

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

JOSEPH C. TERESI,

a Justice of the Supreme Court,
Albany County.

DETERMINATION

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn Blake, Of Counsel)

Roche, Corrigan, McCoy & Bush (By Robert P. Roche) for Respondent

The respondent, Joseph C. Teresi, a Justice of the Supreme Court, Albany County, was served with a Formal Written Complaint dated July 1, 2004, containing one charge. Respondent filed an answer dated July 14, 2004.

On November 2, 2004, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and waiving further submissions and oral argument. The administrator recommended that respondent be censured, and respondent's attorney recommended that respondent receive a sanction less than removal.

On November 4, 2004, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Supreme Court, Albany County since 1994.
2. From June 23, 2003, through June 26, 2003, respondent presided over the trial of *People v. Jeffrey Grune*, in which the defendant was charged with two felony DWI counts.
3. On the morning of June 25, 2003, counsel for the defendant, Randall Kehoe, advised respondent that he intended to call Sister Phyllis Herbert, a registered nurse and Roman Catholic nun, to testify as an expert witness on behalf of the defendant. Sister Herbert is the director of the Albany Honor Court, a program of the State Division of Probation and Correctional Alternatives, and in that capacity has worked with respondent for several years. Sister Herbert was called by defense counsel to be available for that afternoon. Respondent directed that the attorneys refrain from addressing the witness as "Sister" while she testified.

4. During the lunch recess on June 25, 2003, Sister Herbert visited respondent in chambers to discuss an Honor Court case pending before respondent. No one else was present. In the course of their discussion, Sister Herbert told respondent that she was asked to be a witness in the pending case that afternoon.

5. Although Mr. Kehoe had informed respondent that morning that Sister Herbert was a proposed witness for the defense in *Grune*, respondent indicated surprise that she would be a witness and stated that he was unaware Sister Herbert “did that”; respondent further stated that he thought she normally remained “neutral.” Sister Herbert told respondent that she had testified in one other drug case and then stated to respondent that she was asked to testify in *Grune* regarding the defendant’s blood/alcohol content.

6. Respondent did not interrupt Sister Herbert or otherwise indicate that they should not discuss her impending testimony, nor did he discuss whether Sister Herbert could qualify as an expert witness.

7. Following her conversation with respondent, Sister Herbert decided that she would not testify on behalf of the defendant. Sister Herbert expressed grave concerns that her testimony might affect her neutrality in Albany Honor Court matters. Sister Herbert approached Mr. Kehoe in the courthouse hallway and told him that she had seen respondent and that she would not be able to testify as an expert witness for him because she was uncomfortable and was concerned it might somehow cause “a conflict of interest.” Sister Herbert gave Mr. Kehoe the name of another potential expert witness and left the courthouse.

8. When the *Grune* trial resumed that afternoon, Mr. Kehoe stated on the

record that Sister Herbert had abruptly withdrawn and requested an adjournment to locate another expert witness, which respondent denied. Mr. Kehoe's first choice of witnesses had not been able to testify due to a scheduling conflict and Mr. Kehoe could not represent to respondent whether he would be able to locate another expert witness without delaying the trial. The defendant did not present expert testimony on the subject matter at issue and was later convicted.

9. Respondent did not disclose his *ex parte* communication with Sister Herbert on the record, nor did he disclose it off the record to either the prosecutor or defense counsel. Although respondent did not view his exchange with Sister Herbert as a prohibited *ex parte* communication at the time, in hindsight respondent would have put it on the record, to err on the side of caution. Following the trial, the defendant filed a motion in County Court to vacate the judgment, citing respondent's conversation in chambers with Sister Herbert. The motion was denied.

10. Respondent now appreciates that he should have been sensitive to the appearances of his in-chambers *ex parte* conversation with a potential expert witness in a case before him. Respondent acknowledges that he was censured by the Commission in February 2001, in part for *ex parte* communications with the parties in a pending case, and in part for excluding a defense attorney from a substantive, in-chambers conversation that occurred immediately following the testimony of the plaintiff's expert witness in a pending case.

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(B)(6) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State 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.

It was improper for respondent to have an *ex parte* discussion in chambers with a witness scheduled to appear before him later that day. Such conduct violates Section 100.3(B)(6) of the Rules Governing Judicial Conduct, which specifically prohibits a judge from initiating, permitting or considering *ex parte* communications.

When Sister Herbert, the director of the Albany Honor Court, advised respondent that she was scheduled to be an expert witness for the defendant, respondent not only failed to terminate the discussion promptly, but expressed surprise and commented that he thought she normally remained "neutral." In fact, the defendant's attorney had stated earlier that day that he intended to call Sister Herbert as a witness in the case, so it appears that respondent should have known even before she spoke to him that she was about to testify in the pending proceeding. Respondent made no effort to interrupt her comments about her impending testimony and her role as an expert witness. The stipulated facts, including Sister Herbert's subsequent comments to the defendant's attorney about her conversation with respondent, make it clear that respondent's comments influenced her decision not to testify in the case.

Once respondent had spoken to the witness, he had an obligation to place the *ex parte* contact on the record and to hear objections to his continuing to preside in the case. *See, Matter of Cerbone*, 1997 Annual Report 83 (Comm. on Judicial Conduct). Respondent failed to disclose the *ex parte* contact, even when the defendant's attorney announced in court that the witness had abruptly withdrawn. Respondent's conduct created an appearance of impropriety and shows insensitivity to the high ethical standards required of judges. Compounding the harm caused by respondent's misconduct, he denied the defense request for an adjournment to get another expert witness, notwithstanding that he should have known that his *ex parte* conversation with Sister Herbert caused her not to testify.

In imposing sanction, we note that respondent had previously been warned of the impropriety of *ex parte* activity. In a determination dated February 8, 2001, respondent was censured, in part, for engaging in *ex parte* communications in a pending case and was specifically advised that such conduct is prohibited by Section 100.3(B)(6). *Matter of Teresi*, 2002 Annual Report 163 (Comm. on Judicial Conduct). In view of his prior discipline, respondent should have been especially sensitive to the high standards of conduct expected of judges and, in particular, the prohibition against improper *ex parte* discussions.

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

Mr. Goldman, Judge Ciardullo, Mr. Emery, Mr. Felder, Ms. Hernandez,

Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Pope dissents from the disposition and votes that respondent be admonished.

Mr. Coffey and Ms. DiPirro were not present.

CERTIFICATION

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

Dated: December 17, 2004



Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct