

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

DAVID F. PORTER,

a Justice of the Allegany Town Court,
Cattaraugus County.

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 (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Connors LLP (by Vincent E. Doyle III) for respondent

The respondent, David F. Porter, a Justice of the Allegany Town Court,
Cattaraugus County, was served with a Formal Written Complaint dated May 7, 2018,

containing one charge. The Formal Written Complaint alleged that respondent failed to disqualify himself in three matters arising out of a boundary dispute involving his neighbor's daughter, which he had previously discussed ex parte with his neighbor.

On September 24, 2018, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On October 25, 2018, the Commission accepted the Agreed Statement and made the following determination:

1. Respondent has been a Justice of the Allegany Town Court, Cattaraugus County, since January 2006. His current term expires on December 31, 2021. He is not an attorney.
2. From July 23, 2015, through September 24, 2015, as set forth below, respondent failed to disqualify himself or seek remittal in three matters – *People v E. K.*, *People v L. C.* and *People v C. M.* – each of which arose from a boundary dispute involving K. K., notwithstanding that respondent had discussed the matter ex parte with K. K.'s father, E. K., in May 2015.
3. In May 2015 respondent spoke with E. K., a neighbor, who had come to respondent's home seeking his assistance as a judge with a boundary dispute between his daughter, K. K., and her neighbors, L. C. and C. M.

4. E. K. told respondent that attempts to resolve his daughter's escalating boundary dispute through a town code officer had been unsuccessful. Respondent told E. K. that the court could not become involved in the boundary dispute until charges were brought and that law enforcement officers were responsible for filing charges. Respondent told E. K. that he could contact law enforcement directly, provided him the names of seven law enforcement officers, including New York State Trooper David Kendzior, and informed him that all of the officers lived near E. K.'s home.

5. L. C. drafted a three-page letter to K. K. dated May 17, 2015, detailing her complaints on their boundary dispute and describing a Mother's Day visit by a Trooper to L. C.'s home, during which the Trooper allegedly suggested how the boundary dispute might be resolved. L. C. sent a copy of her letter to respondent.

6. On July 23, 2015, respondent issued a criminal summons for E. K. directing him to appear and answer charges that he committed Harassment in the Second Degree in violation of Section 240.26 of the Penal Law. Before issuing the summons, respondent reviewed the accusatory instrument alleging that on July 22, 2015, E. K. struck the hand of his daughter's neighbor, C. M., with a hammer, and C. M.'s supporting deposition, in which he requested that the court issue an order of protection against E. K.

7. On July 27, 2015, respondent arraigned L. C. for Harassment in the Second Degree pursuant to Section 240.26(2) of the Penal Law, for allegedly cursing at K. K. on July 22, 2015. Respondent did not disclose his May 2015 communication with E. K. concerning the boundary dispute. Respondent issued a temporary order of protection against L. C. and in favor of K. K., pursuant to a telephone request to the court

that respondent understood to have come from K. K.

8. On August 17, 2015, respondent arraigned C. M. for Criminal Tampering in the Third Degree pursuant to Section 145.14 of the Penal Law, for allegedly removing K. K.'s posted signs on July 22, 2015. The sworn statement filed with the complaint against C. M. was affirmed by E. K. on July 28, 2015. Respondent did not disclose his May 2015 communication with E. K. concerning the boundary dispute. Respondent issued a temporary order of protection against C. M. and in favor of K. K., pursuant to a request from the Cattaraugus County Sheriff Deputy who took E. K.'s statement and filed the complaint. During the arraignment, C. M. again asked for an order of protection against E. K.

9. On August 17, 2015, E.K.'s arraignment in Allegany Town Court was adjourned by the court so that E. K. could attend a Buffalo Bills football practice. Respondent took no action on C. M.'s repeated requests for an order of protection against E.K.

10. On September 14, 2015, respondent arraigned E. K. for allegedly striking C. M. with a hammer on July 22, 2015. Respondent did not issue an order of protection against E. K.

11. On September 24, 2015, respondent disqualified himself from *People v E. K.*, *People v L. C.*, and *People v C. M.* As a basis for his disqualification in each case, respondent wrote that he recused himself "on the grounds that I have a conflict of interest. I have spoken with E. K. about this land dispute situation prior to E. K. being charged with Harassment 2nd."

Additional Factors

12. Respondent has been cooperative with the Commission throughout its inquiry.

13. Respondent now recognizes and appreciates that, where a judge has engaged in substantive communications with an interested party or individual about a matter prior to the initiation of legal action, such that the judge should be disqualified, such disqualification must occur at the outset, not after arraignment. Respondent regrets that he did not disqualify himself at the outset of this matter and commits to adhering to the Rules more stringently should similar situations arise 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), 100.3(B)(1) and 100.3(E)(1) 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, and respondent’s misconduct is established.

A judge’s disqualification is required in matters in which the judge's impartiality “might reasonably be questioned” (Rules, §100.3[E][1]), and judges must assiduously avoid even the appearance of impropriety (Rules, §100.2[A]). Since respondent had discussed with his neighbor an escalating boundary dispute involving the neighbor’s daughter and her neighbors, a reasonable person might question whether he could be impartial in three cases arising out of the dispute that came before him within

the next few months. *See Matter of Valcich*, 2008 NYSCJC Annual Report 221 (judge failed to disqualify herself despite having a professional and social relationship with the defendant and having discussed the underlying facts ex parte with her); *Matter of Trickler*, 2011 NYSCJC Annual Report 147 (before disqualifying himself, judge arraigned a defendant notwithstanding that he knew the defendant and complaining witness, had observed at least some of the underlying events and had spoken to the complaining witness about the matter). The moment that respondent welcomed his neighbor into his home and began to discuss the dispute, he should have realized that he was engaging in an ex parte conversation that would require his disqualification if the matter came to his court. Yet, instead of immediately stepping down when three cases arising out of the dispute came before him, or even disclosing his earlier discussion with his neighbor, respondent issued a criminal summons, conducted the arraignments and made determinations regarding the issuance of an order of protection. As respondent has acknowledged, his behavior was inconsistent with the above-cited ethical requirements.

When a judge has engaged in such an ex parte discussion or has any other conflict going into a case that requires disqualification, the judge must recuse at the outset of the case and, therefore, may not conduct the arraignment since “[a]n arraignment is not merely administrative, but, rather, is a significant stage in the criminal proceeding” requiring the exercise of discretion (NYS Jud Adv Ops 14-166, 09-223). *See Matter of Astacio* __ NY3d __, No. 94 (2018) (despite knowing that her recusal was required in her former client’s case, judge conducted the arraignment before disqualifying herself, set low bail, and asked the clerk not to transfer the case to a particular judge); *see*

also *Matter of LaBombard*, 11 NY3d 294, 298-99 (2008) (judge arraigned his former co-worker's son despite recognizing that his disqualification was required in cases involving the defendant, and his handling of the matter created an appearance of partiality). Here, respondent's handling of the arraignments in each case included a significant exercise of discretion in making determinations as to the issuance of an order of protection.

Compounding the appearance of impropriety, he issued such orders against two individuals involved in the dispute with his neighbor's daughter, but did not issue an order of protection against his neighbor, the only defendant alleged to have engaged in a physical attack. Respondent's impartiality in making those decisions can reasonably be questioned in view of his earlier conversation with his neighbor.

It is unclear to what extent that discussion addressed the merits of the dispute, but even if the discussion focused on procedures, as the stipulated facts suggest, the appearance created by a private discussion about the dispute created a significant issue that needed to be addressed. Thus, at the very least, when each of the cases came before him respondent should have disclosed the conversation. Even if he believed he could handle the cases impartially, disclosing the conversation would have afforded the prosecutor and defendants an opportunity to be heard on the issue of his participation in the matters. See Rules, §100.3(F)¹; *Matter of Merkel*, 1989 NYSCJC Annual Report 111

¹It should be emphasized that remittal of disqualification requires, among other conditions, the consent of the parties and their lawyers "without participation by the judge" (Rules, §100.3[F]). It would be improper for a judge to "seek" remittal by engaging in any conduct that could be viewed as coercive. A litigant should not have to question the assurance of a judge, in such circumstances, that he or she can be impartial in the matter, especially if the judge volunteers to remain on the case.

(though judge's disqualification was not required in a case involving her court clerk, her failure to disclose the relationship was improper). Respondent's belated recusal in the matters, two months after the first case came before him, mitigates but does not cure the impropriety. *Matter of Remchuk*, 2000 NYSCJC Annual Report 149.

In considering the appropriate sanction, we note that respondent has acknowledged his misconduct and now recognizes his ethical obligations in such circumstances and commits to adhering to them stringently should similar situations arise in the future.

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 Ms. Yeboah concur.

Mr. Stoloff was not present.

CERTIFICATION

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

Dated: November 13, 2018

A handwritten signature in black ink, reading "Jean M. Savanyu", written over a horizontal line.

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