

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

JOSEPH J. CERBONE,

**Determination**

a Justice of the Mount Kisco Town  
Court, Westchester County.

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THE COMMISSION:

Henry T. Berger, Esq., Chair  
Helaine M. Barnett, Esq.  
E. Garrett Cleary, Esq.  
Stephen R. Coffey, Esq.  
Mary Ann Crotty  
Lawrence S. Goldman, Esq.  
Honorable Daniel F. Luciano  
Honorable Juanita Bing Newton  
Honorable Eugene W. Salisbury  
Barry C. Sample  
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for  
the Commission

Kitson & Kitson (By Kevin J. Kitson and Catherine  
McCaffrey) for Respondent

The respondent, Joseph J. Cerbone, a justice of the  
Mount Kisco Town Court, Westchester County, was served with a  
Formal Written Complaint dated March 23, 1995, alleging that he  
made an improper, ex parte telephone call to the victim in an  
assault case and that he conducted arraignments in a police  
station. Respondent filed an answer dated April 19, 1995.

By order dated May 9, 1995, the Commission designated Robert L. Ellis, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 23, July 12 and August 8 and 16, 1995, and the referee filed his report with the Commission on October 12, 1995.

By motion dated November 30, 1995, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion on December 19, 1995. The administrator filed a reply dated December 22, 1995.

On January 11, 1996, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Mount Kisco Town Court for 17 years. He is a part-time judge who also practices law in Mount Kisco.

2. On May 24, 1994, respondent signed a warrant for the arrest of Edward Hicinbothem on a charge of Assault, Third Degree. Mr. Hicinbothem was accused of assaulting Susan McKee.

3. Respondent was acquainted with Mr. Hicinbothem's parents, who live across the street from close friends of respondent. As an attorney, respondent prepared a will for Mr. Hicinbothem's mother on February 3, 1986, and a will for his

father on October 8, 1987. Respondent represented Mr. Hicinbothem's brother in the purchase of a home in March 1992.

4. On May 24, 1994, Edward Hicinbothem was arrested and arraigned before respondent, who recognized the name and assumed that the defendant was related to his former clients. Respondent released Mr. Hicinbothem on his own recognizance and orally issued an Order of Protection in favor of Ms. McKee. The Order of Protection was reduced to writing the following day.

5. On May 25, 1994, respondent called Ms. McKee by telephone. There were no other parties to the conversation, and neither the prosecution nor the defense was given notice that the call would be made. Respondent told Ms. McKee that she could choose whether to continue the case in his court or have it transferred to Family Court. Respondent also said that Mr. Hicinbothem appeared to be a "decent guy" who had "made a mistake" and did not pose a future threat to Ms. McKee. Respondent stated that he felt that Mr. Hicinbothem was "sincere about not causing any more trouble." Respondent also asked Ms. McKee whether she intended to permit Mr. Hicinbothem to visit their two-year old son and suggested that he might modify the Order of Protection to permit visitation.

6. As a result of the telephone conversation, Ms. McKee "felt that I had no one behind me, no support, and, by getting a phone call from a judge, I felt that maybe I was making a mistake by going through with these charges."

7. On August 11, 1994, Ms. McKee appeared before respondent and asked that the charge against Mr. Hicinbothem be dropped. However, the assistant district attorney handling the case objected. Without conducting a trial, respondent dismissed the charge.

8. At no time during the proceedings did respondent disclose that he had spoken with Ms. McKee or that he had previously represented Mr. Hicinbothem's family. He did not offer to disqualify himself.

As to Charge II of the Formal Written Complaint:

9. Between November 1993 and May 1994, respondent conducted night-time and weekend arraignments in the Mount Kisco police station, even though a courtroom was available in the same building. At various times, respondent arraigned defendants in the police station lobby, in the detectives' office and in a holding cell.

10. Since he was told in May 1994 that the police chief objected to the procedure, respondent has conducted all arraignments in the courtroom.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1,

100.2(a), 100.2(b), 100.2(c), 100.3(a)(4)<sup>1</sup> and 100.3(c)(1)<sup>2</sup>, and Canons 1, 2A, 2B, 3A(4) and 3C(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

It was improper for respondent to make an ex parte call to a witness in a criminal case before him and to make favorable comments about the defendant that might induce the witness to withdraw her complaint. (See, Matter of McCormick, 1994 Ann Report of NY Commn on Jud Conduct, at 84; see also, Matter of Abbott, 1990 Ann Report of NY Commn on Jud Conduct, at 69). A judge should not interfere in the presentation of a party's case (Matter of Finley, 1981 Ann Report of NY Commn on Jud Conduct, at 123, 128) and should not engage in communications that lend or appear "to lend the prestige of his office to advance...private interests" in a court proceeding. (Matter of Kiley v State Commission on Judicial Conduct, 74 NY2d 364, 368).

The appearance of favoritism is exacerbated in this situation because of respondent's past association with members of the defendant's family and because he eventually dismissed the charge without trial over the objection of the prosecutor.

Because respondent had previously represented the defendant's parents and his brother, respondent's impartiality

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<sup>1</sup>Now Section 100.3(B)(6)

<sup>2</sup>Now Section 100.3(E)(1)

might reasonably be questioned. (See, Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.3[c][1]; now Section 100.3[E][1]). Although his disqualification was not mandatory, he should have disclosed the prior business relationship and should have considered any objections to his presiding. (See generally, Matter of LaMountain, 1989 Ann Report of NY Commn on Jud Conduct, at 99; Matter of Merkel, 1989 Ann Report of NY Commn on Jud Conduct, at 111).

Once he had spoken to Ms. McKee, he also had an obligation to disclose the conversation and to hear objections to his continuing to preside. (See, Matter of LaMountain, supra).

As to Charge II, it is improper for a judge to hold court proceedings in a police station lobby, office or cell. (People v Schoonmaker, 65 Misc2d 393, 396 [Greene Co Ct]). Criminal arraignments must be open to the public. (Judiciary Law §4; see, Matter of Burr, 1984 Ann Report of NY Commn on Jud Conduct, at 72). "Absent a controlling exception, arraignments should be conducted in public settings. They should also be conducted in an appropriate place that does not detract from the impartiality, independence and dignity of the court." ("Police Court Arraignments," 1989 Ann Report of NY Commn on Jud Conduct, at 37).

By reason of the foregoing, the Commission determines that the appropriate sanction is admonition.

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur as to sanction.

Judge Salisbury dissents only as to the allegations in Paragraph 4 of Charge I concerning the favorable comments by respondent concerning Mr. Hicinbothem and votes that those allegations be dismissed.

Mr. Cleary dissents only as to the allegations in Paragraph 7 of Charge I concerning respondent's failure to disclose and offer to disqualify himself and votes that those allegations be dismissed.

Ms. Crotty and Mr. Sample were not present.

Judge Luciano was not a member of the Commission when the vote in this matter was taken.

#### 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 21, 1996

Henry T. Berger  
Henry T. Berger, Esq., Chair  
New York State  
Commission on Judicial Conduct