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

C. RAYMOND RADIGAN,

Surrogate of Nassau County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Helaine M. Barnett, Esq.
E. Garrett Cleary, Esq.
Stephen R. Coffey, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Juanita Bing Newton
Honorable Eugene W. Salisbury
Barry C. Sample
Honorable William C. Thompson

APPEARANCES:

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

Nathan R. Sobel and Joseph W. Ryan, Jr. (M. Elisabeth Bergeron, Of Counsel) for Respondent

The respondent, C. Raymond Radigan, a judge of the Surrogate's Court, Nassau County, was served with a Formal Written Complaint dated August 18, 1994, alleging, inter alia, certain improprieties in connection with a not-for-profit corporation connected to the court. Respondent filed an answer dated September 2, 1994.

By order dated September 27, 1994, the Commission designated the Honorable Leon B. Polsky as referee to hear and report proposed findings of fact and conclusions of law.

By motion dated October 31, 1994, respondent moved to dismiss the Formal Written Complaint. By motion dated November 4, 1994, the administrator of the Commission opposed respondent's motion and cross moved for summary determination and a finding that respondent had engaged in judicial misconduct. Respondent replied in papers dated November 7, 1994, and the administrator filed additional papers on November 17, 1994. By determination and order dated November 23, 1994, the Commission granted respondent's motion with respect to Charge III only and denied the motion in all other respects and denied the administrator's motion in all respects.

A hearing was held on December 21, 1994, and the referee filed his report with the Commission on April 12, 1995.

By motion dated May 17, 1995, the administrator moved to confirm in part and to disaffirm in part the referee's report and for a determination that respondent be censured. Respondent opposed the motion by cross motion on June 15, 1995. The administrator filed a reply on June 20, 1995.

On June 29, 1995, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Nassau County Surrogate's Court since 1981. He is the only judge of the court.

2. In 1983, respondent and other court officials incorporated the Nassau Surrogate's Development Corporation pursuant to the Not-for-Profit Corporation Law §102. The corporation was designed to pursue goals of research, the development of sound administration of the court, education in trusts and estates law and the training of non-judicial personnel, interns and students interested in law and public administration. Respondent served as chairman of the corporation. It was funded by foundation grants and donations from banks and law firms.

3. A student internship program that was established in the court in the 1970s was subsequently subsumed within the corporation.

4. Respondent and other administrators of the Surrogate's Court served as officers and directors of the corporation. The corporate address of the Nassau Surrogate's Development Corporation was the courthouse. Interns hired with corporate funds worked in the court and were supervised by court administrators. No meetings of the corporation's directors were ever held. Respondent acknowledges that his roles as judge and as chairman of the corporation are "indistinguishable."

5. On June 7, 1983, respondent and Margaret V. Turano, a professor at the Law School of St. John's University, entered into a contract with West Publishing Company to produce a hornbook on New York estates administration. Respondent and Professor Turano agreed between them that they would share equally the cost of any research in connection with the book, as well as any royalties received from its sale.

6. In 1985, Professor Turano advised respondent that she had hired law students from St. John's to research portions of the book which she had drafted. By the end of 1985, Professor Turano had paid $8,769.75 to law students for research on the book.

7. From funds of the Nassau Surrogate's Development Corporation, respondent authorized reimbursement in full to Professor Turano for her research costs. The law students employed by Professor Turano were not employed by the Nassau Surrogate's Development Corporation or its student internship program, and respondent played no role in their selection or supervision.

8. Between 1987 and 1992, respondent and Professor Turano received and kept $22,584 in royalties, which they shared equally.

9. After charges were filed and the hearing conducted in this matter, respondent, by personal check dated May 12, 1995, returned $9,000 to the Nassau Surrogate's Development Corporation.

As to Charge II of the Formal Written Complaint:

10. Annual returns filed with the Internal Revenue Service for the fiscal years ending March 31, 1985, 1986, 1987, 1988, 1989, 1991 and 1992 list, as among the "program services" of the Nassau Surrogate's Development Corporation, job training for "unemployed minorities [and] women returning to the labor force." Each of these returns was signed by the corporation's secretary-treasurer, who was also the chief clerk of the Surrogate's Court at the time.

11. On January 25, 1991, the corporation filed a Charities Registration Statement with the state Department of State and the state attorney general. Among the "programs for which contributions are solicited," the statement lists, "job training for hard-to-employ persons."

12. Between 1984 and 1992, the corporation paid between 40 and 50 persons to work on an hourly basis in the courthouse. Twenty of them were related to regular employees of the court. None was known to be Latino or African-American.

13. The positions were filled solely by "word-of-mouth," and respondent was aware of the use of this method. Respondent did not participate in the selection of interns but was aware that the son of the court clerk at the time, who was also secretary-treasurer of the corporation, was working in the program in the 1980s.

As to Charge III of the Formal Written Complaint:

14. The charge is not sustained and is, therefore, dismissed.

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, 100.3(b)(1), 100.3(b)(2), 100.3(b)(4), and 100.5(c)(1), and Canons 1, 2, 3B(1), 3B(2), 3B(4) and 5C(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established. Charge III is dismissed.

Respondent enriched himself by diverting Nassau Surrogate's Development Corporation funds to Professor Turano for research expenses that they had agreed to share in their private authorship of a hornbook. The hornbook was not a project of the corporation, and the student researchers were not interns employed by the corporation. By transferring corporate monies to Professor Turano, respondent eliminated his share of more than $4,000 for the research expenses, then accepted $11,292 in royalties for the book, enhancing his profit at the expense of the not-for-profit corporation of which he was chairman.

A not-for-profit corporation is issued a charter by the state if it is formed "not for pecuniary profit or financial gain" and "no part of the assets, income or profit of which is

distributable to, or enures to the benefit of, its members, directors or officers...." (Not-for-Profit Corporation Law §102[5]).

The charter of the Nassau Surrogate's Development Corporation lists as its purposes research, development of sound administration and improvement of the Surrogate's Court, as well as training for students. Respondent argues that this legitimizes his use of corporate monies for research on his hornbook, which he maintains was of valuable assistance to the court. Assuming, arguendo, that this is true, as an official of the corporation, he should not have profited from his own, unilateral decision to transfer the money. A contract or transaction involving a not-for-profit corporation that enures to the benefit of one of its officers or directors can only be undertaken if the interested director discloses all material facts to the other members of the board and the board authorizes the transaction by majority vote without participation by the interested director or without counting the interested director's vote. (Not-for-Profit Corporation Law §715[a]). This respondent did not do. He acknowledges that he made the decision to transfer the funds and that no meetings of the board of directors for the corporation has ever been held.

"It is...the inflexible rule that [corporate executives] cannot exercise the corporate powers for their private or personal advantage or gain. The law stringently and rigorously forbids them to use or dispos[e] of the funds or

assets of the corporation for their individual enterprises or acquisition.... These principles, based upon a sound public policy and morality, are so firmly fixed in our jurisprudence that they are not open to discussion and so familiar that authorities declaring them need not be cited." (Pollitz v Wabash Railroad Co., 207 NY 113, at 124).

Although it was an improper act which reflects upon his role as a judge, respondent's diversion of the funds does not require a more severe sanction than admonition. We accept his statements that he did not consider at the time the implications of his receipt of future royalties to him. In addition, he has repaid the money.

We also conclude that respondent's failure to supervise the hiring of interns who worked in the court and were paid by corporate funds led to a patronage system for the relatives of full-time court employees. Notwithstanding that documents filed with the state and federal governments boasted laudatory affirmative-action goals, more than 40% of the persons hired were relatives of other court employees, and none can be identified as members of disadvantaged minority groups.

For all intents and purposes, the interns were employees of the court. They worked on court business in the courthouse and were supervised by court administrators. By failing to assure that the jobs were fairly awarded without regard to favoritism, respondent, as chairman of the corporation and the only judge of the court, failed to meet his ethical

obligations. "A judge shall exercise the power of appointment only on the basis of merit, avoiding favoritism," (Rules Governing Judicial Conduct, 22 NYCRR 100.3[b][4]) and must "require his or her staff and court officials subject to his or her direction and control to observe the standards of fidelity and diligence that apply to the judge," (22 NYCRR 100.3[b][2]). These are among the administrative duties of a judge and are not, as respondent argues, limited to the appointment of fiduciaries. "Nepotism has long been condemned in the judiciary, as it should be..." (Matter of Kane v State Commission on Judicial Conduct, 50 NY2d 360, 363), and "an appearance of such impropriety is no less to be condemned than is the impropriety itself," (Matter of Spector v State Commission on Judicial Conduct, 47 NY2d 462, 466).

Charge I is sustained by a vote of 7 to 3. Mr. Goldman, Judge Salisbury and Judge Thompson dissent and vote that the charge be dismissed.

Charge II is sustained by a vote of 8 to 2. Mr. Cleary and Judge Thompson dissent and vote that the charge be dismissed.

By a vote of 7 to 3, the Commission determines that the appropriate sanction is admonition.

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Mr. Goldman, Judge Newton and Judge Salisbury concur as to sanction.

Ms. Crotty and Mr. Sample dissent as to sanction only and vote that respondent be censured.

Judge Thompson, having concluded that no misconduct is established, dissents and votes that the Formal Written Complaint be dismissed.

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: September 22, 1995

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

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C. RAYMOND RADIGAN,

DISSENTING OPINION BY MR. CLEARY

Surrogate of Nassau County.

I concur that Charge I is sustained and that respondent should be admonished. However, I part company with the majority as to Charge II and conclude that that allegation should be dismissed.

The Nassau Surrogate's Development Corporation was funded by private monies obtained from foundations, banks and law firms. The record contains no indication that the funds were solicited with any representations as to who would be paid with them or that any stipulations were placed by the contributors on who could be hired. Nothing in the corporate charter states that its purpose was to employee minorities or women returning to the work force. The erroneous statements to that effect on Internal Revenue Service and Charities Registration forms in no way compromised the corporation's tax-exempt status. Thus, they were not binding and are irrelevant. Therefore, respondent could have hired anyone that he chose to work as student interns, including the relatives of other court employees. That he did not himself do the hiring or supervise the students further attenuates any suggestion of wrongdoing.

The Rules Governing Judicial Conduct that prohibit favoritism by a judge in court appointments and the cases which speak against nepotism in the judiciary are intended to protect the public from the use of taxpayer dollars to reward the judge's family, friends or political supporters. They are not meant to proscribe the use of private funds in any way. It is the responsibility of the other corporate directors to determine that this is inappropriate or of the contributors to say that this is not the purpose for which the funds were donated. The Commission has no role. It makes no difference that the interns worked in the court on court business. The significant factor in this unique situation is that they were paid with private monies.

I vote that Charge II be dismissed.

Dated: September 22, 1995

E. Garrett Cleary

E. Garrett Cleary, Esq., Member
New York State
Commission on Judicial Conduct

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DISSENTING OPINION BY
MR. GOLDMAN
IN WHICH
JUDGE SALISBURY JOINS

I dissent from the Commission's finding of misconduct as to Charge I only, and believe that the charge should be dismissed.

The Rules Governing Judicial Conduct permit a judge to "speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice," (22 NYCRR 100.4[a]), and to "receive compensation and reimbursement of expenses for the quasi-judicial...activities," (22 NYCRR 100.6). Thus, respondent was not, as a general matter, prohibited from receiving, either directly or indirectly, compensation and reimbursement of expenses for his authorship of a hornbook on estate practice.

The Nassau Surrogate's Development Corporation ("NSDC") was, according to its certificate of incorporation, designed in part:

> (a) to conduct research and advance knowledge of the laws affecting administration of estates, powers and trusts and Surrogate's Court practice;
>
> ...

> (g) to make donations, gifts, contributions, grants and loans out of its earnings or from the principal of its funds or both, or of its property, for the use and benefit of any organization or individual for the purpose of promoting the purposes of this corporation as heretofore set forth.

A clearly proper purpose of the NSDC was to compensate and reimburse expenses to an author of a hornbook on estate practice. Therefore, the NSDC funds could have properly been used to reimburse the expenses incurred by Professor Turano had she been the sole author of the book in question. The question before the Commission is whether respondent, as the chairman of NSDC, could properly direct that its funds be used to reimburse Professor Turano for those purposes if he were a beneficiary of their use.

The majority bases its finding of misconduct largely upon the contention that respondent "enriched himself" by reimbursing Professor Turano for the student research expenses that she had incurred and for which he had agreed to share equally so that his royalties were pure profit undiminished by the expenses. I agree with the majority that the net effect of respondent's use of NSDC funds to reimburse Professor Turano was that he was able to profit to the full extent of the royalties he received some years later. I do not agree, however, that the use of the funds in this manner was improper.

The NSDC funds could properly have been used to pay the expenses of law students providing research assistance for the book. Payment of research expenses for the hornbook, even if written for compensation, was clearly compatible with the goal of NSDC "to make donations, gifts or contributions" in order "to conduct research and advance knowledge of the laws affecting administration of estates, powers and trusts and Surrogate's Court practice." I do not believe it determinative that respondent ultimately benefited from the reimbursement. The provisions of the NSDC's certificate of incorporation permit even direct payment to an author of a textbook on estate practice.

Similarly, I do not believe it determinative that respondent was receiving compensation from the publisher of the hornbook. Certainly, it would not have been improper for respondent to contract with the publisher to receive as compensation reimbursement of expenses in addition to royalties. That the NSDC, in effect, supplemented respondent's earnings for authorship of the book was within its province.*

The majority also bases its finding of misconduct on a purported violation of the Not-for-Profit Corporation Law. Whether respondent's conduct violated the Not-for-Profit Corporation Law was not part of the charges in the complaint, not considered in the Referee's Report, not briefed by either party

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*Respondent's earnings from the book were not unreasonably high. His share of the royalties, received between 1987 and 1992, was $11,292. The total expense for student research was $8,769.75; his share was half that amount, $4,384.87.

and not mentioned at oral argument. Indeed, there is no mention of that law in any of the papers in this proceeding. I do not believe it comports with the fairness and due process to which judges are entitled for the Commission to base a finding of misconduct, even in part, on a purported violation of a statute without adequate notice, and I believe that respondent did not receive such notice.

Although I do not find judicial misconduct, I do not condone respondent's conduct, which I believe was an error in judgment and, at the least, unseemly. Respondent has apparently recognized--with the benefit of hindsight--that the reimbursement of expenses created at least a potential appearance of impropriety and has repaid the money. Not everything that a judge does wrong, however, is judicial misconduct. While it may have been wiser for respondent to have thought as clearly as the majority thinks he should have, and it may have been more prudent for him not to have reimbursed Professor Turano or to have repaid NSDC once he had received the royalties, I do not believe his exercise of poor judgment in this situation constitutes a breach of judicial ethics.

Charge I, therefore, should be dismissed.

With respect to Charge II, I concur with the majority and find that judicial misconduct is established. Had this charge been the sole one sustained by the Commission, I would not have voted for a public sanction. However, since the Commission has sustained both charges and since I feel that my decision as

to the appropriate sanction must be based on that determination, I agree with the majority that respondent should be admonished.

Dated: September 22, 1995

Lawrence S. Goldman, Esq., Member
New York State
Commission on Judicial Conduct