

**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

W. JOSEPH EMBSER,

a Justice of the Wellsville Town Court, Allegany  
County.

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**Determination**

THE COMMISSION:

Henry T. Berger, Esq., Chair  
Stephen R. Coffey, Esq.  
Mary Ann Crotty  
Lawrence S. Goldman, Esq.  
Honorable Daniel F. Luciano  
Honorable Frederick M. Marshall  
Honorable Juanita Bing Newton  
Alan J. Pope, Esq.  
Honorable Eugene W. Salisbury  
Barry C. Sample  
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the  
Commission

Honorable W. Joseph Embser, pro se

The respondent, W. Joseph Embser, a justice of the Wellsville Town Court,  
Allegany County, was served with a Formal Written Complaint dated May 13, 1996, alleging  
that, as an attorney, he mishandled an estate. Respondent filed an answer dated June 4, 1996.

By motion dated October 3, 1996, the administrator of the Commission moved for  
summary determination and a finding that respondent's misconduct had been established.

Respondent opposed the motion by affidavit dated October 22, 1996. The administrator filed a reply dated October 29, 1996. By determination and order dated February 4, 1997, the Commission granted the motion.

The administrator filed a memorandum as to sanction. Respondent neither filed a memorandum nor requested oral argument, but, on March 11, 1997, he submitted a letter challenging the finding of misconduct. The parties were notified that the Commission would consider the letter as an application to reconsider. The administrator filed a response to the application on March 19, 1997.

On March 27, 1997, the Commission denied the application for reconsideration. Thereafter, it considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Wellsville Town Court since 1979. He was acting justice of the Wellsville Village Court from 1966 to 1968. He is a part-time judge who practiced law in Wellsville from 1965 to 1995. He was disbarred by the Appellate Division, Fourth Department, on March 8, 1996, based on the conduct found herein.

2. Respondent drafted a Last Will and Testament for Edward J. Antoon. The will was executed on May 9, 1989, and Mr. Antoon died on September 26, 1989, at age 83.

3. Mr. Antoon's wife, Edna, was named executrix of the estate. Respondent was retained as attorney for the estate in October 1989.

4. Respondent opened an account at Norstar Bank in the name of "Edward J. Antoon Estate, Edna M. Antoon, Executrix." Mrs. Antoon was the signatory, but respondent maintained exclusive control over the checks and the check register of the account. The monthly statements were sent to respondent's law office.

5. On October 24, 1989, Mrs. Antoon gave respondent a General Power of Attorney. Shortly thereafter, she moved to Ohio to live with relatives.

6. Between October 30, 1989, and April 14, 1993, 50 checks totalling \$399,320 were drawn on the estate account and made payable to respondent.

7. There was no express retainer agreement regarding respondent's legal services on behalf of the estate. He never prepared or submitted any billing statements for his legal services, and he never specifically discussed with Mrs. Antoon any of the checks made payable to him.

8. On June 25, 1990, respondent prepared and submitted a Petition to Determine Estate Tax in which he listed his total attorney's fees to complete the estate as \$156,575, even though he eventually received a total of \$399,320. In the document, respondent reported that he would receive \$99,000 in attorney's fees in 1990, even though he had already received that amount when the petition was filed on June 25, 1990. In fact, respondent paid himself an additional \$21,000 in 1990, bringing the total for that year to \$120,000. Similarly, respondent listed in the petition that he was to be paid \$10,555 in 1991; he actually paid himself \$82,500.

9. With the petition, respondent and Mrs. Antoon signed under penalty of perjury a Declaration of Executor's Commissions and Attorney's Fees and submitted it to the Internal Revenue Service. It was never amended.

10. Of the 50 checks, the first 17, totalling \$174,520, were signed by Mrs. Antoon. Respondent has acknowledged that at least some of them were pre-signed in blank.

11. Between April 4, 1991, and March 13, 1992, respondent issued himself 18 checks, totalling \$106,200, and signed by him as power-of-attorney. During this period, all of the other checks drawn on the estate account were signed personally by Mrs. Antoon.

12. Mrs. Antoon died on March 16, 1992. Pursuant to Edward Antoon's will, respondent became successor executor. After Mrs. Antoon's death, respondent issued himself another 15 checks, totalling \$118,600. He listed these payments as attorney's fees and executor's commissions.

13. As attorney and sole fiduciary for the estate, respondent failed to obtain court approval for these payments, as required by SCPA 2110, 2111, 2310 and 2311. He received the payments without filing an affidavit of fees and commissions, as required by the Uniform Rules for Surrogate's Court, 22 NYCRR 207.60(a) and (e).

14. Respondent has acknowledged under oath that he experienced financial difficulties during the time that he acted as attorney for the estate. The funds that he received from the estate account were used to meet expenses of his law practice and his personal expenses for himself and his family.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1 and 100.2(a), and Canons 1 and 2A of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Although there was no express agreement between respondent and the executrix as to what his legal fees would be, since Mrs. Antoon signed the Declaration of Executor's Commissions and Attorney's Fees, it can be concluded that she authorized that respondent be paid \$156,575 for handling the estate. Nonetheless, respondent paid himself an additional \$124,145 without her knowledge or permission before Mrs. Antoon died and an additional \$118,600 after she died without obtaining court permission, as required by law. Thus, in violation of his sworn duty as fiduciary to the estate, respondent took a total of \$242,745 in unauthorized fees.

In a sworn statement to the I.R.S., respondent declared in 1990 that his fees would be \$156,575. He never amended this, even though he converted an additional \$224,745 in attorney's fees and took \$18,000 in commissions as successor executor.

These acts constitute gross abuses of the trust placed in him by his client and the state that licensed him to practice law. By his unprincipled conduct as an attorney, he has demonstrated that he lacks the integrity to sit on the bench and judge the conduct of others. (See Matter of Boulanger v State Commission on Judicial Conduct, 61 NY2d 89).

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

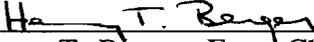
Mr. Berger, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Judge Luciano, Judge Marshall and Mr. Sample were not present.

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: April 2, 1997

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