

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

JOSEPH J. CERBONE,

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

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Raoul Lionel Felder, Esq.¹
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission
Richard E. Grayson for Respondent

¹ Mr. Felder was appointed to the Commission on August 25, 2003. The vote in this matter was taken on May 21, 2003.

The respondent, Joseph J. Cerbone, a Justice of the Mount Kisco Town Court, Westchester County, was served with a Formal Written Complaint dated August 6, 2002, containing two charges. Respondent filed an answer dated August 26, 2002.

By Order dated October 3, 2002, the Commission designated Robert H. Straus, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 3, 2002, in New York City, and the referee filed his report with the Commission dated March 21, 2003.

The parties submitted briefs with respect to the referee's report. At the Commission's request, the parties submitted supplemental briefs with respect to the applicability of Sections 100.1 and 100.2(A) of the Rules Governing Judicial Conduct. On May 21, 2003, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has served as a part-time justice of the Town of Mount Kisco since 1979. He is an attorney who was admitted to the bar in 1966.

As to Charge I of the Formal Written Complaint:

2. Respondent was retained by Diane Treanor shortly after the death of her father, Anthony De Laura, on July 19, 1997, to handle the probate of the estate. Ms. Treanor was the named executrix in the will, which had been drafted by respondent.

3. On or about July 8, 1999, New York State issued a refund check in the amount of \$18,393.36, payable to the order of "Diane Treanor, executrix, c/o Joseph

J. Cerbone, Esq.”

4. Respondent deposited that check into his attorney escrow account at the Hudson Valley Bank, without Ms. Treanor’s endorsement, knowledge or consent. Respondent thereby engaged in conduct that adversely reflects upon his fitness as a lawyer, in violation of DR 1-102(A)(7) of the Code of Professional Responsibility.

5. On or about July 12, 1999, respondent issued check #1433 in the sum of \$6,490.00 from his attorney trust account, payable to his own order. That sum represented legal fees allegedly due and owing respondent with respect to the estate of Anthony De Laura.

6. Respondent issued check #1433 without the knowledge and/or consent of Ms. Treanor, the executrix, and thereby converted funds belonging to the De Laura estate.

7. By converting funds entrusted to him to be held in escrow, respondent breached his fiduciary duty to maintain a duly-constituted escrow account. Such conduct adversely reflects upon respondent’s fitness as a lawyer, in violation of DR 1-102(A)(7) of the Code of Professional Responsibility.

8. As a result of the misconduct set forth above, respondent was suspended from the practice of law for one year, commencing on June 13, 2002, by the Appellate Division, Second Department (295 AD2d 66 [2d Dept 2002]).

As to Charge II of the Formal Written Complaint:

9. In 1996 the Commission issued a public admonition to respondent

for, *inter alia*, making an improper *ex parte* telephone call to the complainant/witness in a criminal assault case over which respondent was presiding. As a result of respondent's remarks, the complainant was persuaded to request that the charges be dismissed. Respondent, who had previously represented the defendant's parents and brother in unrelated matters, then dismissed the charges, over the District Attorney's objections, without disclosing his prior relationships or the telephone call. The Grievance Committee for the Ninth Judicial District subsequently issued a letter of admonition to respondent based upon the same conduct.

10. From November 2001 through August 2002, respondent engaged in behavior in the Mount Kisco Town Court which is set forth in paragraphs 11-15 below.

11. Respondent prepared and distributed to defense attorneys who appeared before him in criminal cases a form letter which he asked them to complete and mail to the office of the District Attorney. The form letter disclaimed any professional or social relationship between the defendant and respondent.

12. In distributing the form letter, respondent frequently made remarks to the effect that the District Attorney had previously filed a complaint against him which had cost him half a million dollars to defend against and that due to illnesses in his family he had neither the time or money to defend himself against future complaints. Respondent requested that the defense attorneys send the completed forms to the District Attorney to show that he had no relationship with their clients.

13. Pursuant to respondent's request, defendants' attorneys sent

numerous letters to the District Attorney.

14. Respondent recused himself *sua sponte* from four shoplifting cases while stating that he was doing so because the District Attorney had failed to prosecute former Mount Kisco employees for their private use of computers belonging to the Town, despite clear evidence of their crimes. As a result of respondent's recusals, the cases were to be reassigned to respondent's co-justice, sitting the following month.

15. On several occasions, respondent stated to courtroom attendees that his office telephone was "tapped," that the District Attorney was keeping "dossiers" on him, and that he was "being watched."

16. In making the statements and taking the actions described in paragraphs 11-15, respondent acted vindictively, seeking to retaliate against the District Attorney for having made the complaint which had led to respondent's admonition by the Commission and by the Grievance Committee for the Ninth Judicial District.

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)(2), 100.3(B)(3), 100.3(B)(4), 100.3(B)(7), 100.4(A)(2) and 100.4(A)(3) of the Rules Governing Judicial

Conduct² and engaged in conduct that adversely affects his fitness to perform the official duties of a judge pursuant to Article 6, Section 22(a) of the Constitution of the State of New York and Section 44 of the Judiciary Law. Charge I and Charge II, paragraphs 8(B), 8(C), 8(D) and 9, of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Paragraphs 8(A) and 8(E) of Charge II are not sustained and therefore are dismissed.

Considered together, respondent's misbehavior on the bench and his financial improprieties as an attorney establish that he lacks the judgment and temperament to sit on the bench and is unfit for judicial office.

Respondent's financial improprieties as an attorney, for which he was suspended for one year from the practice of law, constitute serious misconduct. As found by the Appellate Division, respondent converted funds entrusted to his care and made an unauthorized deposit into his attorney escrow account. *Matter of Cerbone*, 295 AD2d 66 (2d Dept 2002). Those facts, which were established in the disciplinary proceeding before the Appellate Division, may not be relitigated here (*see Matter of Tamsen v.*

² Although earlier this year the Commission was barred from enforcing Sections 100.1 and 100.2(A) of the Rules (*Spargo v. NYS Comm'n on Jud Conduct*, 244 F Supp2d 72 [NDNY 2003]), the U.S. Court of Appeals for the Second Circuit issued a temporary stay of the *Spargo* decision on May 8, 2003, and extended the stay pending appeal on May 20, 2003. As there is no bar to enforcing those provisions, we find that respondent's conduct violated Sections 100.1 and 100.2(A), as charged. We further find that the other cited provisions, standing alone, support the finding of misconduct and the sanction imposed.

Commn on Jud Conduct, 100 NY2d 19 [2003]). Such fiduciary misdeeds by a judge who is permitted to practice law are incompatible with the high standards of conduct, both on and off the bench, required by the Rules.

On the bench, respondent used his courtroom as a forum for expressing his personal grievances against the District Attorney, whose previous complaint had led to respondent's admonition in 1996. Respondent's gratuitous distribution to defense attorneys of a form letter, addressed to the District Attorney, in which the defendant disclaimed any relationship with respondent served no salutary purpose but was simply a retaliatory demonstration of pique. In distributing the letter, respondent frequently stated that it had cost him a half a million dollars to defend himself against the District Attorney's complaint, that the District Attorney was keeping "dossiers" on him and that his telephone was being "tapped." As the referee concluded, such hostile comments detracted from the dignity of his office and underscored the impression that the disclaimer form was merely "a contrivance which permitted [respondent] to express his anger."

Respondent decided to disqualify himself in four shoplifting cases simply because he disagreed with the District Attorney's decision not to prosecute larceny charges against two former town employees. Under such circumstances, respondent's recusal was a demonstration of pique and was clearly improper.

Whatever respondent's personal views, it was inappropriate for respondent to use his courtroom as a soapbox for airing his grievances and to abuse his judicial powers pursuant to a personal agenda. Respondent's claim that his conduct was

somehow justified because of his purported mistreatment by certain public officials is unpersuasive and reflects a serious misunderstanding of the proper role of a judge.

Respondent's disciplinary history, including a prior admonition and four letters of dismissal and caution, bolsters the conclusion that he lacks sensitivity to the special ethical obligations of judges. *See Matter of Cerbone*, 1997 Ann Rep 83 (Comm on Jud Conduct, March 21, 1996). The underlying improprieties include a variety of activities, including, significantly, retaliatory conduct towards an attorney who had made a complaint against him (Letter of dismissal and caution, Nov. 4, 1999 [Appendix 7, Commission counsel's brief to the Commission]).

Respondent's claim that he desisted from particular acts of misconduct whenever they were pointed out to him is hardly reassuring. He repeatedly failed to recognize and avoid misconduct. We are also unpersuaded by respondent's argument that his various misdeeds are, at worst, minor, unrelated transgressions that do not indicate a lack of fitness for judicial office. Respondent's apparent inability or unwillingness to learn from his past mistakes, to recognize misconduct and to adhere to the high ethical standards required of judges demonstrates that he is unfit to serve as a judge. "[T]he purpose of judicial disciplinary proceedings is 'not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents.'" *Matter of Reeves v. Comm on Jud Conduct*, 63 NY2d 105, 111 (1984), quoting *Matter of Waltemade*, 37 NY2d (a), (lll) (Ct on the Jud 1975).

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Ms. Hernandez, Ms. Moore, Mr. Pope and Judge Ruderman concur.

Mr. Goldman dissents only as to Charge II, paragraph 8(D) concerning respondent's statements that his telephone has been "tapped" and the District Attorney is keeping "dossiers" on him, and votes to dismiss that allegation.

Judge Luciano and Judge Peters were not present.

CERTIFICATION

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

Dated: September 19, 2003

A handwritten signature in black ink, appearing to read "H. T. Berger", is written over a solid horizontal line.

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