SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

IN THE MATTER OF LESTER J. MAISTO, FORMER JUDGE OF THE MUNICIPAL COURT	DOCKET NO.: ACJC 2005-175 PRESENTMENT

The Advisory Committee on Judicial Conduct, pursuant to Rule 2:15-15(a), presents to the Supreme Court its Findings that charges set forth in a Formal Complaint against Lester J. Maisto, former Judge of the Municipal Court, have been proven by clear and convincing evidence and its Recommendation that the Respondent be censured.

The Advisory Committee on Judicial Conduct issued a Formal Complaint consisting of six counts, alleging that on April 19, 2005, Respondent engaged in conduct in violation of Canons 1, 2A, 2B, 3A(1), 3A(2), 3A(3), and 3C(1)(a) of the Code of Judicial Conduct and in violation of Rule 2:15-8(a)(6) by pursuing a defendant who fled from the court after engaging in contemptuous conduct (Count I); by imposing a higher fine on a defendant whom he had misunderstood to say "I guess" instead of "yes" (Count II); by accusing a defendant of being a liar at a pre-trial conference (Count III); by dismissing charges only after ascertaining that the defendant's attorney had been paid (Count IV); by making sarcastic remarks on the bench in respect of a policy set by the chief judge of the Trenton Municipal Court (Count V); and by, in conjunction with an earlier matter before the Committee, engaging in a pattern of improper conduct (Count VI). Respondent filed an Answer admitting some allegations and denying others. He

subsequently filed an amended Answer, further admitting that his conduct as set forth in Count I violated the Code of Judicial Conduct and offering facts in mitigation.

The Committee convened a formal hearing. Respondent appeared, represented by counsel, and testified. After carefully reviewing the evidence, the Committee made factual determinations, supported by clear and convincing evidence, which form the basis for its Findings and Recommendation.

I. FINDINGS

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1986. At all times relevant to this matter, Respondent served as Judge of the Municipal Court of the City of Trenton, Mercer County, and as Judge of the Municipal Court of the Township of Willingboro, Burlington County. He was not reappointed to those positions after the events described in this Presentment.

A. As to Count I

On April 19, 2005, Respondent presided over the matter of State v. Howard in the Trenton Municipal Court.

Defendant Howard informed Respondent that he did not wish the services of a public defender and that he had a witness who would testify Howard was not the person who had committed the offense with which he was charged. Howard added that he had information about the identity of the person who actually committed the offense.

Respondent replied that Howard should provide that information to the police. He then ordered that bail continue and that a new trial date be set.

A member of the court staff suggested that trial be set for May 20 at 8:30 a.m. Defendant Howard asked why the matter could not be scheduled for the evening because he had to work during the day. Respondent replied that the matter had to be scheduled for a day session because the complaining police officer worked the day shift. He directed court staff to have Defendant Howard sign the appropriate scheduling document, and he said that Howard was then free to leave. At that point, an attorney approached Respondent, and Respondent directed that the tape recorder be turned off.

After he completed the documents, Howard became aggravated. He nosily left the courtroom, banging the doors behind him. Respondent called to the court attendant to bring Howard back. The attendant went outside the courtroom and saw Howard down the hallway. He told Howard that Respondent wanted him to return to the courtroom, but Howard uttered profanity concerning Respondent and ran away.

The court attendant returned to the courtroom and told Respondent what Howard had said. Respondent got up from the bench and hurried from the courtroom. He was followed by the police officer who was assigned to provide security in the courtroom.

Respondent left the building and crossed the street, still wearing his judicial robe, as he did throughout this episode. As he started to enter a small convenience delicatessen in search of Howard, he encountered a police lieutenant who happened to be leaving the delicatessen. When Respondent explained what he was doing, the lieutenant told him there was no one like that inside. Accompanied by the lieutenant, Respondent went to the street corner to continue his search. Seeing no sign of Howard, Respondent then returned to the courtroom.

When Respondent took the bench again, he revoked Howard's bail and issued a bench warrant for his arrest. At the end of the court session, having had an opportunity to reflect on the matter, Respondent reinstated the bail and recalled the warrant, planning to address the contempt issue at Howard's next court appearance. As it happens, Respondent had no further contact with Howard.

According to Respondent, he merely walked outside in his pursuit of Howard. The police officer who followed him, however, recalled that both he and Respondent ran from the courtroom in their pursuit. In view of Respondent's impulsive and highly unorthodox reaction to what he considered an affront to the authority of the court, the Committee must credit the officer's version rather than Respondent's.

Respondent contends that his purpose in pursuing Howard was merely to locate him and then have the police officer arrest him. That contention is inconsistent with his testimony that he felt obliged to conduct the pursuit himself because both the court attendant and the officer were unresponsive and uncooperative, the court attendant by failing to bring Howard back to the courtroom from the hallway as Respondent had directed and the officer by not taking action at that point. It is also illogical that Respondent, who maintained that he was not accompanied by an officer in his pursuit until he happened to encounter the lieutenant, could have expected when he started out that the police would arrest Howard because an officer was not with him; according to Respondent, it was not until he was walking back to the building that he saw the police officer from the courtroom. Rather, it is reasonably apparent that Respondent, a former police officer himself, intended to apprehend Howard personally.

Respondent reacted intemperately and inappropriately to Howard's behavior by conducting his own pursuit, clad in judicial robes. The apprehension of criminal offenders is an executive function not a judicial function. By leaving the bench and going out of the building and down the street in pursuit of Howard, Respondent violated Canon 3A(2) of the Code of Judicial Conduct, which requires judges to maintain order and decorum in judicial proceedings.

By the same conduct, Respondent also violated Canon 1 of the Code of Judicial Conduct, which requires judges to personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, and Canon 2A, which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

B. As to Count II

On April 19, 2005, Respondent also presided over State v. Navarro, in which the defendant had been charged with failing to stop for a red traffic signal. Defendant Navarro pled guilty to the violation, and Respondent told her that the fine could have been paid through the Violations Bureau. Because Navarro had not paid on time, the Violations Bureau refused to accept her late payment, thus requiring her to make an appearance in court.

When Respondent asked Navarro if she had gone through the red light, she responded: "Yes." Respondent misheard the response and told her: "Don't be guessing." Navarro replied: "I said yes." However, Respondent asked once more if Navarro had gone through the red light. She replied: "I said yes."

After Navarro said that she was guilty, Respondent imposed a fine of $85, plus $33 in court costs. He then told a member of the court staff: "Mark it guilty, $85 because of the mouth."

Respondent's reference to Navarro's "mouth" clearly suggests that he was punishing her for something she said by imposing on her a fine that was higher than the customary fine for the violation. Indeed, no other significance is apparent. As it happens, however, the fine Respondent imposed on Navarro was, in fact, the basic fine for violations of N.J.S.A. 39:4-81 (Failure to Observe Traffic Signal) as set by the statewide Violations Bureau Schedule that was in effect at the time.

Under those circumstances, although Respondent's remark was certainly inappropriate in that it could reasonably be understood to indicate retaliation against the defendant, the Committee does not find that public discipline is warranted. Accordingly, the Committee recommends that Count II of the Complaint be dismissed.

C. As to Count III

On April 19, 2005, Respondent also presided over a status conference in State v. Perez, in which the defendant had been charged with simple assault and with preventing a law enforcement officer from effecting a lawful arrest.

Respondent told Defendant Perez that she had been arraigned almost a month earlier and had been advised at that time that she was facing a sentence of six months incarceration or a fine of up to $1,000 or both. He asked her why she had not previously completed an application for the appointment of a public defender.

Perez replied: "I wasn't aware." Respondent said: "Yes, you were. Don't' stand there and tell me a blatant lie like that."

When Perez insisted she had not known she had to fill out an application, Respondent said: "You also didn't know you had to be here on December the 20th, did you, when you got arrested on the 19th. You forgot about coming in on the 20th. Take your hands out of your pockets. I'm not real thrilled with a liar in the courtroom. Do you understand me?"

Perez replied in the affirmative, and Respondent continued: "Don't tell me blatant lies."

Respondent then had Perez complete an application for representation by a public defender. After reviewing it, he granted the application and set the case down for trial before another judge.

Respondent testified that he concluded Perez was not being truthful because he had before him a form executed by the judge who had arraigned Perez. That judge had checked the box on the form indicating that Perez had been advised of her rights. Respondent did not, however, ask Perez if the other judge had informed her that she had to complete an application to obtain the services of a public defender.

Respondent's remarks to Perez about her telling blatant lies and about her being a liar were inexcusable. As Respondent has admitted, he violated Canon 3A(3) of the Code of Judicial Conduct, which requires judges to be patient, dignified, and courteous to litigants. By his remarks, Respondent also violated Canons 1 and 2A of the Code of Judicial Conduct and engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6). 8.

Respondent's pre-trial remarks to Perez demonstrate his belief that she was not credible. Because he set the case down for trial before another judge, Respondent did not violate Canon 3C(1)(a) of the Code of Judicial Conduct, which requires judges to disqualify themselves from proceedings if they have a personal bias or prejudice concerning a party.

D. As to Count IV

On April 19, 2005, Respondent also presided over State v. Monts, in which the defendant had been charged with possession of drug paraphernalia and with violation of a loitering ordinance that had subsequently been repealed.

The defendant's attorney asked that the loitering charge be dismissed because the ordinance had been repealed. Respondent granted that application.

Defense counsel then told Respondent that the drug paraphernalia charge dated back to 1999 and that the police had been unable to find either a file or a report on the incident. Respondent asked the defendant why he had not appeared in court on a previous occasion, and the defendant replied that he had been in prison. In response to further questions from Respondent, the defendant said that he had been imprisoned for

possession of drugs but that he had completed a program of drug rehabilitation while in prison.

Respondent asked the defendant's attorney to approach. He told his clerk that he wished to speak off the record, but the conversation was in fact recorded and appears in the transcript of the proceeding. Believing that the conversation was not being recorded, Respondent asked the attorney if the defendant had paid him. When the attorney replied that he had been paid, Respondent said that he "[j]ust wanted to make sure," whereupon he directed that the proceeding go back on the record. He then dismissed all charges.

Respondent testified that he recognized the attorney as one who appeared regularly in the Trenton Municipal Court. According to Respondent, he knew that the attorney frequently represented lower income defendants for a reduced rate or without charge. His purpose in inquiring whether the attorney had been paid was to ascertain if he was representing the defendant pro bono. If so, Respondent would merely mention that fact on the record, as he frequently did with other attorneys, as a small way of commending the attorney for his service.

Respondent's explanation of his actions is inherently implausible. He could have asked the attorney on the record if he was appearing pro bono or he could have dismissed the charges and then made his inquiry. Instead, he deferred dismissal of the charges until he had determined, in what he mistakenly thought was a private conversation, that the attorney had been paid for his services. That would cause a reasonable observer to conclude that Respondent would not have dismissed the charges if payment had not been made.

By asking the defendant's attorney, in a conversation that he thought was off the record, if that attorney had been paid, Respondent at the least gave the appearance of conditioning his dismissal of the charges against the defendant on the defendant's having

paid the attorney. That violated Canon 2B of the Code of Judicial Conduct, which prohibits judges from allowing family, social, or other relationships to influence judicial conduct or judgment and from conveying the impression that others are in a special position of influence.

Respondent's conduct also violated Canons 1 and 2A of the Code of Judicial Conduct and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

E. As to Count V

On April 19, 2005, Respondent also presided over State v. Ezekiel. During the proceeding, there was an interruption because a cell phone rang in the courtroom. Respondent said: "That's alright. Use your phone. It doesn't bother me." When the owner of the phone apologized and said that he would turn the phone off, Respondent replied that it did not bother him either way.

Respondent then engaged in colloquy with a person who is not identified in the transcript but whom he identified in his testimony as the police officer assigned to provide security in the courtroom. Respondent told the officer: "They are allowed to use cell phones in the courtroom if they like, they just can't talk on them. I can't tell them to take them out, I can't tell them to do anything."

The officer asked when that policy had been put into effect, and Respondent told him that it had been promulgated the preceding Friday. Respondent added: "I don't care if they come in, read the newspaper, kick back, have a cup of coffee, smoke a cigarette, enjoy themselves. It's not a Court anymore."

Respondent testified that he spoke to the officer as the officer got up to take action because the cell phone rang. The chief judge of the Trenton Municipal Court had

recently decided, over Respondent's strong objections, that cell phones should not be prohibited in the courtroom. According to Respondent, his remarks to the officer were meant literally and intended only to inform the officer that no action should be taken against anyone because of conduct in the courtroom unless Respondent first directed that action be taken. Because there was no amplification equipment in the courtroom and he did not speak loudly, Respondent thought that only the officer would hear him.

In spite of his explanation, Respondent's remarks, particularly the observation that it was "not a Court anymore," were clearly an expression of his frustration with the chief judge's new policy concerning cell phones. And if his remark about kicking back and smoking being permitted was not intended to be sarcastic, as it obviously appears to be, it was an expression of pique at the new policy. Either way, Respondent's remarks were improper, directed as they were to a municipal employee who was assigned to duty in the court. Respondent could simply have explained the new policy to the officer without editorializing. Instead, he impulsively gave vent to his resentment of the policy.

By way of mitigation, Respondent made the remarks in what he intended to be a private conversation. The Committee finds, however, that Respondent's remarks were made to an officer of the court, had no place in the courtroom, and should certainly not have been uttered from the bench. They detracted from the dignity of the court.

Respondent's remarks were inappropriate and violated Canons 1 and 2A of the Code of Judicial Conduct. They also constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

F. As to Count VI

On May 30, 2003, the Advisory Committee on Judicial Conduct sent Respondent a letter of admonition concerning his conduct in two matters: ACJC 2002-

196 and ACJC 2003-056. The conduct in those matters included Respondent's making remarks to a defendant suggesting that he had prejudged that defendant, making gratuitous remarks during court sessions, insulting defendants and others, and accusing a defendant of having told him a "fake bullshit story."

In its letter, the Committee informed Respondent that it was giving him the benefit of a doubt because of his assurances that his remarks had been aberrational. The Committee added that further occurrences of such conduct would likely lead the Committee to conclude that public discipline would be required.

Respondent's conduct as set forth in Counts I, III, IV and V, together with his prior conduct as outlined in Count VI, constitutes a pattern of improper conduct in violation of Canons 1, 2A, and 3A(3) of the Code of Judicial Conduct, as well as conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

II. RECOMMENDATION

Respondent has already suffered serious consequences because of the conduct covered by Count I, viz., his pursuit of a defendant from the courtroom out into the street in his judicial robe. At the behest of the Assignment Judges who were responsible for the vicinages where he sat, Respondent took a week off without pay from the performance of all judicial duties. Thereafter, he failed of reappointment in both municipalities where he served as judge, thus becoming ineligible to continue performing additional judicial duties in civil commitment hearings and in other municipal courts to which he had been cross-assigned. Because he had given up the private practice of law in 1993 and was not otherwise employed, Respondent has suffered the loss of his entire income.

To his credit, Respondent has recognized his shortcomings in temperament. Acting on his own volition, he has sought and received professional assistance in that respect through an appropriate and established program.

Those factors do not excuse Respondent's behavior. In addition to his particularly egregious conduct in taking it upon himself to pursue a defendant out into the streets, there is a pervasive pattern of improper conduct that has brought the judicial office into disrepute. The gravamen of that conduct is Respondent's unfortunate tendency to speak and to act on impulse, without appropriate judicial restraint or due regard for dignity and decorum.

The professional assistance that Respondent sought and received may have helped him resolve his problems with temperament and demeanor, and the Committee hopes that is the case. That is not, however, the issue before this Committee because the purpose of judicial discipline "is not so much to punish the offending judge as to restore and maintain the dignity and honor of the position and to protect the public from future

excesses." In re Seaman, 133 N.J. 67, 97 (1993) (citation and internal quotation marks omitted).

The Committee has concluded that the seriousness of the pursuit incident and the pervasiveness of Respondent's other improper conduct requires the imposition of public discipline greater than a public reprimand and respectfully recommends that Respondent, former Municipal Court Judge Lester J. Maisto, be censured.

Members Handler, O'Hern, Davis, Farmer, Olick, and Roper join in this Presentment.

Members Dauber, Kluck, and Thompson dissent from the recommendation of censure and would recommend a public reprimand. They consider Respondent's voluntary seeking of professional assistance and the financial and professional loss he has suffered to be sufficiently mitigating as to warrant a sanction of public reprimand.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

DATED: 1/18/07 By: Alan B. Handler

Alan B. Handler, Chair