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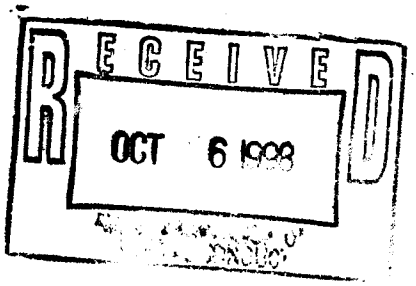
BY HAND



October 6, 1998

Gerald Stern, Administrator
New York State Commission on Judicial Conduct
801 Second Avenue
New York, New York

RE: Judicial Misconduct Complaint against Appellate Division, Second Department Justice Albert M. Rosenblatt and against his co-defendant Appellate Division, Second Department justices in the *Sassower v. Mangano, et* al. federal civil rights action

Dear Mr. Stern:

Transmitted herewith is a copy of the Center for Judicial Accountability's October 5, 1998 letter -- to the State Commission on Judicial Nomination -- which, at page 8, expressly identifies that it is being filed with the Commission on Judicial Conduct "as yet a further facially-meritorious complaint against Justice Rosenblatt"[1].

As set forth therein, the basis for our instant complaint against Justice Rosenblatt is two-fold: (1) our belief, for reasons particularized at page 4 of the letter, that Justice Rosenblatt committed perjury in his responses to Questions #30(a)-(b) and #32(d) of the Commission on Judicial Nomination's

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[1] We note from your enclosed perspective column, "*Judicial Independence Is Alive and Well*" (NYLJ, 8/20/98), which twice invokes Judiciary Law §44.1, that you are quite willing to recognize the controlling significance of that statutory provision -- when it serves your purpose to do so. Perhaps the Commission on Judicial Nomination will be able to elicit from you an explanation as to the basis upon which our September 19, 1994, October 26, 1994, and December 5, 1994 facially-meritorious complaints against Justice Rosenblatt and other Second Department Justices, including Justice William Thompson, a Commission member, were nonetheless, each dismissed by the Commission, without investigation or reasons., by letters dated December 13, 1994 and January 24, 1995 As you know, your refusal to answer that question led to our Article 78 proceeding against the Commission, which annexed copies of those complaints and dismissal letters. Supreme Court Justice Herman Cahn then protected you and the Commission by his fraudulent dismissal decision, as most graphically particularized in "*Restraining 'Liars in the Courtroom' and on the Public Payroll*". (Exhibit "D" to our letter to the Commission on Judicial Nomination).

questionnaire; and (2) Justice Rosenblatt's collusion and complicity -- and that of his co-defendant Second Department judicial brethren -- in the litigation fraud of co-defendant counsel, the New York State Attorney General in *Sassower v. Mangano, et al.* Such litigation fraud is particularized in our *unopposed* cert petition therein, which is also transmitted, together with our supplemental brief (S. Ct. #98-106).

Encompassed by this facially-meritorious complaint against Justice Rosenblatt is a facially-meritorious complaint against his co-defendant Second Department justices based on the *Sassower v. Mangano, et al.* federal action. Needless to say, upon request, we will promptly transmit to the Commission a copy of the record of the district court and Second Circuit proceedings (S.D.N.Y. 94 Civ. 4514; 2nd Cir. #96-7805) so that you can verify the brazenness with which these Second Department justices not only engaged in conduct "prejudicial to the administration of justice" [NYS Constitution, Article VI, §22(a)], but wilfully obstructed "the administration of justice" on the federal level.

As in the past, you may be assured of our complete cooperation.

Yours for a quality judiciary,

Elena Ruth Sassower

ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

Enclosures

cc: NYS Commission on Judicial Nomination

NEW YORK LAW JOURNAL 8/20/98

PERSPECTIVE

Judicial Independence Is Alive and Well

BY GERALD STERN

IN THE MOST recent "Court of Appeals Roundup" (*NYLJ*, Aug. 13), Roy L. Reardon and Mary Elizabeth McGarry express regret for what they regard as the impairment of the judiciary's independence in the investigation of Judge Lorin Duckman. They are not the first commentators to criticize the Commission on Judicial Conduct, and presumably, will not be the last. But the basis for their criticism is wrong.

Some see Judge Duckman as a scapegoat who lost his judgeship because of the negative publicity following the killing of Galina Komar by Benito Oliver, after Judge Duckman released Oliver on bail. Every judge can identify with the colleague who releases a defendant who then commits murder. Given the media pursuit of Judge Duckman and the disruption of his personal life, it was natural to develop sympathy for him.

Mr. Reardon and Ms. McGarry commend the seven judges of the Court of Appeals, the five who comprised a majority to remove the judge from office and the two who dissented. But they harshly criticized the Commission for its "wrongdoing" in investigating the matter, taking their cue from language which they have misinterpreted in the Court's decision.

There is no doubt that the investigation followed unprecedented publicity, an unprecedented complaint and the Governor's unprecedented call for his removal from office. From that point on, it was apparent that if the Commission were to conclude on the merits that the judge should be removed, it would be difficult to convince any reasonable person that the determination was not swayed by the public demands for his removal.

If the Commission had decided on censure, it would have demonstrated its independence. Judge Duckman would have accepted a censure, and the Court of Appeals, which can review a Commission determination only on the request of the judge, would have had no jurisdiction. There would have been a few angry editorials and the Governor might have convened the State Senate to consider the judge's removal. The Commission would then have been out of the picture.

In terms of the ultimate disposition, the Commission was between a rock and a hard place. There would always be the specter of the Governor's call for the judge's removal, even if it was the appropriate sanction on the merits. No one at the Commission could feel comfortable in that environment. But there was no question that allegations concerning the judge's courtroom antics, bizarre statements, and his alleged intentional disregard of established law, had to be investigated and if proven, would constitute misconduct.

Despite the criticism about the judge's bail decision, that was never considered. The Commission has a 24-year policy not to investigate controversial decisions, and if that were the only basis of the complaints, it would not have investigated. Excoriating prosecutors for their bail recommendations and refusing to hear argument before he set bail or dismissed charges, often after ridiculing them and deriding their integrity, are matters that warrant investigation.

Some commentators are under the misapprehension that after the Governor complained about the bail decision, the Commission investigated to find misconduct that could form the basis of a case against the judge. This confusion may stem from the argument made on the judge's behalf that the Governor's call for removal was based solely on the *Oliver* case.

The focus on the bail decision may have prompted commentators to forget that the Governor's complaint to the Commission was based on much more. The Governor's staff conducted what some, including Judge Vito Titone in his dissenting opinion, have called an "investigation" and compiled 12 transcripts in other cases as well as summaries of interviews with lawyers. No reasonable person could argue that in light of the complaint and the transcripts attached to it, the Commission lacked a facially valid complaint to investigate, which is the statutory standard. The law requires the Commission to investigate complaints that are valid on their face. To dismiss it would have been arrogant and contrary to law (see Jud. Law, §44, subd. 1.) Further, if the transcripts submitted by the Governor were accurate, Judge Duckman would not be entitled to immunity solely because he was being criticized for his bail decision.

Mr. Reardon's and Ms. McGarry's analysis is based on a misunderstanding of the facts and the law. Conceding that the Court made the correct decision to remove the judge, they condemn the Commission for investigating him in the absence of a complaint. They ask: "Who will sanction the Commission for letting itself be used by the Executive Branch to initiate an investigation for which it had received no complaint, other than the erroneous claim the judge had mishandled a bail hearing?" They then provide the answer: "No one."

If the Commission had investigated the judge without a valid complaint, the Court of Appeals would have had jurisdiction to condemn such a practice. Judge Duckman never contested the validity of the investigation (i.e. that it had not been preceded by a complaint) because it was not an issue.

The authors are also wrong in their reading of the Court's decision insofar as they believe that the Court concluded that the Commission engaged in "wrongdoing" and that such "wrongdoing" should be "redressed." Similarly, nothing in the decision gives credence to their claim that the Commission "let itself be used" or that it should be sanctioned. (Judge Titone commented that the Commission "allowed itself to be used to advance the agenda of the judge baiters who were feeding off the media frenzy." Since he voted for censure, it is likely that he was referring in his criticism to the determination to remove the judge.)

Addressing "the origin of the Commission's investigation," the Court observed it was the result of "a firestorm of public criticism" generated by a bail ruling and a tragic murder, which was not found to be a basis for discipline. The Court noted that unwarranted criticism or targeting of judges and keeping of "dossiers" by prosecutors, which was *not* shown to have occurred in the *Duckman* case, are legitimate concerns. But "wrongdoing in connection with initiating an investigation could not insulate an unfit judge; any such wrongdoing must be otherwise redressed," the Court stated. That

observation is precisely the standard the Commission had to apply when it received the Governor's complaint.

The majority's discussion of the claim of "wrongdoing" was interpreted by the authors as a finding that there in fact had been wrongdoing, and that the Commission was responsible. The Court clearly was saying that claims of wrongdoing had to be dealt with elsewhere, not in these proceedings.

If Mr. Reardon and Ms. McGarry have concluded that there was wrongdoing in the decision to investigate, they are wrong as a matter of law. Section 44, paragraph 1 of the Judiciary Law provides that the Commission "shall conduct an investigation" upon receipt of a complaint, and may dismiss a complaint "if it determines that the complaint on its face lacks merit."

What the critics fail to see is that the Commission could not ignore Judge Duckman's misconduct for the same reason that the Court could not ignore it. It is interesting that Mr. Reardon and Ms. McGarry found the Court's decision to remove the judge to be correct. The most shocking transcripts of Judge Duckman's behavior, which the Court highlighted, had been sent to the Commission by the Governor as part of his complaint.

Following a due process hearing, some of the transcripts submitted by the Governor (and additional ones discovered by the Commission) were found to demonstrate misconduct. Four dissenting Commission members and two dissenting judges of the Court would have censured Judge Duckman on the evidence available, while seven Commission members and five Court of Appeals judges believed removal was warranted.

It is neither reasonable nor fair to attribute the Commission's action to the Governor's call for action. The final sanction was placed in motion by, and was a consequence of, the compilation of transcripts and incidents that formed the basis of the Court's rationale. As the Court of Appeals observed: "on the merits of this case, the judiciary, the bar, and the public are better served when an established course of conduct is appropriately redressed and an unfit incumbent is removed from the bench."

The fact that the bail cause celebre led to the disclosure of other conduct seems to be a matter of concern: If not for that fateful decision in *Oliver*, Judge Duckman would not even be subject to censure because his other misconduct would not have been discovered. It may well be that Judge Duckman's indiscretions and behavior would never have been reported. On the other hand, by now some other matter might have come to the Commission's attention, which would have led to the disclosure of the prior record of misconduct. The point is that it should not matter what precipitates the exposure of such a record. The Commission receives many complaints from individuals motivated by the "wrong" reasons. But when judges engage in a pattern of misconduct, they risk exposure for reasons that they might not have imagined. Do judges not deal often with defendants who face serious charges brought to light because of an unrelated, minor incident? The moral of this story is not that judges should avoid releasing dangerous defendants. It is that judges should avoid compiling a record of the kind that Judge Duckman compiled.

Mr. Reardon and Ms. McGarry raise an issue of great concern: whether the Commission's action impaired the independence of the judiciary. Judges need not fear removal or censure for displeasing the public, the press or elected officials by issuing unpopular decisions or rulings. Judges should not be misled by the rhetoric emanating from this case.

Although it is beyond the scope of this article to set forth the entire basis of the Court's removal of Judge Duckman, the judge was grossly abusive to young lawyers and intentionally ignored the law by dismissing charges that he knew he had no authority to dismiss. Further, his own testimony demonstrated his lack of fitness. No one should confuse the action of the Commission or the Court with the criticism of judges for making unpopular decisions. The judiciary has enormous decision-making discretion, and should exercise it without fear of reprisal.

There is no new law or legal principle arising from the *Duckman* case. It has long been held that a judge cannot decide knowingly and consciously to disregard the law (See *In re Quigley*, 32 NYS. 828 [Sup. Ct. 2d Dept. 1895]; *In re Bolte*, 97 A.D. 551 [1st Dept. 1904]), or act as a "drill sergeant" or otherwise be abusive to attorneys (see *Matter of Mertens*, 56 A.D.2d 456, 468 [1st Dept. 1977]).

Judges are criticized unfairly for the exercise of their discretion, and often for carrying out the law. There is no doubt that judges are apprehensive about such criticism, which is troublesome. Some judges have terms expiring and are dependent for their reappointment on the very office holders who may be critical of them. Judge Duckman's attorney elicited testimony from a few lawyers that some New York City Criminal Court judges, in the aftermath of the highly-publicized murder of Ms. Komar, expressed reluctance to dismiss charges or release defendants on their own recognizance. That, unfortunately, is a response to the barrage of publicity that preceded the Commission's actions. Over the past two decades, the Commission has resisted many calls for disciplinary action based on unpopular judicial rulings, and it is unthinkable that that practice would change.

The decision in *Duckman* reconfirms that certain conduct, which has been the basis for public discipline since the early part of the century, will not be tolerated. Indeed, if Judge Duckman had not been removed, either as a "message" of the Commission's "independence" or for other reasons, it would have made it difficult to remove judges for similar conduct in the future or to justify removal for lesser misconduct in the past.

Had Judge Duckman not been removed on the overwhelming record of misconduct, the result would have been a blow to the independence of the judiciary, which is preserved by the great majority of judges who "personally observe" high standards of conduct (Section 100.1 of the rules governing judicial conduct).

Gerald Stern *is counsel to the State Commission on Judicial Conduct.*