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

GARY P. ALLEN,

a Justice of the Newfield Town Court,
Tompkins County.

DETERMINATION

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission

Williamson, Clune & Stevens (by John Alden Stevens) for the Respondent

The respondent, Gary P. Allen, a Justice of the Newfield Town Court, Tompkins County, was served with a Formal Written Complaint dated April 14, 2010,

containing two charges. The Formal Written Complaint alleged that respondent intervened in an impending proceeding involving his son, engaged in an improper *ex parte* communication, and took judicial action in the matter involving his son's complaint. Respondent filed a verified answer dated May 6, 2010.

On October 21, 2010, the Administrator of the Commission, respondent's counsel and respondent 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, recommending that respondent be censured and waiving further submissions and oral argument.

On November 4, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Newfield Town Court, Tompkins County, since 1994. His current term expires on December 31, 2013. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On November 30, 2008, respondent's son, Gary C. Allen, told respondent that he had an encounter with a hunter, Larry G. Fenton, Jr., on his private property. Respondent and his son discussed initiating a trespassing charge against Mr. Fenton with the New York State Police or the Department of Environmental Conservation ("DEC").

3. Osman J. Eisenberg is the DEC officer assigned to the area that covers respondent's court and, as of December 2008, had appeared before respondent in about two dozen cases. Respondent has known Officer Eisenberg and his family since Officer Eisenberg was a child.

4. In late November or early December 2008, Mr. Allen called Officer Eisenberg on the officer's personal cell phone to talk about pursuing a trespassing charge against Mr. Fenton. Mr. Allen met with Officer Eisenberg and signed a complaint against Mr. Fenton on December 3, 2008. Sometime after signing the complaint, Mr. Allen told respondent that Officer Eisenberg was taking too long to resolve the case.

5. In early December 2008, respondent called Officer Eisenberg on Eisenberg's cell phone and requested that Officer Eisenberg make Mr. Fenton's appearance ticket returnable before him in the Newfield Town Court. Respondent told Officer Eisenberg that he did not want Mr. Fenton's ticket to go to his co-judge and that he wanted to transfer the ticket to County Court for re-assignment.

6. On January 24, 2009, Officer Eisenberg issued an appearance ticket to Mr. Fenton for Trespassing on Posted Lands for the Purpose of Hunting, a violation of Section 11-2113 of the Environmental Conservation Law. The appearance ticket directed Mr. Fenton to appear in the Newfield Town Court on February 9, 2009.

As to Charge II of the Formal Written Complaint:

7. On February 9, 2009, Larry G. Fenton, Jr., appeared before respondent in response to an appearance ticket for Trespassing Upon Posted Lands for the

Purpose of Hunting, a violation of Section 11-2113 of the Environmental Conservation Law. He was not represented by counsel.

8. At this and all times relevant to the facts herein, respondent was aware that his son, Gary C. Allen, was the complainant in Mr. Fenton's case and that the charge alleged that Mr. Fenton had trespassed on Mr. Allen's property.

9. Prior to Mr. Fenton's appearance, respondent had contacted Osman J. Eisenberg, the DEC officer handling his son's complaint, and requested that he make Mr. Fenton's appearance ticket returnable before him.

10. Respondent presided over Mr. Fenton's arraignment and accepted his guilty plea to the trespassing charge. Respondent disclosed that his son was the complainant and advised Mr. Fenton that he could not impose sentence.

11. There is no stenographic, audio or other mechanical recording of the *Fenton* arraignment, notwithstanding the requirement as of June 16, 2008, that all proceedings in town and village courts be mechanically recorded, pursuant to Section 30.1 of the Rules of the Chief Judge and Administrative Order 245-08 of the Chief Administrative Judge.

12. Sometime after Mr. Fenton's appearance, respondent sent a letter to his co-justice, Debbi J. Payne, with Mr. Fenton's appearance ticket on which respondent made the notes "Attorney-No" and "Guilty."

13. In his letter to Judge Payne, respondent stated that Mr. Fenton's arrest stemmed from a complaint made by his son and that he initially planned to recuse

himself but then felt that "neither side" of the court could hear the matter because he was a "possible witness." He also stated that he decided to "arraign [Mr. Fenton] with the understanding that I would only do the arraignment, gain trial jurisdiction and if he pled not guilty draw up an order for County Court to reassign to another town court."

14. Respondent's letter to Judge Payne further stated that he had advised Mr. Fenton of his "dilemma" and that Mr. Fenton wanted to plead guilty. Respondent asserted that he told Mr. Fenton he "would take his plea but would not be able to sentence him." He then advised Judge Payne that she could "adopt a new case and send him a fine notice."

15. On February 12, 2009, Judge Payne sent a letter to the Tompkins County District Attorney advising that she was disqualifying herself from Mr. Fenton's case and requesting the transfer of the case to another court.

Mitigating Factors

16. During the arraignment, respondent advised Mr. Fenton of his right to counsel and disclosed his relationship with the complainant in the case, before accepting Mr. Fenton's guilty plea.

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

18. Respondent has served as a Newfield Town Court justice for 16 years and has never been disciplined for judicial misconduct. He regrets his failure to abide by the Rules in this instance and pledges to conduct himself in accordance with

the Rules, to which he avers he has been attentive throughout his judicial tenure.

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), 100.3(B)(6), 100.3(E)(1) and 100.3(E)(1)(e) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Upon learning of his son's interest in initiating a Trespass complaint arising out of an incident to which respondent was a possible witness, respondent was obliged to refrain from any involvement in the matter and, in particular, to avoid any conduct that used or appeared to use his judicial prestige to advance his son's private interests (Rules, §100.2[C]). Instead, he violated well-established ethical standards by intervening in his son's case, engaging in an *ex parte* communication with the Environmental Conservation Officer handling the complaint, arranging for the case to come before himself, and taking judicial action in the matter.

After respondent's son told him that the officer "was taking too long" to act on the complaint, respondent contacted the officer and asked him to make the ticket returnable before respondent. By doing so, he conveyed an implicit message that he was personally interested in the matter and that the officer should act on his son's complaint.

Such conduct lent the prestige of his judicial status to advance his son's personal interests, which is strictly prohibited (Rules, §100.2[C]); s*ee, e.g., Matter of Edwards*, 67 NY2d 153 (1986) (judge initiated several *ex parte* contacts with a judge who was presiding over his son's traffic case). As the Court of Appeals has stated:

> [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, whether 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.]

Matter of Lonschein, 50 NY2d 569, 571-72 (1980). Respondent, who is not an attorney, could not act as his son's legal advocate, a role which should properly be delegated to an attorney. A judge's "'paternal instincts' do not justify a departure from the standards expected of the judiciary" (*Matter of Edwards*, *supra*, 67 NY2d at 155). *See also, Matter of Pennington*, 2004 Annual Report 139 (judge contacted the district attorney to discuss a pending case involving his son and to object to his son's treatment by the police); *Matter of Magill,* 2005 Annual Report 177 (after transferring a case in which his wife was the complaining witness, judge personally delivered the file to the transferee court and left his judicial business card, on which he had written a request for an order of protection).

By asking specifically that the ticket be returnable *before him*, respondent

not only underscored his expectation that a ticket would be issued, but compounded the impropriety by insuring that he would be personally involved in the case in his judicial capacity. While the dissent minimizes respondent's involvement in his son's case even before the arraignment, it seems clear that there was no reason for respondent to ask that the case be brought before him except to convey his personal interest in the matter and to ensure that respondent himself would have control of the case when the defendant appeared in court. Respondent had no authority to disqualify his co-judge from handling the case (*Matter of Hooper*, 2004 Annual Report 113).

Respondent further compounded his misconduct by failing to disqualify himself promptly when the case came before him; instead, he arraigned the defendant and accepted his guilty plea. Taking such judicial action in a case in which his son is the complaining witness was patently improper since the judge's impartiality could reasonably be questioned (*see* Rules, §100.3[E][1]; *see*, *Matter of Tyler*, 75 NY2d 525 [1990] and *Matter of Sims*, 61 NY2d 349 [1984]). Respondent's on-the-bench disclosure of the relationship underscores why the case should not have been before him in the first place; for the defendant, hearing from the judge that the complaining witness is the judge's son could only be an intimidating message, and respondent should have been aware that making such a statement might have encouraged the defendant to plead guilty. Moreover, his disclosure to the defendant was incomplete since he did not disclose that he was a possible witness in the case.

Even with full disclosure and even if the defendant wanted to go forward, it

was improper for respondent to take judicial action in the case under the remittal provision (Rules, §100.3[F]) since (i) the conflict could not be waived by the unrepresented defendant and (ii) the disclosure and waiver of the conflict were not on the record. The fact that no recording was made of the arraignment, contrary to a recent statewide Order of the Administrative Judge requiring such recording, compounds the appearance of impropriety.

Finally, in belatedly transferring the case to his co-judge, respondent sent a letter describing his own involvement in the matter and noting that his son was the complaining witness. This was *ex parte* information, and given the context – and respondent's suggestion that his co-judge could "adopt a new case" and fine the defendant – his letter conveyed the appearance that he was attempting to influence the sentence. From start to finish, respondent's conduct seemed calculated to ensure that his son's complaint would result in the defendant being charged by the DEC and that respondent would have control over the outcome of the case.

As an experienced judge, respondent should have recognized that his conduct was improper. We note that he has been cooperative and contrite and pledges to conduct himself in accordance with the Rules in the future.

By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

Judge Klonick, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck, Mr. Coffey and Ms. Hubbard dissent and vote to reject the Agreed Statement on the basis that the proposed disposition is too harsh. Mr. Belluck files an opinion in which Mr. Coffey and Ms. Hubbard join.

CERTIFICATION

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

Dated: January 4, 2011

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

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DISSENTING OPINION BY MR. BELLUCK, IN WHICH MR. COFFEY AND MS. HUBBARD JOIN

I respectfully vote to reject the Agreed Statement in this case because I believe that on the facts presented, the stipulated sanction of censure is too harsh. Because of the limited sanctions available to the Commission, it is important that the Commission reserve censure for the most severe behavior short of removal. Otherwise, the sanction of censure will be diluted to the point that the public assigns no weight to this punishment.

In this case, the facts simply do not warrant a censure. It was improper for respondent to contact a DEC officer in connection with his son's complaint and to conduct an arraignment of the defendant. To avoid any appearance of impropriety, he should have avoided any involvement in his son's case, as required by the ethical standards (Rules, §100.3[E][1][e]), and his failure to do so requires a disciplinary sanction.

Significantly, however, before accepting the plea, respondent advised the

defendant of the right to counsel, disclosed that the complaining witness was his son and told the defendant that he could not impose a sentence. There is no indication that the defendant objected to respondent's handling the arraignment under these circumstances. Nor is there any indication of bias or coercion in respondent's handling of the matter. Moreover, I do not see any improper message in respondent's note transmitting the case for sentencing to his co-judge, which explained why he was disqualifying himself. And while the lack of a recording for the arraignment may compound the appearance of impropriety, I am reluctant to base a misconduct finding on what might have been an oversight or even a mechanical error. (The Agreed Statement offers no explanation for the absence of a recording.) In sum, during and following the arraignment the Judge seemed to take due care to make sure that the defendant's rights were protected and that he remained uninvolved with the process.

On these facts, I cannot conclude that respondent's misconduct rises to a level which requires censure, the same sanction the Commission has recently imposed on a judge who repeatedly handled cases involving his nephews, his employers' sons and his co-workers (*Matter of Menard*) and on a judge who was convicted of a misdemeanor Driving While Intoxicated, based on a .18% blood alcohol content, after driving erratically (*Matter of Martineck*). Having censured those judges, the Commission should not accept an Agreed Statement imposing the same sanction for a single incident of improper but far less serious misbehavior. By doing so, the Commission diminishes the significance of this sanction when it is imposed in an appropriate case.

Accordingly, since I believe admonition at most is appropriate here, I vote

to reject the Agreed Statement of Facts.

Dated: January 4, 2011

Joseph W. Belluck, Esq., Member
New York State
Commission on Judicial Conduct