

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

ALAN I. FRIESS,

a Judge of the Criminal Court
of the City of New York, New
York County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of
Counsel) for the Commission

Eric A. Seiff, Alan I. Friess, Bette Blank
and Bryan Barrett for Respondent

The respondent, Alan I. Friess, a judge of the Criminal
Court of the City of New York, was served with a Formal Written
Complaint dated February 25, 1982, alleging misconduct with respect
to two cases over which he presided. Respondent filed an answer
dated March 15, 1982.

By order dated March 18, 1982, the Commission designated the Honorable Simon J. Liebowitz as referee to hear and report proposed findings of fact and conclusions of law. The hearing was public, pursuant to respondent's written waiver of the confidentiality provision of Section 44, subdivision 4, of the Judiciary Law. It was held on January 20 and 27 and February 2, 9 and 10, 1983,* and the referee filed his report with the Commission on March 11, 1983.

By motion dated March 11, 1983, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion by cross-motion dated March 21, 1983. By determination and order dated March 24, 1983, the Commission disposed of the procedural issues raised in respondent's cross-motion.

The Commission heard oral argument on the merits of this matter on March 25, 1983, thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. During the week of June 18, 1979, respondent was assigned to sit in Part SP1 of the Criminal Court of the City of

* Respondent commenced a CPLR Article 78 proceeding in Supreme Court in April 1982, challenging the Commission on various jurisdictional and procedural grounds. He was granted a stay of the hearing, pending determination of his petition. The matter reached the Appellate Division, which denied respondent's petition on December 16, 1982. Respondent sought leave to appeal to the Court of Appeals and on January 13, 1983, his request that the hearing continue to be stayed was denied, except that the Appellate Division temporarily stayed the referee from filing his report with the Commission. On January 20, 1983, the hearing was commenced. On January 25, 1983, respondent's motion for leave to appeal was denied by the Appellate Division, and the stay on the referee was vacated.

New York, at 346 Broadway. The physical conditions of the court were generally unsatisfactory, and the courtroom was frequently crowded.

2. Quarrels between neighbors frequently became the subject of bitter disputes in SP1. With the exception of those cases involving fines and petty offenses, many complaints in SP1 are dismissed without witnesses being sworn, adjourned in contemplation of dismissal or referred to a trial part.

3. The condition of the courtroom and its surroundings has no bearing on or relevance to the acts or conduct of respondent.

4. On June 22, 1979, in SP1, respondent presided over the case of People v. Louis Santiello, in which the complaining witness, John Haisley, charged the defendant with harassment. In addition to Santiello, there were 10 other cases on respondent's calendar involving quarrels between individuals.

5. Before rendering his decision in the Santiello case, respondent told both Mr. Haisley and the defendant that he was going to ask the courtroom spectators to decide the case by a show of hands as to whether Mr. Haisley or Mr. Santiello was telling the truth. Respondent asked both Haisley and Santiello if they would abide by the spectators' vote, which he referred to as "the decision of the jury." Mr. Santiello agreed. Mr. Haisley refused.

6. Respondent then asked the courtroom spectators to vote by raising their hands in favor of either Mr. Haisley or Mr. Santiello. After the vote, respondent stated: "It seems to be

a divided jury. This case is A.C.D.'d" [adjourned in contemplation of dismissal]. Respondent then rendered a disposition of A.C.D.

7. By his actions, respondent intended to convey to the litigants that he was basing his decision on the audience vote. He conveyed to the audience the impression that he intended to abide by their vote.

As to Charge II of the Formal Written Complaint:

8. On January 26, 1982, respondent was sitting in Part AP7 of the Criminal Court of the City of New York, and presided over a plea and bench conference in People v. Jeffrey Jones, in which the defendant was charged with jostling, a Class A misdemeanor. The assistant district attorney was John Jordan, and the defendant's counsel was Michael Moscato.

9. During the bench conference, respondent stated that he would sentence the defendant to 3-years probation if he pled guilty. The District Attorney's office took no position on sentencing. Mr. Moscato conferred with the defendant and advised respondent that the defendant would prefer a short jail sentence to probation.

10. Respondent stated that he would sentence the defendant to a term of 30 days in jail if he pled guilty. Mr. Moscato conferred with the defendant and advised respondent that the defendant would prefer a sentence of 20 days.

11. Respondent asked Mr. Moscato if the defendant was a "gambling man." Respondent then asked the defendant directly if he was a "gambling man."

12. Respondent then told the defendant he was prepared to have a coin tossed to determine if the defendant should be sentenced to 20 days or 30 days in jail. The defendant agreed to the procedure and asked respondent if the coin was rigged. Respondent told the defendant that the coin was not rigged.

13. Respondent requested that Mr. Moscato toss the coin. Respondent stated that if the coin landed "heads" the sentence would be 30 days, and if it landed "tails" the sentence would be 20 days. Mr. Moscato tossed the coin, which came out "tails."

14. As a result of the coin toss, respondent sentenced the defendant to 20 days in jail.

15. Other people in the court besides the individuals involved in the bench conference were able to observe the coin toss and hear respondent's statements during the conference.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a) and 100.3(a) (1-4) of the Rules Governing Judicial Conduct and Canons 1, 2A and 3A (1-4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained and respondent's misconduct is established.

Public confidence in the judiciary is fundamental to the fair and proper administration of justice. A judge's conduct must be and appear to be beyond reproach if respect for the courts is to be maintained.

In allowing a coin toss to determine the length of a defendant's jail term, and in representing to courtroom spectators that their show of hands would determine the outcome of a disputed matter, respondent undermined public respect for the judiciary and irretrievably lost the public's confidence.

As noted by the referee:

Judicial judgment is a non-delegable duty. For a judge to abdicate this judicial judgment to the flipping of a coin gives the appearance of reckless dispensation of justice [Ref. Rep. 17].

* * * * *

It is not the function of a judge to play games with the litigants or the spectators. His avowed intention of not being bound by the vote and then calling for a vote was deceptive. The respondent's callous reaction to the humiliation he caused Mr. Haisley should not be discounted. Furthermore, thousands of these neighborly quarrels, bitter as they have been, have been resolved satisfactorily without resorting to the method used by respondent. It is true that at the time respondent...was a new and inexperienced judge. He still insists with vehemence and fervor that the polling of the audience was an act of judicial propriety and dignity. His immutable belief [to date] that he acted properly negates any possible mitigating finding that his conduct was the result of his inexperience. He insists to this very day that his act was one of a genius and that he acted with judicial propriety. He compares his conduct of being innovative as a new judge to Mozart creating his first symphony at the age of 4 [Ref. Rep. 10-11].

It is intolerable for a judge to act as respondent did. The suggestion that his conduct was "creative" or "innovative" and therefore appropriate is absurd. A court of law is not a game of

chance. The public has every right to expect that a jurist will carefully weigh the matters at issue and, in good faith, render reasoned rulings and decisions. Abdicating such solemn responsibilities, particularly in so whimsical a manner as respondent exhibited, is inexcusable and indefensible.

The argument that respondent acted reasonably, given the emotional character of the court in which he sat, is likewise without merit. The disdainful characterization of the court, by respondent and others, as a "sham," a "zoo" and a "nut part," is troublesome. Respondent's unflattering view of the litigants does not excuse his having made a mockery of the legal proceedings. Indeed, that the court was a volatile place made it all the more imperative for respondent to act in a dignified manner. He was obliged to set an appropriate example.

The Commission notes the testimony of several members of the judiciary in support of respondent's conduct. While their opinion evidence was well-intentioned, and they are well within their rights in expressing their views, we deem their testimony totally unpersuasive.

Respondent resigned from office on December 31, 1982, during the course of these proceedings. Section 47 of the Judiciary Law authorizes the Commission to determine that a judge be removed from office, notwithstanding such resignation. Removal automatically bars a judge from ever again holding judicial office in this state.

Among the factors to be weighed in making such a serious determination are the nature of the misconduct, respondent's appre-

ciation of the gravamen of the misconduct, and whether the prospect of his attaining a maturity of judgment, such as would warrant his possible service as a jurist in the future, is worth the risk to the public and the administration of justice in permitting him to return to the bench.

Of course, no one can make such a judgment with absolute certainty. However, in considering these issues and the entire record of this proceeding, we note respondent's complete failure to appreciate the fact that his conduct was totally inappropriate and plainly wrong. We also note his continued and unyielding insistence not only that his conduct was appropriate but that it was an act of genius. Finally, we take particular note that in June 1981, only seven months before the coin-tossing incident, respondent was censured by this Commission for having taken to his home the criminal defendant in a case over which he was presiding. Matter of Friess, June 25, 1981 (Com. on Jud. Conduct).

By his conduct in these cases, respondent has exhibited extraordinarily poor judgment, utter contempt for the process of law and the grossest misunderstanding of the role and responsibility of a judge in our legal system. He has severely prejudiced the administration of justice and demonstrated his unfitness to hold judicial office.

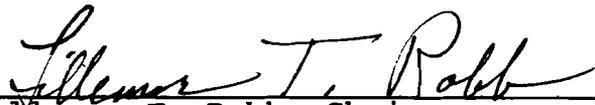
By reason of the foregoing, the Commission determines that respondent should be removed from office pursuant to Section 47 of the Judiciary Law.

All concur, except for Judge Shea, who dissents in a separate opinion as to sanction only.

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 30, 1983



Lillemor T. Robb, Chairwoman
New York State Commission on
Judicial Conduct

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DISSENTING
OPINION BY
JUDGE SHEA

I concur in the finding of misconduct as to Charges I and II. I agree that respondent exhibited extremely poor judgment on these two occasions and demonstrated a serious misconception of the proper role of a judge.

Nevertheless, the record as a whole, and particularly the testimony of esteemed members of the bench, shows that respondent was an able and dedicated judge. His resignation makes it unnecessary to apply the ultimate sanction that the majority finds appropriate. In my view, removing respondent solely to insure that he can never again serve on the judiciary is unwarranted.

Accordingly, I dissent and vote for dismissal, the only other disposition available pursuant to Section 47.

Dated: March 30, 1983

Felice K. Shea
Felice K. Shea