Mr. Cordes, in which *inter alia* she identified herself as a judge, stated that Mr. Cordes was her "friend" but did not disclose that she had never met him, expressed her support for Mr. Cordes's release on parole, and set forth factors that she believed demonstrated Mr. Cordes's rehabilitation.

6. Respondent took no other action on behalf of Mr. Cordes. Respondent did not contact or speak with any attorney representing Mr. Cordes. Respondent did not appear at Mr. Cordes's parole hearing. Respondent did not speak about Mr. Cordes with any member of the Division of Parole.

7. As part of her official duties, respondent had previously sent many letters in response to direct inquiries by the Division of Parole in which she offered her opinion for consideration at parole hearings involving inmates over whose trials she had presided and/or whom she had sentenced to prison. Respondent was aware that the Rules

Governing Judicial Conduct ("Rules") and applicable opinions of the Advisory Committee on Judicial Ethics ("Advisory Committee") permit such responses to inquiries from the Division of Parole.

8. Respondent acknowledges that she should have been aware that the Rules, as interpreted by the Commission and the Advisory Committee, prohibit judges from writing to the Division of Parole on an inmate's behalf voluntarily, at his or her request, or at the request of someone else. She pledges that she will refrain from such conduct in the future.

9. Mr. Cordes's request for parole was denied.

Additional Factor

10. Respondent has never previously been the subject of discipline by the Commission.

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

Respondent's unsolicited letter to the Division of Parole on behalf of the son of a family acquaintance was inconsistent with well-established ethical standards

prohibiting a judge from lending the prestige of judicial office to advance private interests (Rules, §100.2[C]). With her judicial stationery underscoring the impact of her professional clout, respondent acted as an advocate for an inmate who was seeking release on parole, describing him as her "friend" and "a good person" (although she had never met him), citing his worthy activities while incarcerated, and stating that she was "confident" of his exemplary behavior if released. Respondent's letter was clearly intended to influence the Parole Board to give favorable consideration to the inmate's application. The favoritism inherent in her letter, which she sent at the request of the inmate's mother (a friend of respondent's relative), subverts the fair and proper administration of justice since the inmate is the beneficiary of an influential plea from a sitting judge based on personal connections, a benefit not available to others who have no such connections.

A request by a judge to another public official or agency for special consideration for any person "is wrong, and always has been wrong" (*Matter of Byrne*, 47 NY2d [b], 420 NYS2d 70, 71 [Ct on the Jud 1979]). 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. 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. [Citations omitted.]

Matter of Lonschein, 50 NY2d 569, 571 (1980). In numerous cases over more than three decades, the Commission and the Court of Appeals have disciplined judges for lending the prestige of judicial office to advance private interests in violation of section 100.2(C) by, *inter alia*, using judicial stationery in connection with a private matter or otherwise asserting their judicial position while contacting a judge, law enforcement official or other person in authority in order to assist a friend or relative. *See Matter of Martin*, 2002 NYSCJC Annual Report 121 (judge sent two unsolicited letters to sentencing judges in other courts on behalf of defendants awaiting sentencing); *see also, e.g., Matter of Dixon*, 47 NY2d 523 (1979); *Matter of Sharlow*, 2006 NYSCJC Annual Report 232; *Matter of Engle*, 1998 NYSCJC Annual Report 125; *Matter of Freeman*, 1992 NYSCJC Annual Report 44. As a judge since 1993, respondent should have recognized that such communications are strictly prohibited.

Respondent's letter did not even specify that her comments were "personal and unofficial." Including that language in her letter would not have annulled the impropriety of her assertion of special influence (*see Matter of Nesbitt,* 2003 NYSCJC Annual Report 152), but at least it would have underscored the personal nature of her comments. Regardless of her intent, the letter, on its face, conveys an appearance of using her official status to advance personal interests.

The Advisory Committee has compared sending an unsolicited reference letter to testifying voluntarily as a character witness, which is specifically prohibited by section 100.2(C). As the Committee has advised, a judge may not send an unsolicited

letter on behalf of an inmate seeking parole (Adv Ops 99-07, 97-92[1]) or a criminal defendant prior to sentencing (Adv Op 89-73) or an attorney facing disciplinary charges (Adv Op 90-156), but may respond to an official request for his or her views, which is akin to responding to a subpoena. In no instance may a judge initiate communication with those entities in order to convey information.

Here, since the factual information respondent provided was not based on her personal knowledge and could have been provided by others, she should have recognized the likelihood that she was asked to write on Cordes's behalf primarily because her status as a high-ranking judge would give clout to her expression of support. This is especially so since she had never even met Cordes, had no official connection with him or his case, and was asked to write the letter by his mother. In this regard, describing him as her "friend" was deceptive and disguises the limited nature of the relationship; by not disclosing those facts and circumstances (including her relative's connection to Cordes's mother), the entire letter is misleading. Since respondent's letter, unlike character testimony, was not under oath or subject to cross-examination, the Parole Board would not have known that her optimistic assessment of his character and rehabilitative prospects was based entirely on correspondence with him (the extent of which is unclear in the record before us) and hearsay.

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[1] In Opinion 97-92, the Committee advised that a judge *may respond to an official request* of the Division of Parole for a statement and/or recommendation concerning a former client who is applying for parole, "provided that the response is based upon the judge's knowledge of the defendant and is designated 'personal and unofficial.'"

The fact that respondent had written many other letters to the Division of Parole offering her opinions on behalf of inmates is irrelevant. As the stipulated facts indicate, those other letters were written "in response to direct inquiries by the Division of Parole" and "involv[ed] inmates over whose trials she had presided and/or whom she had sentenced" (Agreed Statement, par 8). Those are critical distinctions, since those previous letters were within the parameters of the criminal justice system, in which the Parole Board might wish to hear the opinions and insights of the judge who had presided at a defendant's trial. Respondent should have recognized that sending an unsolicited letter to help someone based on personal connections is critically different from responding to an official request for her views. It is difficult to believe that as a judge for 18 years she would not have known that sending such a letter was improper, in view of her ethics training as a judge, the Commission's decisions in *Matter of Martin* and other cases, the Commission's annual reports (including a special section in the 2008 Annual Report addressing the issue), and numerous Advisory Opinions on the subject. In the time it took respondent to compose the letter, she had ample opportunity to reflect on the ethical implications or seek advice as to the propriety of her planned conduct.

Upon assuming the bench, a judge surrenders certain rights and must refrain from some conduct that would be permissible for others. Even otherwise laudable acts, including fund-raising for civic or charitable activities, must be avoided if they use the prestige of judicial office to advance private interests. When asked to write a letter on behalf of an acquaintance or relative in need, every judge must be mindful of the

importance of adhering to the ethical standards intended to safeguard the impartiality of the judiciary and to curtail the inappropriate use of the prestige of judicial office. While respondent's judgment may have been clouded by a "sincere, albeit misguided desire" to help someone who she believed merited support (*Matter of Lonschein*, *supra*, 50 NY2d at 573; *see also*, *Matter of Edwards*, 67 NY2d 153, 155 [1986]), that does not excuse the favoritism demonstrated by her letter, which undermines public confidence in the impartial administration of justice and in the integrity of the judiciary as a whole.

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

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

Judge Klonick did not participate.

Mr. Belluck was not present.

CERTIFICATION

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

Dated: June 19, 2013

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