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

LARRY D. MARTIN,

a Justice of the Supreme Court, Kings County.

DETERMINATION

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THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission

Jerome Karp for Respondent

The respondent, Larry D. Martin, a justice of the Supreme Court, Kings County, was served with a Formal Written Complaint dated January 2, 2001, containing two charges.

On March 19, 2001, the Administrator of the Commission, respondent and respondent's counsel 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. The Commission approved the agreed statement on March 29, 2001. Each side submitted memoranda as to sanction.

On June 18, 2001, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and rendered a determination dated December 26, 2001, that respondent be admonished.

On January 31, 2002, respondent moved for correction of the record, reargument and/or reconsideration of the determination, and renewal. By memorandum dated February 20, 2002, the Administrator opposed the motion. On May 9, 2002, the Commission granted the motion for reconsideration and, upon reconsideration, issued the following determination.

1. Respondent became a judge in January 1993 upon election to the Civil Court of the City of New York. He was elected to the Supreme Court in November 1994 and assumed that office in January 1995.

As to Charge I of the Formal Written Complaint:

2. On August 7, 2000, respondent sent a letter on his judicial stationery

to the Honorable Ralph Gazzillo, a Justice of the Supreme Court, Suffolk County, seeking favorable consideration on behalf of Marlon Paul, a defendant in Judge Gazzillo's court convicted on a felony drug charge. Respondent's letter stated that a "non-jail probation disposition would allow for [the defendant to] continue to be a productive member of his community." The defendant, a college graduate, was the son of a long-time family friend of respondent.

3. Respondent wrote the letter in response to a request for assistance from the defendant's mother and the defendant himself. Respondent's letter had not been solicited by any court or any probation official. Respondent sent a copy of the letter to defense counsel but did not send a copy to the District Attorney prosecuting the case.

4. During the Commission's investigation of this matter, an attorney for Mr. Paul informed Commission staff that, prior to sentencing, he had advised Judge Gazzillo that Mr. Paul's attorneys were obtaining character letters on behalf of the defendant, including a letter from a judge, and that Judge Gazzillo had stated that he did not want to receive a character letter from another judge. There is no indication in the record that respondent was informed of Judge Gazzillo's statement prior to sending the letter on behalf of the defendant.

5. Upon receipt of respondent's letter, Judge Gazzillo recused himself from the case by order dated August 11, 2000, but subsequently accepted a guilty plea from the defendant and imposed sentence.

As to Charge II of the Formal Written Complaint:

6. On or about May 4, 1999, respondent sent a letter on his judicial stationery to the Honorable Lawrence C. McSwain, Chief Judge of the Guilford County District Court in Greensboro, North Carolina, seeking favorable consideration on behalf of Stefan Malliet, a defendant in Judge McSwain's court convicted of shoplifting. Respondent's letter expressly supported the position advocated by defense counsel. The defendant, a college student, was the son of a long-time family friend of respondent's.

7. Respondent wrote the letter after requests for assistance from both the defendant's mother and the defendant's attorney. Respondent did not send a copy of his letter to the District Attorney prosecuting the case.

8. Respondent advised the Commission of his letter to Judge McSwain in response to a question by Commission staff during the investigation concerning his letter to Judge Gazzillo.

As to Charges I and II of the Formal Written Complaint:

9. After election to the Civil Court and again after election to the Supreme Court, respondent attended orientation and training programs for newly elected judges run by the Office of Court Administration. At those programs, respondent and his colleagues were acquainted with the Rules Governing Judicial Conduct and were specifically advised to avoid unauthorized *ex parte* communications and to avoid using

the prestige of judicial office to advance a private interest.

10. Respondent was aware of the Advisory Committee on Judicial Ethics and the role of that committee in issuing advisory opinions to judges upon request. Respondent did not request an advisory opinion before writing the letters to Judge Gazzillo and Judge McSwain addressed above. Numerous published opinions of the Advisory Committee have advised judges against sending such communications.

11. Respondent received annually the Opinions of the Advisory Committee on Judicial Ethics and the Annual Reports of the Commission, which made it clear that judges must avoid initiating *ex parte* communications and asserting the influence of their judicial office for the private benefit of others.

12. Respondent asserts that, when he wrote the two letters at issue in this case, he did not consider that his conduct constituted an improper *ex parte* communication, the assertion of influence or lending the prestige of judicial office to advance a private interest.

13. Respondent is active in a community program that provides mentors for young men and women. Respondent himself is and has been a mentor through this program, but he had not been a mentor to either defendant in the two matters referred to above. He is also active with the Center for Community Alternatives, which is also involved in counseling young people.

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), 100.2(C) and 100.3(B)(6) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

On two occasions, respondent sent *ex parte* letters seeking special consideration on behalf of defendants who were awaiting sentencing in other courts. Such conduct violated well-established ethical standards barring a judge from lending the prestige of judicial office to advance the private interests of others and from engaging in unauthorized *ex parte* communications (Sections 100.2[C] and 100.3[B][6] of the Rules Governing Judicial Conduct). As the Court of Appeals stated in Matter of Lonschein v. State Commn on Jud Conduct, 50 NY2d 569, 571-72 (1980):

> [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.]

With his judicial stationery underscoring the impact of his professional clout, respondent acted as the defendants' advocate, recommending a "non-jail probation disposition" for one defendant and expressly supporting the position of defense counsel in the other matter. Respondent's letters could have had only one purpose: to influence the presiding judges to give special consideration to the defendants, who were the children of respondent's long-time friends. A request by one judge to another for special consideration for any person is "wrong and always has been wrong," whether for favorable treatment as to sentence or for other matters. Matter of Byrne, 47 NY2d (b)(Ct on the Jud 1978); Matter of Calabretta, 1985 Ann Report of NY Commn on Jud Conduct 112. In numerous cases over more than two decades, the Commission and the Court of Appeals have disciplined judges for engaging in such conduct. *See, e.g.,* Matter of Dixon v. State Commn on Jud Conduct, 47 NY2d 523 (1979); Matter of Freeman, 1992 Ann Report of NY Commn on Jud Conduct 44; Matter of Engle, 1998 Ann Report of NY Commn on Jud Conduct 125; Matter of Putnam, 1999 Ann Report of NY Commn on Jud Conduct 131. As a judge since 1993, respondent should have recognized that such communications are strictly prohibited. *See also* Adv Op 89-4 and 89-73 (Advisory Comm on Jud Ethics).

Upon assuming the bench, a judge surrenders certain rights and must refrain from conduct which may be permissible for others. Even otherwise laudable civic or charitable activities must be avoided if they create the appearance that a judge is lending

the prestige of judicial office to advance to private interests. Difficult as it may be to refuse a friend's request to write a letter on behalf of a family member in trouble, every judge must be mindful of the importance of adhering to the ethical standards so that public confidence in the integrity and impartiality of the judiciary may be preserved. While respondent's judgment may have been clouded by a "sincere, albeit misguided desire" to help his friends, that does not excuse his ethical transgressions. Matter of Lonschein, *supra*, 50 NY2d at 573; Matter of Edwards v. State Commn on Jud Conduct, 67 NY2d 153 (1986).

While a judge may respond to an official request for his or her views, a judge may not initiate communication with a sentencing judge in order to convey information. If a judge has information which he or she believes is pertinent, the defense attorney may request the Probation Department to formally contact the judge for the judge's input as part of the pre-sentencing investigation. In no case may a judge voluntarily communicate with a sentencing judge, as respondent did here. Compounding the misconduct, respondent did not send a copy of either letter to the prosecution (*see* Section 100.3[B][6] of the Rules Governing Judicial Conduct).

The consequences of respondent's improper intervention were far from harmless. A judge who receives such an *ex parte* request is placed in a difficult position; indeed, one sentencing judge felt constrained to disqualify himself from the case after receiving respondent's letter, though he later accepted the defendant's guilty plea and

imposed sentence. The fair and proper administration of justice, and public confidence in the integrity of the process, are impaired when a defendant is the beneficiary of an influential plea for favorable treatment from a sitting judge, a benefit not available to other defendants. Nor can it be said that respondent received no personal benefit from his actions. A judge who is willing to use judicial prestige to advance the interests of others in need may well earn the gratitude of friends and community, but such conduct is detrimental to the judiciary as a whole.

In mitigation, we have considered respondent's record of community service, which includes acting as a mentor to others, and that he has been forthright and cooperative throughout this proceeding.

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

Mr. Berger, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

Judge Ciardullo and Mr. Coffey dissent as to sanction only and vote that respondent be issued a letter of caution.

Ms. Moore and Mr. Pope did not participate.

Judge Marshall was not present.

CERTIFICATION

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

Dated: June 6, 2002

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

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DISSENTING OPINION
BY MR. COFFEY,
IN WHICH JUDGE
CIARDULLO JOINS

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I am mindful of the numerous precedents cited by Commission counsel that judges should be publicly disciplined when they improperly assert the influence of judicial office in seeking special consideration on behalf of others. I find that these precedents, however, do not address the specific facts raised in this case. Indeed, I am persuaded that respondent acted on both occasions out of a sincere, selfless desire to help the children of his long-time friends at a critical time in their lives and expected and received no benefit in return for his letters. While I concur with the conclusion that respondent's conduct violated the ethical rules, I would not publicly admonish this judge. Accordingly, I respectfully dissent.

Dated: June 6, 2002

Stephen R. Coffey, Esq., Member
New York State
Commission on Judicial Conduct