

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

ROBERT W. KELSO,

a Justice of the Montgomery Town
Court, Orange County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
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 Straus, Of Counsel)
for the Commission

G. R. Bartlett, Jr. for Respondent

The respondent, Robert W. Kelso, is an attorney and has been a justice of the Montgomery Town Court, Orange County, since 1973. He was served with a Formal Written Complaint dated October 4, 1982, alleging certain improprieties in connection

with his private law practice. Respondent filed an answer dated October 21, 1982.

By order dated January 4, 1983, the Commission designated Richard D. Parsons, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on March 9, 1983, and the referee filed his report with the Commission on May 27, 1983.

By motion dated June 20, 1983, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion by cross-motion on July 11, 1983. The Commission heard oral argument on the motion on July 21, 1983, 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. In 1972, respondent was retained by Charles Duryea to pursue legal claims arising from an injury received in an accident at his place of employment.

2. In 1975, Mr. Duryea received approximately \$2,000 in satisfaction of a Workers' Compensation claim arising from his injury.

3. Although respondent knew that Section 11 of the Workers' Compensation Law precluded a civil action for damages

for personal injuries arising from the accident, he told Mr. Duryea that he would bring such a claim. He did not advise Mr. Duryea that such an action was precluded.

4. From 1975 to 1979, respondent made numerous misrepresentations to Mr. Duryea. He told Mr. Duryea that he had commenced a civil action for damages, that the action had been placed on the court calendar and that it had been adjourned several times. In fact, respondent had commenced no action and all of his statements were false.

5. Respondent made these misrepresentations to deceive Mr. Duryea into believing that his action had been commenced and was proceeding.

6. On January 4, 1980, respondent instituted a civil action on Mr. Duryea's behalf, although he knew that that recovery on the claim was then barred by both Section 11 of the Workers' Compensation Law and the statute of limitations. He did not advise Mr. Duryea that recovery was barred. Respondent withdrew the complaint after Mr. Duryea retained another attorney and filed a grievance against respondent.

As to Charge II of the Formal Written Complaint:

7. On February 20, 1980, respondent offered to pay Mr. Duryea \$10,000 for the purpose of inducing him not to file a grievance for professional misconduct against respondent. Respondent confirmed the offer in writing on February 21, 1980.

8. Because Mr. Duryea thereafter filed the grievance, respondent never paid the money as promised.

As to Charge III of the Formal Written Complaint:

9. On the basis of Mr. Duryea's grievance, formal charges were instituted against respondent, and on June 1, 1982, he was suspended from the practice of law for one year by the Appellate Division, Second Department.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a) and 100.3(a)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A and 3A(1) of the Code of Judicial Conduct. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established. Respondent's cross-motion is denied.

Over a period of years, in dozens of conversations, respondent deliberately deceived a client who had placed his trust in respondent to give truthful legal advice and conscientious legal assistance. In violating that trust, respondent prejudiced the administration of justice. Such misconduct by one who also sits as a judge "engender[s] disrespect for the entire judiciary." In re Ryman, 394 Mich 637, 232 NW2d 178, 184 (1975).

Respondent compounded his misconduct by offering his client \$10,000 to dissuade him from filing a grievance -- a right available to the client as a matter of law. Respondent's offer was malum in se. By this act, respondent further destroyed public confidence in his ability to adhere to the high standards of conduct expected of every judge.

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

Mrs. Robb, Mrs. DelBello, Mr. Kovner, Judge Rubin, Judge Shea and Mr. Sheehy concur.


Mr. Cleary and Judge Ostrowski dissent as to sanction only and vote that respondent be censured.

Judge Alexander, Mr. Bower and Mr. Bromberg 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: September 21, 1983


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

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DISSENTING OPINION BY
MR. CLEARY IN WHICH
JUDGE OSTROWSKI JOINS

On this record, I do not feel that the sanction of removal is appropriate. Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances. Matter of Steinberg, 51 NY2d 74, 83. The Court of Appeals recently indicated that removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment. Matter of Cunningham, 57 NY2d 270, 275, citing Matter of Shilling, 51 NY2d 397, 403, and Matter of Steinberg, supra, at 81. Under the circumstances of this case, I feel that censure is the appropriate sanction.

Dated: September 21, 1983



E. Garrett Cleary, Esq.