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SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NOS.: ACJC 2008-122 and ACJC 2008-136

IN THE MATTER OF JAMES B. CONVERY, JUDGE OF THE SUPERIOR COURT	**PRESENTMENT**

The Advisory Committee on Judicial Conduct ("Committee" or "ACJC") hereby presents to the Supreme Court its Findings and Recommendation in this matter in accordance with Rule 2:15-15(a) of the New Jersey Court Rules. The Committee's Findings demonstrate that the charges set forth in the Formal Complaint against James B. Convery, Judge of the Superior Court ("Respondent"), have been proven by clear and convincing evidence. The Committee recommends that the Respondent be publicly reprimanded.

On April 1, 2009, the Committee issued a Formal Complaint in this matter, which contained two primary allegations against Respondent: (1) that Respondent made disrespectful and insulting comments to a litigant appearing before him in violation of Canons 1, 2, 3A(2) and 3A(3) of the Code of Judicial Conduct and Rule 2:15-8(a)(6) of the New Jersey Court Rules; and (2) that

Respondent made an undignified and discourteous comment, which also created the appearance of ethnic bias, to an attorney appearing before him in violation of Canons 1, 2, 3A(2), 3A(3) and 3A(4) of the Code of Judicial Conduct and Rule 2:15-8(a)(4) and Rule 2:15-8(a)(6) of the New Jersey Court Rules. The Respondent filed an Answer to the Complaint on May 5, 2009 in which he admitted most of the factual allegations of the Formal Complaint and set forth certain Affirmative Defenses.

Respondent waived his right to a formal hearing in this matter. Exhibits were offered by both the Presenter and Respondent and accepted into evidence by the Committee. See P-1 through P-13 and R-1 and R-2.

After carefully reviewing all of the evidence, the Committee made factual determinations, supported by clear and convincing evidence, which form the basis for its Findings and Recommendation.

I. FINDINGS

A. Factual and Procedural Background

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1969. At all times relevant to this matter, Respondent was a Judge of the Superior Court of New Jersey, Chancery Division, Family Part, in the Essex Vicinage, a position he continues to hold.

On September 20, 2007, Respondent presided over a motion hearing in the matter of Martha A. Kozielski v. Joseph Kozielski, Jr., FM-07-819-01. During the hearing, counsel to Mr. Kozielski, the defendant, advised Respondent that her client wears a hearing aid, to which Respondent replied, "What?," prompting others in the courtroom to laugh. P-2 at T32-3 to 5 and P-3. Later on, Mr. Kozielski's counsel commented on various surgeries her client had undergone: "[S]ince the divorce, he's had five knee operations, a back operation, a hip and knee replacement and a separated shoulder." P-2 at T48-12 to 15. In response, Respondent stated, "It's that new show, Bionic Woman. You might be better off." Id. at T48-16 to 17. Mr. Kozielski and his counsel filed separate grievances with the ACJC regarding Respondent's conduct during the hearing and his statements to Mr. Kozielski and his counsel. P-4 and P-5.

On January 4, 2008, Respondent presided over another motion hearing in the matter of Benjamin Taylor v. Sandra Mazara Taylor, FM-07-1453-07, in which the plaintiff was represented by Ivette R. Alvarez, Esq. At some point during the hearing, an issue arose regarding the production of plaintiff's Social Security earnings statements. Upon learning from Ms. Alvarez that plaintiff did not possess Social Security earnings statements, Respondent appeared incredulous and began asking others in the courtroom if they received Social Security

earnings statements annually. P-6 at T16-4 to 19. Ms. Alvarez advised Respondent that she had not received a Social Security earnings statement for the last three years to which Respondent replied, "Well, when did you become an illegal alien?" Id. at T16-20 to 17-4. Ms. Alvarez took offense at the comment and advised Respondent that she thought his remark was "totally inappropriate." Id. at T17-7 to 8. Ms. Alvarez left the courtroom prior to the conclusion of the hearing. When she returned approximately ten minutes later, Respondent apologized to her. Id. at T20-11 to 12. Ms. Alvarez filed a complaint with the Committee regarding Respondent's remark.

On March 6, 2008, Respondent appeared before the Committee for an Informal Conference at which time the Committee questioned Respondent about the comments he made in both the Kozielski and Taylor matters. Regarding the Kozielski matter, Respondent testified that it was never his intention to "impugn" Mr. Kozielski's hearing condition by his remark, "What?," but acknowledged the appearance of impropriety it created and apologized for it. P-13 at T6-5 to 8. Respondent similarly denied any intention to offend Mr. Kozielski as a result of his reference to the "Bionic Woman" and testified he only meant to convey that one was often "better off" after such surgeries. Id. at T6-21 to 7-2. Respondent admitted that he found Mr.

Kozielski's reaction to the "Bionic Woman" comment to be "reasonable." Id. at T7-5 to 10.

Regarding the comment he directed to Ms. Alvarez in the Taylor matter, Respondent testified that he recognized it was "inappropriate" but further indicated that he did not intend it to be a "bias statement or any other derogatory statement." Tr. 3-12 to 4-3. Respondent asserted that the statement was a "blip" related to the parties' discussion about Social Security statements, and that he apologized immediately to Ms. Alvarez after making his comments. Id.

B. Analysis

The Formal Complaint against Respondent charged him with violating Canons 1, 2, 3A(2) and 3A(3) of the Code of Judicial Conduct and Rule 2:15-8(a)(6) of the New Jersey Court Rules as a result of the comments he directed to Mr. Kozielski and his counsel and with violating Canons 1, 2, 3A(2), 3A(3), and 3A(4) of the Code of Judicial Conduct and Rule 2:15-8(a)(4) and (a)(6) of the New Jersey Court Rules as a result of his statement to Ms. Alvarez. The charges in question are supported by clear and convincing evidence, and we find Respondent's conduct violated the cited Canons of the Code of Judicial Conduct as well as Rule 2:15-8(a)(6).

Canon 1 requires judges to maintain high standards of conduct so that the integrity and independence of the Judiciary

is preserved. Canon 2A directs that judges conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the Judiciary. The cited provisions of Canon 3A of the Code of Judicial Conduct state:

(a) Canon 3A(2): A judge should maintain order and decorum in judicial proceedings.

(b) Canon 3A(3): A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity….

(c) Canon 3A(4): A judge should be impartial and should not discriminate because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or disability.

Finally, Rule 2:15-8(a)(4) prohibits intemperate judicial conduct, while Rule 2:15-8(a)(6) prohibits judicial conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

1. Respondent's Comments to Mr. Kozielski and His Attorney

Respondent not only admits making the comments in question to Mr. Kozielski and his attorney but their overall inappropriateness. He further offers, however, that the

statements were not made with "the intent to offend" or "be derogatory."

We accept Respondent's representations regarding his intent in making the remarks in question. Nevertheless, while Respondent may not have intended the comments to be humorous or sarcastic, they were apparently understood and interpreted that way, as evidenced by the laughter that occurred in response to Respondent's statements by others in the courtroom. Moreover, both Mr. Kozielski and his attorney took offense at the comments, interpreting them as deliberately "rude." We find these reactions reasonable and demonstrative of the inappropriateness of Respondent's conduct.

As held by the Supreme Court in IMO Albano, 75 N.J. 509, 514 (1978), "An attempt at judicial sarcasm or humor, directed at a litigant, witness, attorney ... has no place in a courtroom. It is deeply resented and inevitably demeans the judge himself." Here, Respondent's comments were minimally flippant and not befitting a court of law. Moreover, they created the appearance that Respondent was or could have been poking fun at Mr. Kozielski. In fact, Respondent offended both Mr. Kozielski and his counsel by his needless comments about Mr. Kozielski's highly personal situation. It was Respondent's obligation, under Canon 3A(2) and (3) of the Code of Judicial Conduct, to maintain the decorum of his courtroom and treat all those who

appear before him in an official capacity with dignity and respect. Respondent's statements to Mr. Kozielski were badly chosen and did not uphold either of these obligations.

By violating Canons 3A(2) and 3A(3), Respondent's conduct likewise violated Canons 1 and 2A of the Code of Judicial Conduct and Rule 2:15-8(a)(6) of the New Jersey Court Rules. Respondent's inappropriate comments damaged the integrity and dignity of the Judiciary and the public's confidence in the Judiciary.

2. Respondent's Statement to Ms. Alvarez

The Formal Complaint also charged Respondent with asking Ms. Alvarez, "When did you become an illegal alien," in open court and during a court proceeding. Like the comments to Mr. Kozielski, Respondent admits making the remark in question as well as its inappropriateness. He again submits, however, that the statement was not made "with the intention to offend, be derogatory or express any bias."

We find that Respondent's question to Ms. Alvarez was wholly inappropriate. Whatever its intent, the question, "When did you become an illegal alien," indisputably conveys an insinuation of national identification and ethnicity in a legal proceeding where such a reference had no place. Further, the term "illegal alien" was uttered in a context to convey an innuendo clearly connoting an individual who is not law-abiding or who has done

something improper. See 2009 ed. Dictionary.com, LLC (defining "illegal alien" as a "foreigner who has entered or resides in a country unlawfully or without the country's authorization."). To confront an attorney in a formal proceeding, where neither the attorney's conduct nor the topic of illegal activity were relevant, was highly disrespectful, insensitive, derogatory and injudicious in violation of Canons 3A(2) and 3A(3) of the Code of Judicial Conduct.

Further, Ms. Alvarez was deeply offended at the comment and interpreted it as a personal attack based upon her ethnicity: "Without a doubt [the statement] was aimed at me because I am Latina." We give weight to Ms. Alvarez's reaction and find it reasonable and understandable. We further credit, however, Respondent's representation that his statement to Ms. Alvarez was not intended as an expression of bias but rather was a clumsy and extreme response to a discussion concerning Social Security statements.

Regardless of whether the statement was rooted in ethnic or national basis or not, however, we find it minimally created the appearance that Respondent may harbor a personal bias against Ms. Alvarez due to her ethnicity or nationality. That appearance is entirely unacceptable and violates Canon 3A(4) of the Code of Judicial Conduct, which demands a judge's impartiality and prohibits discrimination by a judicial officer

"because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or disability." Bias or the appearance of bias is contemptible, has no place in a court proceeding and detracts from the impartiality that is the hallmark of our Judiciary.

Respondent's statement also created the precarious possibility that the parties to the dispute or outside observers could view his handling of the case as unfair or predisposed. Such remarks decrease public confidence in the integrity and impartiality of the judiciary in violation of Canons 1 and 2A of the Code of Judicial Conduct. See IMO Gaeta, ACJC 2002-171 (adopted by May 8, 2003 Supreme Court Order in D-140) ("A judge who makes [biased] remarks, even out of inadvertence or by speaking carelessly or loosely, creates in the context in which they were spoken the perception that he or she is biased and harbors prejudices that will lead to prejudgment, lack of objectivity and unfairness.").

For all of the above reasons, we find that Respondent's remark to Ms. Alvarez was inappropriate and violative of Canons 1, 2A, 3A(2), 3A(3) and 3A(4) of the Code of Judicial Conduct, as well as Rule 2:15-8(a)(4)and Rule 2:15-8(a)(6) of the New Jersey Court Rules.

II. RECOMMENDATION

The Committee recommends that Respondent be publicly reprimanded. Respondent's remarks in both the Kozielski and Taylor matters were gratuitous and inappropriate. In addition, they were interpreted in both cases as deliberately offensive and, in the Taylor matter, as deliberately discriminatory. These reactions cannot be overlooked. Such conduct undermines the integrity and independence of the Judiciary and decreases public confidence in the Judiciary as well.

Nevertheless, we credit Respondent's representations that his remarks, though inappropriate and badly chosen, were not generated by animus or underlying bias. Our review of this matter and our meeting with Respondent support that conclusion. For these reasons, the Committee respectfully recommends that Respondent be publicly reprimanded for the conduct at issue in this matter.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

January 27, 2010 By: Alan B. Handler /JMN
Alan B. Handler, Chair