

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

WAYNE R. PEBLER,

a Justice of the Roxbury Town Court,
Delaware County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Taa Grays, Esq., Vice Chair
Jodie Corngold
Honorable John A. Falk
Paul B. Harding, Esq.
Honorable Leslie G. Leach
Honorable Angela M. Mazzarelli
Honorable Robert J. Miller
Marvin Ray Raskin, Esq.
Ronald J. Rosenberg, Esq.
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and S. Peter Pedrotty, Of Counsel)
for the Commission

Young/Sommer LLC (by Kristin Laviolette Pratt) for respondent

Respondent, Wayne R. Pebler, a Justice of the Roxbury Town Court, Delaware
County, was served with a Formal Written Complaint dated March 27, 2020, containing

one charge. Respondent filed an Answer dated May 6, 2020. The Formal Written Complaint alleged that on June 13, 2018, August 1, 2018, and August 15, 2018, respondent (A) engaged in improper *ex parte* communications and publicly commented about charges pending against the defendant in *People v. Chad M. Ostrander* in the Roxbury Town Court and in the Delhi Town Court; and (B) made comments that created an appearance that respondent was biased against defendant Ostrander. The Formal Written Complaint further alleged that respondent engaged in the foregoing improper *ex parte* communications about the *Ostrander* cases notwithstanding that on June 29, 2009, the Commission sent respondent a Letter of Dismissal and Caution for, *inter alia*, engaging in improper *ex parte* communications with the parties and a non-party about a pending small claims matter.

On June 1, 2020, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On June 11, 2020, the Commission accepted the Agreed Statement and made the following determination:

1. Respondent, who is not an attorney, has been a Justice of the Roxbury Town Court, Delaware County, since January 2, 2002. His current term expires on December 31, 2021.

2. On June 8, 2018, Chad M. Ostrander was charged in the Roxbury Town Court with Reckless Endangerment in the first degree, a felony; Fleeing an Officer in a Motor Vehicle in the third degree, a misdemeanor; Reckless Driving, a misdemeanor; Aggravated Unlicensed Operation in the third degree, a misdemeanor; and 12 traffic infractions.

3. On June 13, 2018, Mr. Ostrander was charged in the Delhi Town Court with Promoting Prison Contraband in the first degree, a felony; Criminal Possession of a Controlled Substance in the fifth degree, a felony; and Criminal Sale of a Controlled Substance in the fourth degree, a felony.

4. On June 13, 2018, at the Roxbury Town Court, while Mr. Ostrander, defense counsel and the prosecutor were not present, respondent told a man in the courtroom that Mr. Ostrander was a “convict” with two prior felony convictions. He then described in detail the circumstances that led to the charges against Mr. Ostrander in the Roxbury Town Court, including that Mr. Ostrander had allegedly, without a driver’s license, sped past a flagman and “tried to run [a] cop over doing 92 miles an hour,” which respondent referred to as “asinine.” The conversation was captured by the court’s audio recording system. A transcript is annexed as Exhibit A to the Agreed Statement.

5. On June 13, 2018, at the Roxbury Town Court, while Mr. Ostrander, defense counsel and the prosecutor were not present, respondent initiated a conversation about Mr. Ostrander with another defendant and that defendant’s mother. Respondent told them that Mr. Ostrander had “16 tickets before this court” and that

“[h]e’s going to federal pen eventually ... over this, whatever he did.” Respondent also recounted that he had told Mr. Ostrander he was not entitled to assigned counsel because child support could not be considered as “part of [his] poverty level,” while complaining that Mr. Ostrander had children whom he could not afford to support. The conversation was captured by the court’s audio recording system. A transcript is annexed as Exhibit A to the Agreed Statement.

6. On August 1, 2018, at the Roxbury Town Court, while Mr. Ostrander, defense counsel and the prosecutor were not present, respondent told a woman in the courtroom details about a plea agreement that had been reached in Mr. Ostrander’s pending case in the Delhi Town Court. Respondent said Mr. Ostrander was “dealing drugs and they don’t seem to care,” and said “I’m sorry. If this is what’s happening, I mean, why would he have it up his back end if he’s not dealing?” The conversation was captured by the court’s audio recording system. A transcript is annexed as Exhibit B to the Agreed Statement.

7. On August 1, 2018, and August 15, 2018, at the Roxbury Town Court, while Mr. Ostrander and his attorney were not present, respondent made comments to the prosecutor and/or his court clerk, implying that he believed Mr. Ostrander to be a drug user and drug dealer, notwithstanding that at the time, Mr. Ostrander had no narcotics-related charges pending in the Roxbury Town Court. Respondent stated, *inter alia*, that:

- a. Mr. Ostrander had “drugs up his backside and good old mom lost her supplier.”

- b. “We’ve got to get the drugs back to mom.”
- c. “If he’s not using the illicit drugs, then what is he transporting them up his backside for?”
- d. “He’s running around us dealing more drugs.”

The August 1 and August 15 conversations were captured by the court’s audio recording system. Transcripts are annexed as Exhibit B and Exhibit C, respectively to the Agreed Statement.

8. By Letter of Dismissal and Caution dated June 29, 2009, a copy of which is annexed as Exhibit D to the Agreed Statement, respondent was cautioned by the Commission to abide by Section 100.3(B)(6) of the Rules after he engaged in unauthorized *ex parte* communications with each party and a non-party, in connection with *Joseph Giangioffe v. Kathleen Paige*, a small claims matter over which he was presiding. Respondent accepted the Letter of Dismissal and Caution without requesting a formal disciplinary hearing.

Additional Factors

9. On August 22, 2018, after the felony charge against Mr. Ostrander had been reduced to a misdemeanor, Mr. Ostrander pled guilty, with the assistance of counsel and in satisfaction of all the charges he faced in Roxbury Town Court, to Reckless Endangerment in the second degree, Fleeing an Officer in the third degree and Reckless Driving, all misdemeanors. Respondent sentenced Mr. Ostrander to one year in jail.

10. Respondent has been cooperative and contrite with the Commission throughout this inquiry. Respondent now recognizes that it was improper for him to

speak with members of the public about the merits of pending cases and pledges to refrain from such conduct in the future.

11. Respondent was acquainted with Mr. Ostrander prior to June 2018. From 1996 to 1998, respondent was employed as a study hall and substitute shop teacher at a middle school where Mr. Ostrander was a student. Respondent also knew Mr. Ostrander from having presided over other criminal cases in which Mr. Ostrander was a defendant. Additionally, respondent was aware of Mr. Ostrander's criminal history from reviewing his criminal history report.

12. Although respondent asserts that he harbored no actual bias against Mr. Ostrander, he now understands that his public comments about Mr. Ostrander created the appearance of prejudice and prejudgment. He further recognizes that the "perception of impartiality is as important as actual impartiality: Judges must conduct themselves 'in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property.'" *Matter of Duckman*, 92 N.Y.2d 141, 153 (1998) (quoting *Matter of Sardino*, 58 N.Y.2d 286, 290-91 (1983)).

13. After nearly twenty years on the bench, respondent does not intend to run for reelection in 2021.

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)(4), 100.3(B)(6) and 100.3(B)(8) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause pursuant to Article 6, Section 22, subdivision (a) of the Constitution and

Section 44, subdivision 1 of the Judiciary Law. Charge I of the Formal Written Complaint is sustained and respondent's misconduct is established.

Each judge is obligated to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and must "avoid impropriety and the appearance of impropriety." (Rules, §100.2(A)) The Rules specifically prohibit a judge from commenting on a pending case and from initiating *ex parte* communications about a pending matter. (Rules, §§100.3(B)(6) and (8)) Furthermore, the Rules require that a judge "shall not, by words or conduct, manifest bias. . . ." (Rules, §100.3(B)(4)) On three different dates, outside the presence of the defendant and his attorney, respondent publicly commented about criminal charges pending against the defendant in the Roxbury Town Court and in the Delhi Town Court. Respondent made multiple disparaging comments about the defendant to individuals in respondent's courtroom, including to another defendant and that defendant's mother, the prosecutor and the court clerk. In one instance, referring to the defendant's conduct as alleged in the criminal charges pending before respondent, respondent described the defendant's conduct as "asinine." Respondent, while at the Roxbury Town Court, also publicly stated with respect to the defendant that, "he's going to federal pen eventually" Furthermore, respondent improperly stated multiple times that the defendant had drugs "up his backside" and was "dealing drugs."

It is well settled that judges are strictly prohibited from commenting on pending cases. (Rules, §100.3(B)(8)) The Commission has held "this ethical prohibition 'is clear and unequivocal,' and, consequently, "[i]t is wrong for a judge 'to make any public

comment, no matter how minor, to a newspaper reporter or to anyone else, about a case pending before him.” *Matter of Piampiano*, 2018 NYSCJC Annual Report 208, 219 (citations omitted); *Matter of Whitmarsh*, 2017 NYSCJC Annual Report 266.

Respondent’s multiple comments regarding the criminal matters pending in the Roxbury Town Court and in the Delhi Town Court violated this strict prohibition.

Moreover, respondent’s series of comments regarding the defendant created at least the appearance that he was biased against the defendant in violation of Section 100.3(B)(4) of the Rules. *Matter of Frati*, 1996 NYSCJC Annual Report at 83, 84 (judge conveyed the appearance of bias when he suggested that the plaintiff was a “negligent” farmer and that his claim was not in the “spirit” of the community’s “codes of honor.”); *Matter of Wylie*, 1991 NYSCJC Annual Report 89, 92 (judge “compromised his impartiality” when he referred to defendants appearing before him as “a thief”, “scum”, “a bum” and “sick, sick, sick.”) Respondent acknowledged that his comments created the appearance that he had prejudged the defendant’s case. In addition, when respondent made the disparaging comments in a conversation with another defendant and his mother as well as to others in his courtroom, respondent undermined public confidence in the fairness and impartiality of the judiciary.

Furthermore, respondent’s statements regarding the defendant and the charges pending against him were made outside the presence of the defendant and his counsel. Accordingly, respondent also violated the ethical rule which prohibits a judge from initiating *ex parte* communications regarding a pending matter. (Rules, §100.3(B)(6))

Respondent’s misconduct was exacerbated by the fact that he had previously been

cautioned by the Commission to not engage in *ex parte* communications. *Matter of Lamson*, 2013 NYSCJC Annual Report 235, 244 (in light of a prior caution regarding *ex parte* communications, “respondent should have been particularly sensitive to the impropriety of engaging in any *ex parte* communications.”)

In accepting the jointly recommended sanction of censure, we have taken into consideration that respondent has admitted that his conduct warrants public discipline. We trust that respondent has learned from this experience and in the future will act in strict accordance with his obligation to abide by all the Rules Governing Judicial Conduct.

By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

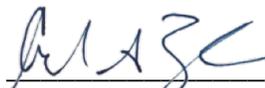
Mr. Belluck, Ms. Grays, Ms. Corngold, Judge Falk, Mr. Harding, Judge Leach, Judge Mazzairelli, Judge Miller, Mr. Raskin, and Mr. Rosenberg concur.

Ms. Yeboah did not participate.

CERTIFICATION

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

Dated: June 17, 2020



Celia A. Zahner, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct