

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

WILLIAM F. O'BRIEN,

Determination

a Justice of Supreme Court, 6th Judicial District,
Madison County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Jeremy Ann Brown
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez
Honorable Daniel W. Joy
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Juanita Bing Newton
Alan J. Pope, Esq.
Honorable Eugene W. Salisbury

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Honorable William F. O'Brien, III, pro se

The respondent, William F. O'Brien, III, a justice of the Supreme Court, 6th Judicial District, was served with a Superseding Formal Written Complaint dated March 30, 1998, alleging that he made public comments on a pending case. Respondent filed an answer to the superseding complaint on April 2, 1998.

By Order dated February 19, 1998, the Commission designated Maryann Saccomando Freedman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 7, 1998, and the referee filed her report with the Commission on September 8, 1998, and submitted a supplemental report on October 20, 1998.

Both sides filed briefs with respect to the referee's report. On December 18, 1998, the Commission heard oral argument by staff counsel and respondent and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Supreme Court since January 1997. He was a judge of the County Court, Family Court and Surrogate's Court, Madison County, from 1983 to 1996.

2. In December 1995, respondent was seeking the Republican nomination for Supreme Court justice. He was opposed by a fellow judge, Hugh C. Humphreys.

3. On December 29, 1995, respondent was advised that the Appellate Division, Third Department, had overturned the conviction of George H. Wiemeier, who had been tried before respondent and a jury in June 1994. The conviction was reversed on the ground that respondent had improperly communicated with the jury during

deliberations by responding to a note without notice and outside the presence of the defendant and his counsel. The case was remanded to respondent for a new trial.

4. On January 11, 1996, respondent was told that Dale Seth, a reporter for the Oneida Daily Dispatch, had called him about the Wiemeier case. When respondent returned Mr. Seth's telephone call, the reporter told him, "Judge, they really beat you up on this one." Respondent spoke with him about the Appellate Division's decision, then discontinued the call, telling Mr. Seth that further comment would be inappropriate.

5. Nevertheless, respondent then prepared a statement for Mr. Seth, entitled, "For Release Re: People v. Wiemeier," in which he stated, inter alia:

The non-substantive ministerial decision on the note from the jury was not affirmed. A disagreement exists between this court and the Appellate Court on that issue. A further appeal by the District Attorney to the Court of Appeals should resolve this disagreement.

6. On January 16, 1996, the Oneida Daily Dispatch published a front-page story in which it reported respondent's statements to Mr. Seth.

7. On January 22, 1996, respondent received a message from Clarisel Gonzalez, a reporter for The Post-Standard of Syracuse, asking to speak with him concerning Wiemeier.

8. Respondent did not return the call but prepared a statement for Ms. Gonzalez, in which he stated, inter alia:

There may have been an entirely different result here had District Attorney Cerio gone to Albany and personally presented oral argument to that Court in support of the position he had earlier taken before me on this note.

A disagreement exists between this Court and the Appellate Court on the question of this note from the jury. Further appeal by District Attorney Cerio to the Court of Appeals should resolve this disagreement.

...[W]hile I respect the Appellate decision, I am satisfied that it was the right thing to do at the time to tell the jury that they could continue their deliberations....

9. On January 24, 1996, The Post-Standard published a story about the case, with the headline, "Judge and DA at Odds. A Man's Convictions Were Overturned. The Prosecutor Said He Is Offended That the Judge Is 'Shifting Blame' To His Office." The story said that respondent did not believe that he had done anything wrong and was "satisfied it was the right thing to do." The paper also reported respondent's remark that the outcome of the appeal might have been different had the district attorney presented oral argument before the Appellate Division.

10. When respondent spoke with Mr. Seth and when he prepared the two press statements, he knew that the Rules Governing Judicial Conduct prohibited judges from making public comments about pending or impending proceedings.

11. On February 19, 1997, respondent testified during a duly-authorized investigation of this matter. Asked why he made the statements, respondent said:

It has to be that at that particular point in time, it was like, I can't believe it that this DA wouldn't go to Albany to argue this case and allow it to be argued just on the other side. I took that to be an attempt to make me look bad at a very important time with the politics that were going on. I had an opponent, Judge Humphreys and the Republicans were gathering to decide who was to be their nominee and it was making me look bad, I mean, and I felt it was an intentional thing here.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(A), 100.2(B) and 100.3(B)(8). Charge I of the Superseding Formal Written Complaint is sustained, and respondent's misconduct is established.

Because he was concerned that he would "look bad" at a time when he was seeking nomination to a higher office, respondent--even though he knew that it was improper to do so--made a series of public comments on a case that had been remanded to him. "A judge shall not make any public comment about a pending or impending

proceeding in any court within the United States or its territories.” (Rules Governing Judicial Conduct, 22 NYCRR 100.3[B][8]). The rule is clear and unequivocal and makes no exception, as respondent would have it, for explanations of a judge’s “decision-making” process. A judge should not “make any public comment, no matter how minor, to a newspaper reporter or to anyone else, about a case pending before him.” (Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135, 137) (emphasis in original).

Moreover, in his statements, respondent insisted that his actions in the Wiemeier case had been appropriate, even though a higher court had ruled otherwise. He undermined the proper administration of justice by implicitly criticizing the appellate court. He also improperly blamed the district attorney for failing to argue the case on appeal.

A judge must “respect and comply with the law....” (Rules Governing Judicial Conduct, 22 NYCRR 100.2[A]). “For a trial judge, the law is comprised of both statutes and appellate directives.” (Matter of Dier, 1996 Ann Report of NY Commn on Jud Conduct, at 79, 81). A judge must follow the directives of higher courts and should not give the impression that he or she would do otherwise. (Matter of Maislin, unreported, NY Commn on Jud Conduct, Aug. 7, 1998).

Respondent’s written statements to two newspapers were misleading in that they described the reversal of Mr. Wiemeier’s conviction as merely a disagreement

between the two courts. He should not have publicly suggested that the district attorney appeal the Appellate Division's decision in order to "resolve" the matter.

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

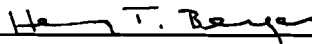
Mr. Berger, Ms. Brown, Mr. Coffey, Mr. Goldman, Judge Joy, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope and Judge Salisbury concur.

Ms. Hernandez was not a member of the Commission when the vote in this matter was taken.

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: March 4, 1999



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