STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

ROGER L. FORANDO,

a Justice of the Granville Town Court
and the Granville Village Court,
Washington County.

# DETERMINATION

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THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Jodie Corngold
Honorable John A. Falk
Taa Grays, Esq.
Honorable Leslie G. Leach
Honorable Angela M. Mazzarelli
Honorable Robert J. Miller
Marvin Ray Raskin, Esq.
Richard A. Stoloff, Esq.
Akosua Garcia Yeboah

APPEARANCES:

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

Robert M. Winn for respondent

Respondent, Roger L. Forando, a Justice of the Granville Town Court and the Granville Village Court, Washington County, was served with a Formal Written

Complaint dated August 21, 2017, containing one charge. The Formal Written Complaint alleged that respondent attempted to influence and/or created an appearance that he was attempting to influence the outcome of a pending case by communicating his personal interest in the case to the presiding judge, the defendant's attorney and the District Attorney's office. Respondent filed a verified Answer dated August 31, 2017.

By Order dated November 6, 2017, the Commission designated Jay C. Carlisle, II, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 23, 2018, in Albany, New York. The referee filed a report dated November 1, 2018.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended confirmation of the referee's findings and conclusions and the sanction of removal. Respondent's brief recommended disaffirming the referee's findings and conclusions and a confidential disposition. On January 31, 2019, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Granville Town Court, Washington County, since 1979 and a Justice of the Granville Village Court, Washington County, since 1990; his current terms expire, respectively, on December 31, 2019, and March 31, 2019. Respondent is not an attorney.

2. Respondent has been a member of the Capital District Board of Women's Basketball Officials ("referees' association") since 1972 and, in connection

with that organization, assigns referees to officiate over high school girls' basketball games; he has also been a referee himself. He assigned two referees, Dan Dineen and John Kelleher, to officiate over a junior varsity girls' basketball game at the Argyle Central School on January 29, 2016.

3. At the conclusion of that game, a spectator, D. F., was allegedly involved in an altercation with Mr. Dineen and Mr. Kelleher. Later that evening, Mr. Dineen reported the incident to respondent by email, including that police had been called to the scene. As a result of the incident, Mr. F. was charged with Unlawful Imprisonment in the Second Degree, a class A misdemeanor, and Harassment in the Second Degree, a violation, and was issued an appearance ticket directing him to appear in the Argyle Town Court on February 9, 2016.

4. Within a few days of the incident, respondent was interviewed by a newspaper reporter from *The Post Star*, and an article titled "Police: Fan attacked referee at girls basketball game" was published on February 4, 2016. The article reported that Mr. F. had been charged with two offenses and had been released pending prosecution in the Argyle Town Court, and quoted respondent, who was identified as "the region's referee assigner for girls high school basketball," as stating, "We are quite concerned with the escalation of poor sportsmanship at basketball games." It was also reported that respondent said that he "plans to check to see if the spectator who was involved will be banned from future games." The article made no reference to respondent's judicial status.

5. In the afternoon of February 9, 2016, the date of Mr. F.'s scheduled

arraignment in the Argyle Town Court, respondent telephoned the court and left two voicemail messages identifying himself, requesting a return call and leaving the phone number of the Granville Village Court.

6. Respondent has acknowledged that he called the Argyle Town Court on that date to inquire about the *D. F.* case. He testified that he had intended to speak with the court clerk in order to ascertain whether charges had been filed and, if so, the appearance date so he could relay that information to the referees' association.

7. Judge Robert Buck is the sole justice of the Argyle Town Court. At the time of these events, he had no court clerk. Respondent and Judge Buck knew one another as members of the Washington County magistrates' association; Judge Buck also knew respondent as a referee of basketball games in which Judge Buck's daughters had participated. The two judges had a cordial relationship.

8. Judge Buck arraigned Mr. F. at about 5:45 PM on February 9, 2016, entered a not guilty plea on his behalf and adjourned the matter to March 8, 2016. Judge Buck did not listen to the voicemail messages left by respondent until after the arraignment in the *D. F.* case.

9. On or about February 12, 2016, Judge Buck returned respondent's calls and spoke with respondent. Although there was conflicting testimony at the Commission hearing as to the date of their conversation, telephone company records indicate that a call lasting nearly 15 minutes was placed from the Argyle Town Court phone number to the Granville Village Court phone number on February 12, 2016. At the hearing, both respondent and Judge Buck testified that their telephone conversation

lasted about two minutes.

10. At the hearing, respondent testified that during the call he told Judge Buck that the referees' association might send someone, possibly respondent himself, to observe the proceedings in the *D. F.* case, and Judge Buck told him that Mr. F. had been arraigned on February 9th. Judge Buck's hearing testimony describing the conversation differed from respondent's in several respects.[1] While it cannot be determined precisely what was said during the call, based on the record before us, it is unnecessary to do so since respondent's admitted statements to Judge Buck conveyed the appearance that he and/or the referees' association was interested in the *D. F.* case.

11. Both Judge Buck and respondent testified that they did not discuss the *D. F.* case with each other on any other occasion.

12. Sometime in February 2016, Judge Buck advised assistant district attorney ("ADA") Sara Fischer, who was assigned to the *D. F.* case, that respondent had contacted him about the case and "would be watching what happened with the case." After reporting this information to her supervisor, Ms. Fischer disclosed it to attorney Thomas Cioffi, whom the defendant had retained to represent him. Mr. Cioffi, who regularly appeared before respondent, was aware of respondent's role as a referee and

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[1] Judge Buck testified that respondent (i) stated that what had happened at the basketball game was "of great concern" to the referees' association, which "didn't want this condoned or tolerated," and (ii) asked to be informed of the outcome of the case. He acknowledged that he did not recall "the exact wording" of what was said, that he told the Commission earlier that the conversation had "nothing of real import to imprint" it in his memory, and that his initial description of the conversation did not include the "condoned or tolerated" language. In these circumstances, we cannot come to a firm conclusion as to what was said and, accordingly, our finding is based on respondent's admitted statements.

referee assigner in the referees' association.

13. On March 1, 2016, Mr. Cioffi and ADA Devin Anderson appeared before respondent in the Granville Village Court on a matter unrelated to the *D. F.* case. During breaks in court proceedings, after Mr. Cioffi mentioned that he was appearing in the Argyle Town Court the following week, respondent and the attorneys discussed the *D. F.* case. The tone of the conversations, which were recorded, was light and somewhat jocular. Among other comments, respondent asked Mr. Cioffi, "Are you representing the guy that got involved in that basketball thing?" and Mr. Cioffi answered, "The guy that's falsely accused, yes, I am"; respondent echoed, "Falsely accused." Mr. Anderson pointed out that respondent "was the guy that supervises the refs," and respondent said, "You may see me sitting in the gallery ... I can't say anything but I can just observe." Respondent told the two attorneys, "Two weeks ago, referees had to throw three grandfathers out of an eighth grade basketball game." Mr. Cioffi said that he understood from his client that some players in the game had been injured; respondent said he was unaware of that, and Mr. Anderson said that a referee had a sprained finger. Near the end of the proceedings, Mr. Cioffi asked respondent if he would see him "[d]own in Argyle," referring to the next court date in the *D. F.* case, and respondent replied, "If I'm not too tired. I told Judge Buck I may show up, I may not, but the longer it goes, like everything else, who cares, but it is a problem around every place." (Respondent testified at the hearing that the "problem" he was referring to was poor sportsmanship by spectators.) Respondent asked which ADA was handling the *D. F.* case, and Mr. Anderson told him it was Sara Fischer.

14. On March 8, 2016, at approximately 4:45 PM, Judge Buck adjourned the *D. F.* case to April 12, 2016.

15. The evidence presented at the hearing, including telephone company records and Judge Buck's log of the court's telephone messages, establishes that respondent called the Argyle Town Court and left a voicemail message on March 8, 2016, and that Judge Buck returned the call to respondent and left a message three days later.[2] At the hearing before the referee, respondent testified that he has "no recollection" of calling the Argyle court on that date and denied that he did so; Judge Buck had no recollection of respondent's voicemail message or of returning respondent's call.

16. The evidence presented at the hearing, including the emails of two assistant district attorneys on March 9, 2016, establishes that respondent called the District Attorney's office on that date about the status of the *D. F.* case. ADA Anderson sent ADA Fischer an email on that date with the subject heading "Basketball Ref case in Argyle," which stated: "Can you shoot Judge Forando an emailing [*sic*] updating him on this case when you get a chance. He called today wondering the status." Later that day, Ms. Fischer sent respondent an email with the subject heading "RE: D. F. case," which stated: "Hi Judge: Devin said you wanted an update. I do not have one at this time, his

[2] Telephone records show a 77-second call from the Granville Village Court to the Argyle Town Court at 4:42 PM on March 8, 2016, and a 30-second call from the Argyle Town Court to respondent's cell phone number at 11:19 AM on March 11, 2016. Judge Buck's log indicates a voicemail message from respondent at 4:50 PM on March 8th and respondent's cell phone number, and has a check mark indicating that Judge Buck returned the call. Respondent testified that calls from any of multiple telephones at the Granville village hall and the Argyle town hall would appear to be coming from the court telephone number.

attorney adjourned the case last night. He comes back in April." A few minutes later respondent replied "Thanks" to Fischer's email and forwarded it to referee Dineen, asking, "Do you care what happens to him in the court case?" Mr. Dineen told respondent at some point that all he wanted was an apology from the defendant.

17. Mr. Anderson testified that he had no recollection of respondent's March 9th telephone call. Respondent denied calling the District Attorney's office about the *D. F.* case, although he acknowledged asking ADAs Anderson and Fischer, when they appeared in his court, if the case had been disposed of.

18. On April 12, 2016, Mr. Cioffi informed Judge Buck that he and Ms. Fischer had reached an agreement to resolve the *D. F.* case by a six-month adjournment in contemplation of dismissal with 15 hours of community service, completion of a values improvement program and a six-month non-violent order of protection. On his own initiative, Judge Buck told the attorneys that he wanted the defendant to write a letter of apology to the referees' association and to the two schools involved, and it was agreed that that condition would be included in the plea agreement. Judge Buck testified at the hearing that the condition of letters of apology was entirely his own idea, and both he and respondent testified that respondent never said anything to Judge Buck about a letter of apology.

19. Respondent did not attend any court proceedings in the *D. F.* case.

20. The charges against D. F. were ultimately dismissed.

21. Respondent is contrite and has acknowledged that his conduct was improper. He testified at the hearing that when he communicated with Judge Buck and

the attorneys about the *D. F.* case, he "let the referee hat probably supersede the judge hat," and stated that he had "no ulterior motive" in contacting Judge Buck to inquire about the case, but now recognizes that such communications by a judge concerning a pending matter may create an appearance of using the prestige of judicial office to influence the outcome of the case. He testified that he will refrain from engaging in any such communications and discussions in the future.

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(C), 100.3(B)(6) and 100.4(A)(2) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

By contacting the judge who was handling a case involving two referees who were allegedly accosted after a high school basketball game, respondent, a long-time member of the referees' association who had assigned the referees to the game, lent the prestige of judicial office to advance private interests in violation of established ethical standards (Rules, §100.2[C]). 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, 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. 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." [Internal citations omitted.]

*Matter of Lonschein*, 50 NY2d 569, 571-72 (1980). Regardless of a judge's intent, such communications may convey an appearance of misusing the prestige of judicial office for personal advantage, and judges "must assiduously avoid those contacts which might create even the appearance of impropriety" (*Id* at 572; Rules, §100.2).

The moment that respondent learned, on the day of the incident, about the altercation involving the referees in which police had been called to the scene, he should have realized that as a judge, especially in the same county, he should refrain from any involvement in the matter that, intentionally or not, would telegraph that a judge was interested in the case. Instead, throughout the pendency of the criminal matter, he repeatedly interjected himself into the case in an apparent attempt to monitor its progress and, in doing so, repeatedly signaled his interest in the matter to those who were directly involved in it, including the presiding judge. Whether he was acting on behalf of the referees' association or on his own, his conduct was inconsistent with the high ethical standards required of him as a judge.

Respondent has acknowledged that in February 2016, on the date the defendant was scheduled to be arraigned on charges arising out of the post-game incident, respondent called the Argyle Town Court, where the case was pending, left at least one voicemail message asking for his call to be returned and subsequently discussed the case

with Judge Buck, the sole judge of the court. Although respondent insists that the purpose of his call was merely to ask about scheduling so that he could relay that information to the referees' association, any communication by a judge about a pending matter, even to ask about scheduling or procedures, is improper since it conveys the judge's interest in the case and can be interpreted as an implicit request for special treatment, in violation of Rule 100.2(C). *See, e.g., Matter of Edwards*, 67 NY2d 153, 155 (1986) (where a judge contacted the court handling his son's traffic case and inquired about the procedures to be followed in resolving the case, "[t]he absence of a specific request for favorable treatment or special consideration is irrelevant"); *Matter of Sharlow*, 2006 NYSCJC Annual Report 232 (judge's letter on court stationery to the judge handling his son's Trespass case, which entered a plea of not guilty and asked whether the son was required to appear on the scheduled date, was "an implicit request for special consideration"). Particularly in the circumstances here, where respondent and Judge Buck knew each other as fellow judges and Judge Buck was familiar with respondent's activities as a referee, respondent should have "assiduously avoid[ed]" any communication with him about the case in order to avoid even the appearance of seeking to influence his handling of the matter (*Matter of Lonschein, supra*, 50 NY2d at 572).

While there is some dispute as to the substance of their conversation, respondent has admitted that he asked about the *D. F.* case and told Judge Buck that he or someone else from the referees' association might be sent to attend the court proceedings. Those words, standing alone, conveyed unambiguously that the referees' association had an interest in the pending case and would be watching it closely and, as such, could be

perceived as an assertion of special influence, which was inconsistent with the above-cited ethical prohibitions. Although Judge Buck testified that he did not view respondent's comments as an ex parte attempt to influence the case, Judge Buck's perception of respondent's intent is irrelevant; respondent's admitted conduct, on its face, demonstrated an interest in the pending matter and therefore was improper. Certainly the attorneys involved in the matter would want to know about such a communication, and, significantly, the record reveals that Judge Buck properly informed the prosecutor that respondent had contacted him about the case and "would be watching what happened" with it; the prosecutor notified the defendant's attorney; and respondent also told the defendant's attorney of the conversation when the attorney appeared in his court. Thus, as a direct result of respondent's improper call, not only the presiding judge but all the attorneys involved in the pending case were aware of a local judge's interest in it, a fact that could taint the public's perception of the fairness of the eventual outcome.

The evidence establishes that respondent also contacted the Argyle Town Court on the next scheduled appearance date in the *D. F.* case a month later, left a message and received a return call from Judge Buck, who apparently left a brief message. Although respondent denied contacting Judge Buck after their initial conversation and Judge Buck has no recollection of getting or returning a subsequent call, telephone company records and Judge Buck's message logs indicate that the call was made, and the timing of the call suggests that respondent was likely seeking another update on the *D. F.* case.

Throughout the pendency of the case, respondent also showed poor

judgment by communicating his interest in the case to attorneys involved in the matter. The circumstantial evidence establishes that the day after the second appearance date in the *D. F.* case, before Judge Buck had returned his telephone call, respondent called the District Attorney's office seeking a status update and was informed that the case had been adjourned. Although respondent has denied making that call, he admitted asking two assistant district attorneys about the case when they appeared in his court. Regardless of whether the inquiries were made in or out of court, they were inconsistent with Rule 100.2(C) since they reminded the prosecutors of respondent's continuing interest in the pending case and could be perceived as an attempt to influence them. Respondent also discussed the *D. F.* case with the defendant's attorney and a prosecutor in his courtroom, raising the subject during a break in the proceedings. Significantly, respondent again stated that he might attend the *D. F.* proceedings and commented philosophically, "[T]he longer it goes, like everything else, who cares...." While the tone of these comments was light and somewhat jocular, they again conveyed his ongoing interest in the case and reveal his openness to discussing it, even in open court with an attorney involved in the case.

Any judge, and certainly one with four decades of judicial experience, should know that such communications should be avoided, even in the absence of any advocacy for a particular outcome, since they "reflect, whether designedly or not, upon the prestige of the judiciary" (*Matter of Lonschein, supra*, 50 NY2d at 572). Strict adherence to this important principle is essential to ensure public confidence in our system of justice and in decisions that not only are, but appear to be, based entirely on the

merits and not the result of special influence and ex parte, out-of-court communications. With the benefit of a significant body of case law in which the Court of Appeals and the Commission have disciplined judges for lending the prestige of judicial office to advance private interests (their own, or the interests of friends or relatives),[3] every judge in the state should be aware that such behavior is prohibited. Regrettably, respondent's years of experience and ethics training as a judge failed to alert him to the impropriety of his behavior.

We thus conclude that respondent's conduct constitutes a significant breach

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[3] *See, e.g., Matter of LaBombard*, 11 NY3d 294 (2008) (judge contacted the judge handling his relative's case and asked about the date of the next court appearance, told the judge that his relative was a "good kid," and made remarks that gave the impression that others were more culpable); *Matter of Dixon*, 2017 NYSCJC Annual Report 100 (judge called the chambers of the judge handling her lawsuit against an insurance company and spoke to him about her concerns regarding her case, then faxed and mailed him a letter that included details about her alleged injuries); *Matter of Horowitz*, 2006 NYSCJC Annual Report 183 (judge interceded on behalf of friends in two pending cases, including advising a judge, a court attorney and a court clerk that the litigants were her friends and were "nice people"); *Matter of DeJoseph*, 2006 NYSCJC Annual Report 127 (on behalf of a friend whose son had been arrested, judge called a judge who was on call for after-hours arraignments and applications, introduced the defendant's father and handed the phone to the father, who asked for the defendant's release); *Matter of LaClair*, 2006 NYSCJC Annual Report 199 (judge contacted the judge handling his wife's traffic case and identified himself as a judge and the defendant as his spouse, which prompted the other judge to say he would "see what he could do"; in a second case, he telephoned the judge handling the traffic case of an acquaintance and said he would appreciate anything that could be done for the defendant, who was "a nice, elderly gentleman"); *Matter of Bowers*, 2005 NYSCJC Annual Report 125 (judge wrote a letter on judicial stationery to another judge on behalf of a defendant charged with Speeding, asking for "help" in connection with the ticket, stating that the defendant "needs to avoid any points," and falsely identifying the defendant as "my relative"); *Matter of Williams*, 2003 NYSCJC Annual Report 200 (judge called a judge who had issued an order of protection against an individual charged with assaulting his wife, told the judge that the couple were his friends and asked the judge to vacate the order; when the judge replied that he could not do so without hearing from the prosecution, Williams said that he himself had vacated orders of protection without notice to the district attorney).

of judicial ethics that requires public discipline.[4] In determining the appropriate sanction, we have considered that respondent has acknowledged that his conduct was improper and has pledged that it will not be repeated, and we trust that he recognizes the valuable lessons to be learned from this episode. We are also mindful of respondent's lengthy record of public service, including 40 years as a jurist, and that he appears to be a capable, dedicated judge. (We note that the referee, at the conclusion of the hearing, told respondent, "If I had a problem, I wouldn't hesitate to let you decide it for me.") Weighing these factors, after carefully reviewing the entire record, we have determined that respondent should be admonished.

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

Mr. Belluck, Mr. Harding, Ms. Corngold, Judge Falk, Ms. Grays, Judge Leach, Judge Mazzarelli, Judge Miller, Mr. Raskin and Mr. Stoloff concur.

Ms. Yeboah was not present.

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[4] We reject the staff's argument, based on the referee's findings, that respondent's hearing testimony reflects a lack of candor. While respondent's testimony at times was inconsistent and appeared to be at variance with other evidence, he admitted the thrust of the misconduct alleged but testified that he had no recollection of certain events (he told the Commission that it "would be against my principles to admit to things that I have no recollection of"). In that regard, it is noteworthy that other witnesses also changed their testimony at various stages and had little or no recollection of the events at issue. While we generally give deference to a referee's findings, the referee's report does not set forth any reasoning to support his lack of candor findings, and absent any understanding of the basis for that conclusion, we decline to accept it.

CERTIFICATION

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

Dated: March 25, 2019

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