

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

BERTRAM R. GELFAND,

Surrogate, Bronx County.

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
John J. Bower, Esq.
David Bromberg, Esq.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

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

Shea & Gould (By Milton S. Gould and Michael S.
Feldberg) for Respondent

The respondent, Bertram R. Gelfand, judge of the Surrogate's Court, Bronx County, was served with a Formal Written Complaint dated June 20, 1986, alleging that he engaged in a course of misconduct in connection with a female law assistant in his court. Respondent filed an answer dated July 28, 1986.

By order dated July 30, 1986, the Commission designated the Honorable Matthew J. Jasen as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 14, 15, 16, 17, and 21, 1986, and the referee filed his report with the Commission on December 31, 1986.

By motion dated January 2, 1987, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be removed from office. Respondent opposed the motion on February 9, 1987. The administrator filed a reply on February 13, 1987.

On February 20, 1987, 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.

1. Respondent is Surrogate of Bronx County and has been since January 1, 1973.

2. Irene Gertel was employed by respondent as a law assistant on his court staff from March 1978 to May 1984, and from September 1984 to September 10, 1985. From July to September 1984, Ms. Gertel worked as an attorney for the Mental Health Information Service.

3. Respondent and Ms. Gertel had a sexual relationship from September 1978 to August 2, 1985.

4. In December 1980, respondent was confronted about the sexual affair by Ms. Gertel's husband, who threatened to inform respondent's wife about the affair. Respondent told Ms. Gertel's husband that the affair was over.

5. In December 1980, respondent requested Ms. Gertel's resignation because of the problems her husband was causing as a result of the affair. Her husband complained that Ms. Gertel's resignation had been requested for reasons other than merit.

6. In January 1981, respondent reconsidered his request for Ms. Gertel's resignation and allowed her to withdraw it. Shortly thereafter, sexual relations between respondent and Ms. Gertel resumed.

7. Ms. Gertel and her husband separated in March 1984.

8. In May 1984, respondent accused Ms. Gertel of having sexual relations with other men. Respondent requested and accepted Ms. Gertel's resignation because of his anger and jealousy over her purported affair with another man. Ms. Gertel resigned and subsequently went to work at the Mental Health Information Service ("MHIS").

9. The sexual relationship between respondent and Ms. Gertel continued during the period she worked at MHIS.

10. While she worked at MHIS, respondent accused Ms. Gertel of having an affair with a doctor with whom she worked.

11. In September 1984, respondent decided to rehire Ms. Gertel on a trial basis, over the objection of his chief law assistant.

12. In October 1984, respondent accompanied Ms. Gertel on a visit to her psychiatrist. Respondent told the psychiatrist that Ms. Gertel had been lying to the psychiatrist about her relationships with other men. Prior to visiting the psychiatrist, respondent drafted and had Ms. Gertel sign an agreement whereby she would be liable to him for \$100,000 if she revealed to anyone that he had accompanied her to the session.

13. On or about February 22, 1985, Ms. Gertel told respondent that she would be attending a weekend synagogue function at a friend's home. Respondent did not want her to attend the function and accused her of "going on the hunt" for men.

14. Because of his anger and jealousy, respondent informed Ms. Gertel by letter dated February 22, 1985, that her employment with the court was terminated, although no date for leaving was set.

15. Ms. Gertel then wrote a letter to respondent pleading for reinstatement and declaring that she had "lost all desire to go away for the weekend."

16. Upon receiving Ms. Gertel's letter, respondent in effect withdrew his decision to terminate her employment by not fixing a specific date by which she must leave the court.

17. Following this incident, respondent and Ms. Gertel continued to have sexual relations.

18. During the weekend of July 19, 20 and 21, 1985, respondent learned that Ms. Gertel had been dating and having sexual relations with Steven Kessler, an assistant district attorney in Bronx County. Respondent confronted Ms. Gertel about this affair, and she confirmed it.

19. Because of jealousy, respondent immediately demanded Ms. Gertel's resignation by Monday, July 22, 1985.

20. On July 22, 1985, Ms. Gertel submitted a letter of resignation to respondent but immediately requested permission to withdraw it. Respondent said that he would allow Ms. Gertel to withdraw her resignation, contingent upon her agreement not to date other men and upon her calling Steven Kessler to end their relationship. With respondent listening in on an extension, Ms. Gertel called Mr. Kessler from respondent's chambers and ended their relationship, telling him that she had another lover, whom she did not identify.

21. On July 23, 1985, respondent summoned Ms. Gertel and Mr. Kessler to his chambers. Respondent told Mr. Kessler that he knew of his relationship with Ms. Gertel and repeatedly denigrated Ms. Gertel, calling her a "whore," a "slut," a

"bitch" and "fucked up." Respondent said that while Ms. Gertel had been "screwing and fucking" Mr. Kessler, she had also been "screwing and fucking" another boyfriend. Respondent said that he knew that Mr. Kessler and Ms. Gertel had broken up and told Mr. Kessler to "stay away" from her.

22. From July 23 to August 2, 1985, respondent and Ms. Gertel frequently discussed her employment status. Respondent repeatedly demanded that, as a condition of remaining on his staff, Ms. Gertel make a "total commitment" to him in their personal and sexual relationship and that she not date Mr. Kessler and other men.

23. On August 2, 1985, respondent told Ms. Gertel not to report for work the following Monday or thereafter unless she was prepared to make the "total commitment" to him that he desired. Ms. Gertel asked him to reconsider, and respondent said that he would. They then went to Ms. Gertel's home and had sexual relations. Later that day, they again discussed a "total commitment," and Ms. Gertel agreed to make it. Respondent agreed that Ms. Gertel could return to work the following Monday.

24. During the evening of August 2, 1985, respondent called Ms. Gertel at her home and asked whether she understood the commitment that she had made to him.

25. On August 3, 1985, at approximately 7:00 A.M., respondent called Ms. Gertel's home, but there was no answer.

After several more unanswered calls, respondent concluded that Ms. Gertel was with another man and became upset and jealous.

26. Respondent then began leaving obscene and annoying messages on Ms. Gertel's answering machine. He accused her of being "tied up with a customer," a "hypocritical liar" and a "bitch." He referred to Ms. Gertel's roommate as "the other whore you live with" and made vulgar references to oral sex and to "lies" from her "fucking lips."

27. Later on the morning of August 3, 1985, respondent left a message on Ms. Gertel's answering machine that she was "off the payroll, effective 5:00 P.M. Friday, August second," that she should "immediately mail in [her] parking permit and keys," and that she should not "show [her] face around this courthouse again." Respondent made these statements out of jealousy for personal reasons unrelated to Ms. Gertel's official duties.

28. Later on August 3, 1985, respondent, accompanied by Ms. Gertel's attorney, Michael Lippman, an employee of the court, drove to the courthouse and entered Ms. Gertel's office. Respondent and Mr. Lippman took various personal items from Ms. Gertel's desk, cabinet and walls and put them into two boxes. They then drove to Ms. Gertel's home and left the boxes on her porch. In doing so, respondent acted out of jealousy for personal reasons unrelated to Ms. Gertel's official duties.

29. Throughout August 3 and 4, 1985, respondent left numerous messages on Ms. Gertel's answering machine, many of which were obscene, annoying and otherwise offensive.

30. In an attempt to reach Ms. Gertel, respondent also left numerous offensive messages on Mr. Kessler's answering machine. One such call was made at about 2:30 A.M. on August 4, 1985. In another message, respondent threatened to go to Mr. Kessler's mother, Muriel, who was then the Deputy Public Administrator in the Bronx, an employee of respondent, in order to get to speak to Ms. Gertel.

31. Respondent, or Mr. Lippman at respondent's request, also placed calls to Ms. Gertel's roommate, her roommate's father, a friend, Ms. Gertel's brother and Mr. Kessler's grandmother in attempts to reach Ms. Gertel.

32. On Sunday, August 4, 1985, respondent and Mr. Lippman drove to Mr. Kessler's apartment building in search of Ms. Gertel. Respondent approached the doorman at Mr. Kessler's apartment building and identified himself as "Mike Lippman" in an attempt to reach Ms. Gertel at Mr. Kessler's apartment.

33. Later in the evening of Sunday, August 4, 1985, respondent confronted Ms. Gertel outside Mr. Kessler's apartment building, and the two of them walked around the neighborhood and talked. Ms. Gertel complained about having been abruptly taken off the payroll and asked to be allowed to remain until

September 4, 1985. Respondent said that he would put her on sick leave and allow her to stay until September 4.

34. Ms. Gertel told respondent in early August 1985 not to call her. Nonetheless, respondent left 30 obscene, annoying and otherwise offensive messages on her answering machine between August 3 and 5, 1985, and 39 additional obscene, annoying and otherwise offensive messages between August 5 and September 17, 1985.

35. On August 9, 1985, respondent appeared at Mr. Kessler's apartment building in an attempt to see Ms. Gertel. Mr. Kessler refused to allow respondent to enter his apartment but agreed to meet respondent in the lobby of the building. The two men then walked around the neighborhood. Respondent repeatedly asked personal questions about Mr. Kessler's relationship with Ms. Gertel. Respondent several times mentioned the name of Bronx County District Attorney Mario Merola and reminded Mr. Kessler to tell the truth because he was an assistant district attorney. After Mr. Kessler returned to his apartment, respondent twice called him on the building intercom, demanding to be let into the apartment and insisting that Ms. Gertel was in the apartment. When Mr. Kessler again refused to let respondent in, respondent threatened to speak with Mr. Merola. Respondent said that he would tell Mr. Merola that Mr. Kessler was "harboring" Ms. Gertel and that he should be fired from his job.

36. After his conversation with Mr. Kessler, respondent did meet with Mr. Merola to discuss Mr. Kessler's relationship with Ms. Gertel.

37. In late August or early September 1985, respondent called Deputy Chief Administrative Judge Milton L. Williams, who supervises all trial courts, including respondent's, in New York City. The hiring of all lawyers and nonjudicial personnel in the New York City court system is subject to Judge Williams' approval.

38. Respondent asked Judge Williams to view unfavorably any application for employment in the court system by Ms. Gertel.

39. On October 10, 1985, respondent made a second call to Judge Williams to discuss Ms. Gertel.

40. In December 1985, Ms. Gertel was hired as an associate in the law office of Emanuel Kessler, the father of Steven Kessler and the husband of Muriel Kessler, who at the time was Deputy Public Administrator in the Bronx.

41. Upon learning of Ms. Gertel's new employment, respondent summoned Mrs. Kessler to his chambers to ask why he had not been consulted prior to Ms. Gertel's hiring. With Mrs. Kessler before him, respondent called Emanuel Kessler by telephone. Emanuel Kessler suggested that they discuss the matter in person.

42. Emanuel Kessler subsequently met with respondent in respondent's chambers for about 45 minutes. Respondent denigrated Ms. Gertel and indicated his surprise that the Kesslers had hired her without consulting him. Respondent also told Emanuel Kessler that Mrs. Kessler's work in the court was "marginally effective."

43. Respondent's judgment as to each of his actions was affected by his personal relationship with Ms. Gertel. His conduct conveyed the unmistakable appearance that he was acting out of jealousy and not on the basis of merit.

44. Respondent lacked candor when he testified in this proceeding:

a) that he requested Ms. Gertel's resignation in December 1980 because her work was inadequate;

b) that his request for Ms. Gertel's resignation in May 1984 was because her work was inadequate;

c) that he decided to terminate Ms. Gertel's employment on February 22, 1985, because her work was inadequate;

d) that he demanded Ms. Gertel's resignation on July 22, 1985, because her work was inadequate;

e) that a meeting on July 23, 1985, with respondent, Ms. Gertel and Steven Kessler never took place;

f) that he never made a telephone call to Mr. Kessler at 2:30 A.M. on August 4, 1985;

g) that he never approached a doorman and gave a false identity in an attempt to gain entrance to the building;

h) that he did not call Steven Kessler on August 9, 1985, and threaten to have him fired from his job;

i) that he did not attempt to keep Ms. Gertel from obtaining other employment in the court system;

j) that he did not initiate a meeting with Emanuel Kessler in December 1985 and express displeasure that he had not consulted with respondent before hiring Ms. Gertel; and,

k) that at all times he kept separate his personal and professional relationships with Ms. Gertel.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The gravamen of this proceeding is not the fact that respondent had become involved in an extra-marital relationship. However, it is evident from this record that respondent, for a period of years, based staffing decisions in his court on reasons other than merit in order to further his own interests in maintaining a personal relationship with a court employee. Such repeated abuse of judicial authority constitutes serious

misconduct. Matter of Shilling v. State Commission on Judicial Conduct, 51 NY2d 397 (1980); Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74 (1980).

Six times in five years, respondent decided to hire or fire a law assistant not because of the quality of her work but because he was trying to control her personal life and force her to meet his personal demands for fidelity. On one of these occasions, respondent decided to re-hire her over the objections of his chief law assistant. Such decisions could not have been made without a demoralizing effect on other staff and a deleterious effect on the operation of the court.

Respondent's raid on the law assistant's office, numerous annoying and obscene telephone calls, confrontations with the law assistant's friends, use of a false identity and attempts to impair her future employment deviated significantly from the high standards of conduct expected of judges, on and off the bench. Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465 (1980); Matter of Steinberg, supra; Matter of Cerbone v. State Commission on Judicial Conduct, 61 NY2d 93 (1984).

Respondent compounded his misconduct by his repeated lack of candor in this proceeding. As the distinguished referee concluded, "Respondent lacked candor in this proceeding as to most material issues. His testimony was frequently evasive, inconsistent and, in many respects, incredible." Such deception

is antithetical to the role of a judge who is sworn to uphold the law and seek the truth. Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550 (1986); Steinberg, supra at 78 [fn]. The giving of false testimony is inexcusable and destructive of a judge's usefulness on the bench. Matter of Perry, 53 AD2d 882 (2d Dept. 1976).

It is uncontroverted that respondent's reputation as a judge is superior. However, as the Court of Appeals noted in Matter of Shilling, supra at 399:

A Judge whose conduct off the Bench demonstrates a blatant lack not only of judgment but also of judicial temperament and complete disregard of the appearances of impropriety inherent in his conduct, should be removed from office notwithstanding that his reputation for honesty, integrity and judicial demeanor in the legal community has been excellent.

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

Mrs. Robb, Mr. Bromberg, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Rubin, Judge Shea and Mr. Sheehy concur.

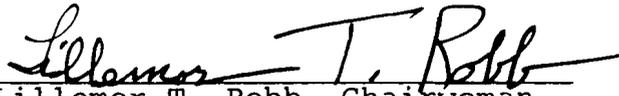
Mr. Bower concurs in a separate opinion.

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 20, 1987


Lillemor T. Robb, Chairwoman
New York State
Commission on Judicial Conduct

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	:	CONCURRING OPINION
	:	<u>BY MR. BOWER</u>
	:	
BERTRAM R. GELFAND,	:	
Surrogate, Bronx County.	:	
	:	
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I concur in the finding of misconduct and the sanction of removal. I write separately only because I should like to emphasize my reasons for imposing the most severe sanction available in the case of a highly respected and competent judge.

There are aspects of our personal lives that should not be a matter of public scrutiny. Some of the underlying charges against respondent and their origins fall in this area. If we start with the premise that the right of an individual to privacy is more than illusory, we must be careful in considering the borders of that privacy and limit our inquiry at some reasonable point where we do not violate them.

Given the nature and length of the relationship between respondent and Ms. Gertel, the language used, either in person or on the telephone, discussions of intimate matters, commentary on others who might threaten the relationship, fall, in my opinion,

within the ambit of an area protected by the right to privacy. I do not consider myself, or for that matter, any of my colleagues on the Commission, as having the duty to impose our sense of morality or good taste on the behavior at issue. Similarly, given the intense emotional atmosphere that pervaded the history of the relationship, just how far each party to it went to protect his or her imagined pride or feelings is a matter of judgment and taste which, in my opinion, is not for this Commission to oversee.

I perceive two important issues that are germane. First, was there a true abuse of judicial and administrative power by the respondent? Second, once the proceedings were begun, did he satisfy the standards of candor expected of a judge?

Turning to the first issue, I am willing to distinguish some of the facts which the learned Referee found. For instance, I think that under the peculiar circumstances that existed between respondent, a married man, and Ms. Gertel, initially a married woman, we must pay some heed to the emotion-charged expectations or demands that each one made on the other. Each disappointed the other. This provoked reactions in respondent that can only be described as pathetic. His demanding her resignation repeatedly, his attempts to prolong a cooling relationship, his trying to break up what he perceived as her budding romance with another, all fall within that highly

personal, private and emotion-charged area. So do the repeated annoying, lengthy and pathetic telephone calls. Of course, becoming a judge doesn't mean that one ceases being human, and respondent's behavior was pathetically human. Even when carried to the preposterous limits of respondent's actions, it still comes within the ambit of essentially private behavior.

What constitutes the true misconduct in this regard are the clear attempts by respondent to damage Ms. Gertel after the end of the relationship. His direct attempt to prevent her re-employment in the court system and his interference with her employment in the private sector are nothing but vindictive venting of his spleen. They are truly bilious misuses of judicial and administrative power. His calls to Judge Williams and his talks with Mr. Kessler cannot be justified. This behavior is judicial misconduct. Of course, while serious, it would not be sufficient ground for removal. It is the second issue facing the Commission which is far more troubling than the first.

When the Commission started an investigation based upon Ms. Gertel's complaints, the respondent gave false and misleading information and testimony in the following material respects:

(a) He testified repeatedly that on the four separate occasions that he demanded Ms. Gertel's resignation, he did so only because he was dissatisfied with her competence and work performance;

(b) He testified that a meeting with Ms. Gertel and Mr. Kessler on July 23, 1985 never took place;

(c) He testified that at all times, he kept his personal and professional relationships with Ms. Gertel separate and his requests for her resignation were not for personal reasons;

(d) He testified that he did not make certain telephone calls at 2:30 A.M. when, in fact, he did;

(e) He testified that an incident involving his giving a false name to a doorman at an apartment house, never took place;

(f) He testified that he did not call Ms. Gertel's friend on the building intercom and did not threaten to have him fired from his job;

(g) He testified that the circumstances of the meeting between him and Mr. Kessler at the apartment house did not come about as alleged by Mr. Kessler;

(h) He testified that he did not request Judge Williams to treat Ms. Gertel's application for future employment in the court system unfavorably; and,

(i) He testified that he did not initiate a meeting with Ms. Gertel's subsequent employer and

did not express displeasure at the fact that she had been hired by him.

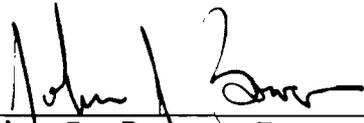
The above partial litany of misstatements convinced the learned Referee to conclude that the respondent lacked candor as to most material issues and his testimony was frequently evasive, inconsistent and in many respects, incredible. Even if one could find that the underlying course of conduct, private or otherwise, was highly improper but not sufficient for removal, his subsequent lack of candor is totally opposed to the role of a judge who is sworn to uphold the law and seek the truth. The office of judge required respondent to cooperate in the investigation of the charges against him. Cooperation not only implies but requires truth and candor. The giving of false testimony not only is inexcusable but is destructive of a judge's usefulness on the Bench.

Respondent submitted numerous character references and encomiums from highly placed, reputable sources. It is uncontroverted that his reputation as a judge has been superior. However, I weigh his conduct during these proceedings even more severely because of his superior intellect and find that his deviations from the truth are even more serious.

Respondent's emphasis on his emotion-charged and stressful period, bordering on irrational behavior in 1985, has no bearing on the issue of his utter lack of candor. He simply decided to "stonewall" the charges without being able to bestow

internal logic on his story. His conduct during these proceedings bespeaks a willful attempt to pervert the truth. It is this which leads me to the inescapable conclusion that respondent has forfeited his right to remain on the Bench.

Dated: March 20, 1987



John J. Bower, Esq., Member
New York State
Commission on Judicial Conduct