ANNUAL REPORT

1988

New York State
Commission on Judicial Conduct

1988 ANNUAL REPORT

OF THE

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

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To the Governor, the Chief Judge of the Court of Appeals and the Legislature of the State of New York:

Pursuant to Section 42, paragraph 4, of the Judiciary Law of the State of New York, the New York State Commission on Judicial Conduct respectfully submits this annual report of its activities. The report covers the period from January 1, 1987, through December 31, 1987.

Respectfully submitted,

Lillemor T. Robb, Chairwoman,
On Behalf of the Commission

March 1, 1988
New York, New York

IN MEMORY OF DAVID BROMBERG

The members of the New York State Commission on Judicial Conduct mourn the passing of their devoted colleague and friend, David Bromberg, whose passionate commitment to individual rights and justice guided us during his 12 years as a Commission member.

We will miss his spirited leadership and we will treasure our wonderful memory of him.

This report reflects his dedication to judicial discipline and to the work of the Commission. With respect and affection, we dedicate this report to him.

TABLE OF CONTENTS

Page

INTRODUCTION 1

COMPLAINTS AND INVESTIGATIONS IN 1987. 3

ACTION TAKEN IN 1987 4

Formal Proceedings. 10
Determinations of Removal 10
Matter of Bertram R. Gelfand 10
Matter of Ernest J. Conti. 12
Matter of James R. Straite 13
Matter of James R. Lenney. 14
Matter of Michael J. Greenfeld 15
Matter of Roy E. Smith 16
Matter of Gerard Deckelman 17

Determinations of Censure 18
Matter of Joseph Goldstein 18
Matter of Elaine M. Rider. 19
Matter of John C. Orloff 20
Matter of Anthony P. LoRusso 21
Matter of J. David Little. 22
Matter of J. Michael Bruhn 23
Matter of Edward T. Feeney 24
Matter of Clair A. Reyome. 25

Determinations of Admonition. 26
Matter of Allan L. Winick. 26
Matter of John G. Turner 27
Matter of Frank J. Blangiardo. 28
Matter of Merrill R. Zapf, Sr. 29
Matter of Benno G. Spiehs. 29
Matter of Charles R. Cooksey 30
Matter of Penny M. Wolfgang. 31

Dismissed Formal Written Complaints 32
Letters Of Dismissal And Caution. 34
Matters Closed Upon Resignation 35
Referrals To Other Agencies 36

SUMMARY OF COMPLAINTS CONSIDERED BY THE
TEMPORARY, FORMER AND PRESENT COMMISSIONS 38

REVIEW OF COMMISSION DETERMINATIONS
BY THE COURT OF APPEALS 40

Matter of Lawrence L. Rater 41
Matter of Patrick T. Maney. 42
Matter of Lee Vincent 43
Matter of Bertram R. Gelfand. 44
Matter of Ernest J. Conti 46

CHALLENGES TO COMMISSION PROCEDURES. 48

John Doe v. Commission. 48
Sims v. Wachtler et al. 49
Matter of James R. Lenney 50

POLICIES AND PRACTICES OF THE COMMISSION 51

The Commission's Budget 52
The Commission's "Mandate". 56
"Concentration" On Town And Village Justices. 59
The "One-Tier" Versus "Two-Tier" Systems. 62
Education Of Judges 66
Confidentiality Of Commission Proceedings 69

SPECIFIC PROBLEM AREAS IDENTIFIED BY THE COMMISSION. 73

Gender Bias 73
Conflicts Of Interest 76
The Right To A Public Trial 81
The Assertion Of Influence. 84
Raising Funds For Charitable, Civic
Or Other Organizations. 85
"Screening" Of Potential Lawsuits By Judges 88
Access To Public Court Records. 90
Ex Parte Communications With And
Improper Reliance Upon Prosecutors. 92
Reducing Or Dismissing Charges
Without Notice To The Prosecutor. 95
Mishandling Court Funds 96
Advisory Opinions 99

ADMINISTRATIVE RECOMMENDATIONS MADE BY THE
COMMISSION AS TO POLITICAL ACTIVITY RULES. 101

Background. 101
Recent Amendments 101
Political Activity By Judges. 103
Political Activity By Court Personnel 106

CONCLUSION 110

APPENDIX A
Biographies of Commission Members 111

APPENDIX B
The Commission's Powers, Duties and Operations. 117

APPENDIX C
Referees Who Presided in Commission
Proceedings in 1987 125

APPENDIX D
Commission Budget Figures, 1978-87. 127

APPENDIX E
Texts of Determinations Rendered in 1987
(Arranged Alphabetically) 129

APPENDIX F
Statistical Analysis of Complaints. 257

INTRODUCTION

The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of misconduct against judges of the New York State unified court system. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding the independence of the judiciary. Judges must be free to act in good faith without fear of being investigated for their rulings or decisions, but they also are accountable for their misconduct.

The ethics standards that the Commission enforces are found primarily in the Rules Governing Judicial Conduct and the Code of Judicial Conduct. The Rules are promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, pursuant to Article VI, Sections 20 and 28 of the New York State Constitution. The Code was promulgated by the American Bar Association and was adopted in 1972 by the New York State Bar Association.

This 1988 Annual Report covers the Commission's activities during calendar year 1987. As in previous annual reports, the Commission identifies "specific problem areas," which should be of assistance to judges and to the Office of Court Administration for its training programs. Because some of the Commission's attention in 1987 was directed to a legislative hearing on issues pertaining to policies, procedures and the law establishing the Commission, this report also addresses some of those issues.

A history of the development of the Commission, beginning with the creation in 1975 of a temporary State Commission on Judicial Conduct, and a description of the Commission's authority and procedures, are appended to this report.

COMPLAINTS AND INVESTIGATIONS IN 1987

In 1987, 1003 new complaints were received. Of these, 813 were dismissed upon initial review, and 190 investigations were authorized and commenced.[1] As in previous years, the majority of complaints were submitted by civil litigants and by complaining witnesses and defendants in criminal cases. Other complaints were received from attorneys, judges, law enforcement officers, civic organizations and concerned citizens not involved in any particular court action. Among the new complaints 49 were initiated by the Commission on its own motion.

On January 1, 1987, 203 investigations and proceedings on formal charges were pending from the prior year.

Some of the new complaints dismissed upon initial review were frivolous or outside the Commission's jurisdiction (such as complaints against attorneys or judges not within the state unified court system). Many were from litigants who complained about a particular ruling or decision made by a judge in the course of a proceeding. Absent any underlying misconduct, such as demonstrated prejudice, intemperance, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate such matters, which belong in the appellate courts.

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[1]The statistical period in this report is January 1, 1987, through December 31, 1987. Detailed statistical analysis of the matters considered by the Commission is appended in chart form.

ACTION TAKEN IN 1987

Of the combined total of 393 investigations and proceedings on formal charges conducted by the Commission in 1987 (203 carried over from 1986 and 190 authorized in 1987), the Commission made the following dispositions in 260 cases:

-- 139 matters were dismissed outright.

-- 47 matters involving 42 different judges were dismissed with letters of dismissal and caution.

-- 12 matters involving 10 different judges were closed upon resignation of the judge from office.

-- 35 matters involving 27 different judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.

-- 27 matters involving 22 different judges resulted in formal discipline (admonition, censure or removal from office).

One hundred thirty-three matters were pending at the end of 1987.

The Commission's dispositions involved judges in various levels of the unified court system, as indicated in the tables on the following pages and in the appended chart.[2]

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[2]Notes as to Tables 1 through 10 on the following pages. The approximate number of judges serving in a particular court is noted in parentheses after the title of each table, followed by their percentage of the total judiciary. (It should be noted that an individual judge may be the subject of more than one complaint.) The "Percent of 1987 Matters" figure indicates the percentage of 1987 results involving judges of a particular court against the total number of Commission actions in the same category in 1987.

Table 1: Town and Village Justices (2400; 68%)

1987 Dispositions	Lawyers	Non-Lawyers	Total	Percent of 1987 Matters
Complaints Received	99	212	311	31%
Complaints Investigated	34	83	117	61.5%
Number of Judges Cautioned After Investigation	4	24	28	70%
Number of Formal Written Complaints Authorized	0	23	23	61%
Number of Judges Cautioned After Formal Complaint	0	0	0	0%
Number of Judges Publicly Disciplined	3	10	13	59%
Number of Formal Complaints Dismissed or Closed	1	8	9	75%

Table 2: City Court Judges (403; 11.5%)

1987 Dispositions	Part-Time	Full-Time	Total	Percent of 1987 Matters
Complaints Received	34	117	151	15%
Complaints Investigated	7	20	27	14.5%
Number of Judges Cautioned After Investigation	2	1	3	7.5%
Number of Formal Written Complaints Authorized	4	0	4	10.5%
Number of Judges Cautioned After Formal Complaint	0	0	0	0%
Number of Judges Publicly Disciplined	2	1	3	13.5%
Number of Formal Complaints Dismissed or Closed	0	0	0	0%

Table 3: County Court Judges (74; 2%)*

1987 Dispositions	All Lawyers; All Full-Time	Percent of 1987 Matters
Complaints Received	7	7%
Complaints Investigated	3	1.5%
Number of Judges Cautioned After Investigation	3	7.5%
Number of Formal Written Complaints Authorized	0	0%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	2	9%
Number of Formal Complaints Dismissed or Closed	0	0%

Table 4: Family Court Judges (116; 3%)

1987 Dispositions	All Lawyers; All Full-Time	Percent of 1987 Matters
Complaints Received	94	9.5%
Complaints Investigated	10	5.5%
Number of Judges Cautioned After Investigation	1	2.5%
Number of Formal Written Complaints Authorized	2	5.5%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	0	0%

* Included in this figure are seven judges who serve concurrently as County Court and Family Court judges. In addition, there are ten judges who serve concurrently as County Court and Surrogate's Court judges, and 33 who serve concurrently as County Court, Surrogate's Court and Family Court judges.

Table 5: District Court Judges (49; 1.5%)

1987 Dispositions	All Lawyers; All Full-Time	Percent of 1987 Matters
Complaints Received	12	1%
Complaints Investigated	3	1.5%
Number of Judges Cautioned After Investigation	0	0%
Number of Formal Written Complaints Authorized	1	2.5%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	1	8%

Table 6: Court of Claims Judges (55; 1.5%)*

1987 Dispositions	All Lawyers; All Full-Time	Percent of 1987 Matters
Complaints Received	2	.5%
Complaints Investigated	0	0%
Number of Judges Cautioned After Investigation	0	0%
Number of Formal Written Complaints Authorized	0	0%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	0	0%

* Some Court of Claims judges serve as Acting Justices of the Supreme Court. A complaint against a Court of Claims judge was recorded as a complaint against a Supreme Court justice if the alleged misconduct occurred in a Supreme Court-related matter.

Table 7: Surrogates (76; 2%)*

1987 Dispositions	All Lawyers; All Full-Time	Percent of 1987 Matters
Complaints Received	36	3.5%
Complaints Investigated	5	2.5%
Number of Judges Cautioned After Investigation	0	0%
Number of Formal Written Complaints Authorized	3	8%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	1	5%
Number of Formal Complaints Dismissed or Closed	0	0%

Table 8: Supreme Court Justices (312; 9%)

1987 Dispositions	All Lawyers; All Full-Time	Percent of 1987 Matters
Complaints Received	216	21.5%
Complaints Investigated	23	12%
Number of Judges Cautioned After Investigation	4	10%
Number of Formal Written Complaints Authorized	5	13%
Number of Judges Cautioned After Formal Complaint	2	100%
Number of Judges Publicly Disciplined	3	13.5%
Number of Formal Complaints Dismissed or Closed	2	17%

* Included in this total are ten Surrogates who serve concurrently as County Court judges and 33 who serve concurrently as Family Court and County Court judges.

Table 9: Court of Appeals Judges and Appellate Division Justices (54; 1.5%)

1987 Dispositions	All Lawyers; All Full-Time	Percent of 1987 Matters
Complaints Received	12	2%
Complaints Investigated	2	1%
Number of Judges Cautioned After Investigation	1	2.5%
Number of Formal Written Complaints Authorized	0	0%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	0	0%

Table 10: Non-Judges

1987 Dispositions	Number	Percent of 1987 Matters
Complaints Received	97	9.5%

Formal Proceedings

No disciplinary sanction may be imposed by the Commission unless a Formal Written Complaint, containing detailed charges of misconduct, has been served upon the respondent-judge and the respondent has been afforded an opportunity for a formal hearing.

The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibits public disclosure by the Commission with respect to charges served, hearings commenced or other matters, absent a waiver by the judge, until a case has been concluded and a final determination has been filed with the Chief Judge of the Court of Appeals and forwarded to the respondent-judge. Following are summaries of those matters which were completed during 1987 and made public pursuant to the applicable provisions of the Judiciary Law. Copies of the determinations are appended.

Determinations of Removal

The Commission completed seven disciplinary proceedings in 1987 in which it determined that the judge involved should be removed from office.

Matter of Bertram R. Gelfand

The Commission determined that Bertram R. Gelfand, Surrogate of Bronx County, should be removed from office for engaging in a course of misconduct in connection with a female

law assistant in his court, including abuse of his judicial authority. (Judge Gelfand is a lawyer.)

Adopting the findings of fact and conclusions of law of the referee, the Honorable Matthew J. Jasen, the Commission, in its determination dated March 20, 1987, found that Judge Gelfand told a law assistant that she was fired because of events in their personal relationship, emptied her office desk and left the contents on the doorstep of her residence, made numerous annoying and obscene telephone calls, falsely identified himself as her lawyer in an effort to reach her, threatened to speak to her boyfriend's parents if the boyfriend would not allow the judge to speak to her, threatened to speak to the boyfriend's employer to have him fired, asked the Deputy Chief Administrative Judge to view unfavorably any application for a position that the law assistant might make, and made critical comments about her to her new employer. Such conduct, the Commission found, conveyed the unmistakable appearance that the judge was acting out of jealousy and not on the basis of merit and deviated significantly from the high standards of conduct expected of judges.

The Commission found that the judge compounded his misconduct by his repeated lack of candor throughout the proceedings. Such deception, the Commission concluded, is antithetical to the role of a judge who is sworn to uphold the law and seek the truth.

Judge Gelfand requested review of the Commission's determination by the Court of Appeals, which ordered his removal

on July 2, 1987. Matter of Bertram R. Gelfand, 70 NY2d 211 (1987).

Matter of Ernest J. Conti

The Commission determined that Ernest J. Conti, a justice of the Amsterdam Town Court, Montgomery County, should be removed from office for misconduct in connection with the disposition of two speeding tickets and for improperly disposing of 31 cases without notice to the prosecutor. (Judge Conti is not a lawyer.)

The Commission found, in its determination dated March 23, 1987, that Judge Conti's conduct, in the first two matters, conveyed an unmistakable appearance of favoritism. In one case, the judge reached out to take a case pending before another judge, altered documents to reflect that a less serious offense had been charged, and improperly dismissed the case without notice to the prosecutor. In a second case, the judge dismissed a charge against his personal attorney, who was also a long-time friend, without a motion before him by either party and without notifying the prosecutor. In addition, the judge failed to comply with the law by dismissing or adjourning in contemplation of dismissal 31 cases without giving the prosecutor an opportunity to be heard.

The Commission found that Judge Conti compounded his misconduct by testifying falsely as to his reasons for dismissing the first two cases.

Judge Conti requested review of the Commission's determination by the Court of Appeals, which ordered his removal on October 22, 1987. Matter of Ernest J. Conti, ____NY2d____, No. 254 (Oct. 22, 1987).

Matter of James R. Straite

The Commission determined that James R. Straite, a justice of the New Berlin Village Court, Chenango County, should be removed from office for engaging in misconduct in numerous cases, including denying to defendants certain basic rights, conveying an appearance of bias, and abusing his judicial authority. (Judge Straite is not a lawyer.)

The Commission found, in its determination dated April 16, 1987, that Judge Straite repeatedly aligned himself with the prosecutor and suggested before trial that defendants were guilty of the offenses charged, failed to advise defendants of basic constitutional rights as required by law, elicited incriminating statements from them before trial, threatened to jail defendants without court hearings, coerced a guilty plea in the absence of counsel, and summarily convicted defendants without trial. In addition, he failed to disqualify himself in one case notwithstanding that his son was a material witness, and in another case in which he himself had personal knowledge of disputed facts; and on another occasion he invoked the prestige of his judicial office to advance the interests of his son in a private dispute. The Commission also found that Judge Straite, a claims manager

for an insurance company, engaged in business dealings with attorneys likely to come before him in his judicial capacity, and served as a peace officer, in violation of specific provisions of the Rules Governing Judicial Conduct.

In many of these dealings, the Commission found, Judge Straite was impatient, undignified and discourteous to lawyers and litigants, and he abused his judicial authority and violated the law in order to achieve results that conformed to his personal prejudices.

Judge Straite did not request review of the Commission's determination, and the Court of Appeals ordered his removal on June 16, 1987.

Matter of James R. Lenney

The Commission determined that James R. Lenney, a justice of the Herkimer Village Court, Herkimer County, should be removed from office for engaging in a pervasive pattern of neglect of his judicial and administrative duties. (Judge Lenney is a lawyer.)

In its determination dated June 23, 1987, the Commission found that Judge Lenney failed to diligently discharge his responsibilities in 35 criminal cases and six civil cases, with the result that the matters remained pending in his court for between 10 and 59 months; he repeatedly disregarded statutory requirements regarding criminal procedure, the disposition of cases, and the maintaining of records and dockets; and he failed

to report cases and remit funds to the State Comptroller in a timely manner. Such egregious neglect and repeated disregard of statutory requirements, the Commission found, constitute serious misconduct and impair public confidence in the proper administration of justice.

Moreover, Judge Lenney failed to cooperate with the Commission in that he failed to respond to four letters seeking information in connection with a duly-authorized investigation.

Judge Lenney requested review of the Commission's determination by the Court of Appeals, where the matter is pending. On October 6, 1987, the Court suspended Judge Lenney pending disposition of his request for review.

Matter of Michael J. Greenfeld

The Commission determined that Michael J. Greenfeld, a justice of the Valley Stream Village Court, Nassau County, should be removed from office for improperly delegating his judicial duties and giving false information concerning the matter to his administrative judge. (Judge Greenfeld is a lawyer.)

In its determination dated September 2, 1987, the Commission found that, over a period of years in numerous cases, Judge Greenfeld abandoned his judicial duties and delegated them to the prosecutor, creating the impression that an interested party in the courtroom was disposing of cases. Thereafter, as found by the Commission, the judge made false statements in a letter to his administrative judge in an attempt to conceal his

improper practices. The Commission also found that Judge Greenfeld failed to change his practices even after the administrative judge's inquiry.

Judge Greenfeld requested review of the Commission's determination by the Court of Appeals, where the matter is pending. On October 13, 1987, the Court suspended Judge Greenfeld pending disposition of his request for review.

Matter of Roy E. Smith

The Commission determined that Roy E. Smith, a justice of the Davenport Town Court, Delaware County, should be removed from office for failing to perform his administrative and adjudicative responsibilities in numerous cases, and for deficiencies in reporting, remitting and depositing court funds. (Judge Smith is not a lawyer.)

In its determination dated December 21, 1987, the Commission found that, over a period of several years, Judge Smith neglected nearly every aspect of his judicial and administrative duties. He failed to dispose of cases pending in his court for years, failed to keep proper records as required by law, and mishandled public monies by keeping them in his personal possession instead of promptly depositing them in his official account and remitting them to the State. (By his own admission, the judge was so careless that he once threw $250 in cash into the trash.) By such conduct, the Commission concluded, Judge

Smith showed disdain for his judicial responsibilities and a lack of fitness for judicial office.

Matter of Gerard Deckelman

The Commission determined that Gerard Deckelman, a justice of the Fremont Town Court, Sullivan County, should be removed from office for failing to perform his administrative and adjudicative duties. (Judge Deckelman is not a lawyer.)

In its determination dated December 21, 1987, the Commission found that, over a three-year period, Judge Deckelman repeatedly failed to report cases and remit monies to the State Comptroller in a timely manner and failed to deposit court funds into his court account within the time required by law, notwithstanding that he handled fewer than 25 cases during this period. The Commission found that the judge's negligence in this regard was pervasive, noting that the State Comptroller had sent stop-salary notices to the judge on four occasions because of his failure to file timely reports. The Commission also found that the judge failed to dispose of cases in a timely manner; failed to maintain complete and adequate court records, including dockets, case files and indices, and a cashbook; failed to issue receipts, and failed to report dispositions to the Department of Motor Vehicles or to law enforcement agencies. The Commission concluded that by such neglect and carelessness, the judge violated various statutory requirements and demonstrated a lack of fitness for judicial office.

Determinations of Censure

The Commission completed eight disciplinary proceedings in 1987 in which it determined that the judges involved should be censured.

Matter of Joseph Goldstein

The Commission determined that Joseph Goldstein, a justice of the Supreme Court, 10th Judicial District, Nassau County, should be censured for abusing his judicial power with respect to a witness in a criminal case and, in another matter, acting in a manner which created the appearance that he was interested in the outcome of the case. (Judge Goldstein is a lawyer.)

In its determination dated January 29, 1987, the Commission found that Judge Goldstein, overreacting to the fact that the testimony of a witness varied from an earlier statement, removed the witness from the stand, implied that he was guilty of perjury, and acted in a manner that conveyed the impression that the witness was in custody for more than an hour. Such conduct, the Commission concluded, was an abuse of judicial power and deviated from the high standards of conduct expected of every judge.

In a second matter, the Commission found, Judge Goldstein entered a closed courtroom where another judge was hearing a case from which Judge Goldstein had disqualified himself. Instead of leaving the courtroom when he realized what

case was being tried, Judge Goldstein followed the presiding judge into chambers and created the impression that he was interested in the outcome of the case, thereby causing a mistrial.

In determining the appropriate sanction, the Commission noted that a judge is required to avoid even the appearance of impropriety and stated that a judge whose actions create an appearance of favoritism harms the administration of justice.

Judge Goldstein did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of Elaine M. Rider

The Commission determined that Elaine M. Rider, a justice of the Sangerfield Town Court and Waterville Village Court, Oneida County, should be censured for engaging in improper ex parte contacts with the prosecutor in a criminal matter. (Judge Rider is not a lawyer.)

In its determination dated January 30, 1987, the Commission found that, after a hearing had been held on a motion by the defendant's attorney, Judge Rider contacted the assistant district attorney and asked him how to proceed, told him that she had decided to deny the motion, and accepted the prosecutor's offer to prepare a written decision for her signature. Without notice to the defendant's counsel, the prosecutor then prepared a three-page decision and sent it to Judge Rider, who signed it.

The defendant's counsel was not informed as to how the decision had been prepared nor of the judge's conversations with the prosecutor. The Commission found that, despite her lack of training and experience, the judge should have known that it was improper to rely on the prosecutor and to discuss with him the merits of the case in the absence of defense counsel.

Judge Rider did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of John C. Orloff

The Commission determined that John C. Orloff, a justice of the Northampton Town Court, Fulton County, should be censured, inter alia, for presiding over cases involving clients of the judge's private investigation business. (Judge Orloff is not a lawyer.)

In its determination dated May 28, 1987, the Commission found that Judge Orloff presided over cases in which clients of the judge's private investigation business were parties or attorneys. Presiding over such cases raised reasonable questions concerning the judge's ability to be impartial, the Commission found, although the judge's employment as a private investigator was not, in and of itself, incompatible with his role as a judge. The Commission also found that the judge engaged in improper ex parte communications with a physician in one case and with the arresting officer in another.

Judge Orloff did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of Anthony P. LoRusso

The Commission determined that Anthony P. LoRusso, a judge of the Buffalo City Court, Erie County, should be censured for improperly interceding in a case on behalf of the son of a former court employee. (Judge LoRusso is a lawyer.)

In its determination dated June 29, 1987, the Commission found that Judge LoRusso used the prestige of his judicial office to advance the private interests of a former court employee by seeking the release of the employee's son from jail. The judge had called the jail where the defendant was being held, expressed concern about the defendant's health, and requested that station house bail be set or that the defendant be released earlier than scheduled. In the course of the conversation, the judge expressed irritation and indignation to the police dispatcher and the officer in charge, and questioned police practices. The Commission determined that a strong sanction was warranted because of the judge's persistence with the police in attempting to secure the man's release, his repeated mention of his judicial office and his failure to fully recognize that he should not have made the call and should not do so again.

Judge LoRusso did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of J. David Little

The Commission determined that J. David Little, a justice of the Queensbury Town Court, Warren County, should be censured for granting special consideration in one matter and for failing to disqualify himself in a second. (Judge Little is a lawyer.)

In its determination dated November 19, 1987, the Commission found that Judge Little granted special consideration to a defendant in a traffic case based on an ex parte request from the defendant's father, who is an officer of a bank which is a client of the judge's law firm. In another matter, the Commission found, the judge failed to disqualify himself, notwithstanding his law firm's connection with the plaintiff. (A principal of the corporate plaintiff was an officer of a client of the judge's firm.) The judge signed a warrant of eviction in the matter without any legal basis to do so, thereby failing to comply with the law and denying the parties full right to be heard. Such conduct, the Commission concluded, contributed to the appearance of partiality in his court.

Judge Little did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of J. Michael Bruhn

The Commission determined that J. Michael Bruhn, a judge of the Kingston City Court, Ulster County, should be censured for presiding over two cases involving family members and for engaging in conduct, contrary to statute, in which his judicial responsibilities conflicted with his private practice of law. (Judge Bruhn is a part-time judge and a lawyer. He practiced law with another judge of the Kingston City Court, Edward T. Feeney. See Matter of Edward T. Feeney, below.)

In its determination dated December 24, 1987, the Commission found that Judge Bruhn presided over the cases of eight clients or former clients of his law firm, disposing of two of the cases himself. The Commission also found that the judge: (1) advised or appeared on behalf of a party in seven cases that had originated in his court, in violation of Section 16 of the Judiciary Law, (2) appeared in other courts after he had taken some judicial action in three of those cases in his own court, in violation of Section 17 of the Judiciary Law, and (3) permitted his law partner to represent a party in eleven cases that were initiated in Judge Bruhn's court and transferred to another court, contrary to Section 471 of the Judiciary Law. The Commission noted that the judge's practice of transferring cases out of his court so that his law partner could represent parties created the impression that the courts were being manipulated to benefit the judge's private law practice.

The Commission also found that Judge Bruhn acted improperly in two cases involving his relatives. In one civil matter in which his brother was the plaintiff, the judge, in effect, permitted the court to be used to aid his brother's collection efforts, granting numerous adjournments while his relative collected the monies he believed he was owed. In another matter, in which his brother-in-law was the defendant, the judge failed to disqualify himself and, when the defendant did not appear, granted two adjournments and failed to issue an arrest warrant, allowing the case to languish on his calendar for seven months.

Matter of Edward T. Feeney

The Commission determined that Edward T. Feeney, a special judge of the Kingston City Court, Ulster County, should be censured for engaging in conduct, contrary to statute, in which his judicial duties conflicted with his private practice of law. (Judge Feeney is a part-time judge and a lawyer. He practiced law with another judge of the Kingston City Court, J. Michael Bruhn. See Matter of J. Michael Bruhn, above.)

In its determination dated December 24, 1987, the Commission found that in twelve cases that had originated in the Kingston City Court, Judge Feeney later appeared in other courts on behalf of a party. Such conduct, the Commission found, violated Sections 16 and 471 of the Judiciary Law and created the impression that the courts were being manipulated to benefit the

judge's private law practice. The Commission also found that Judge Feeney failed to disqualify himself from a case in which the defendant was a former client of his law practice and that his handling of the matter created the appearance of favoritism. The Commission concluded that by his conduct, the judge failed to comply with the law and failed to take scrupulous care to distinguish his judicial duties from his private practice of law.

Matter of Clair A. Reyome

The Commission determined that Clair A. Reyome, a justice of the Malone Town Court, Franklin County, should be censured for his conduct in causing the release of a defendant charged with a serious crime, notwithstanding that he had no jurisdiction over the case. (Judge Reyome is not a lawyer.)

In its determination dated December 24, 1987, the Commission found that, as a favor to the defendant's attorney, Judge Reyome accepted a property bond and caused the release of the defendant, notwithstanding that he had no jurisdiction over the case, had not seen any of the papers in the case and had failed to notify the district attorney's office. The Commission found that Judge Reyome accepted the property bond, knowing that the committing judge had specifically required cash bail or insurance company bond, and knowing that defense counsel was seeking this relief from him only because he knew he could not get it from the arraigning judge. Thereafter, when the committing judge contacted him about the matter, Judge Reyome failed to

be candid with the judge in response to her questions concerning his involvement in the defendant's release.

Determinations of Admonition

The Commission completed seven disciplinary proceedings in 1987 in which it determined that the judges involved should be admonished.

Matter of Allan L. Winick

The Commission determined that Allan L. Winick, a judge of the County Court, Nassau County, should be admonished for his conduct in connection with a bail hearing for a defendant, which conveyed the appearance of favoritism. (Judge Winick is a lawyer.)

In its determination dated January 29, 1987, the Commission found that, as a "favor to a friend," Judge Winick, a county court judge with limited geographic jurisdiction, agreed to conduct a bail hearing for a defendant wanted in another county and arrested in a third. Ignoring standard procedures for off-hours proceedings, Judge Winick conducted the hearing not in a courtroom or a police station, but at his home on a Sunday afternoon. At the hearing, the judge set bail at $5,000 bond or $500 cash, notwithstanding the prosecutor's recommendation of a considerably higher amount, the defendant's fugitive status, and the felony nature of the charges. The Commission concluded that the circumstances of the case conveyed the appearance of

favoritism, which, as the Court of Appeals has stated, is no less to be condemned than actual favoritism. Matter of Spector v. State Commission on Judicial Conduct, 47 NY2d 465, 466 (1979).

Judge Winick did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of John G. Turner

The Commission determined that John G. Turner, a judge of the County Court, Albany County, should be admonished for participating in fund-raising activities of the American Heart Association. (Judge Turner is a lawyer.)

In its determination dated March 23, 1987, the Commission found that Judge Turner permitted his name to be used to publicize the American Heart Association's "Jail Bail for Heart" fund-raising event, which consisted of mock arraignments of donors to the association. The Commission found that by mocking a court proceeding and by taking court time to help raise funds for a private organization, the judge further deviated from the high standards of conduct expected of every judge and violated specific ethical proscriptions against lending the prestige of his office to a fund-raising effort. The judge acknowledged that his participation in the mock arraignments constituted a violation of the ethical standards.

Judge Turner did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of Frank J. Blangiardo

The Commission determined that Frank J. Blangiardo, a judge of the New York City Civil Court and acting justice of the Supreme Court, 1st Judicial District, New York County, should be admonished for his actions during a court proceeding, in which he swatted an attorney's hand and said, "I like to hit girls because they are soft." (Judge Blangiardo is a lawyer.)

In its determination dated July 23, 1987, the Commission found that Judge Blangiardo's remarks to the female attorney, who had been reaching for a law book that lay on the judge's bench, were demeaning and undignified. Such remarks, the Commission stated, undermine an attorney's role in a courtroom by indicating that she is not to be taken seriously and may hinder her from properly representing her client. Noting the recent attention in the court system to eliminating gender bias and the Commission's well-publicized decision in Matter of Jordan, a 1983 case concerning that issue, the Commission stated that the judge should have been aware of the offensive nature of the term "girl" in referring to a female attorney.

Judge Blangiardo did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of Merrill R. Zapf, Sr.

The Commission determined that Merrill R. Zapf, Sr., a justice of the Clayton Town Court and acting justice of the Clayton Village Court, Jefferson County, should be admonished for engaging in certain improper practices with respect to small claims cases. (Judge Zapf is not a lawyer.)

In its determination dated July 24, 1987, the Commission found that Judge Zapf engaged in a series of legal errors in the filing of such cases that collectively convey the impression of favoritism toward business interests and prejudice against alleged debtors. Contrary to law, the judge sent letters attempting to coerce the payment of debts outside of any legal proceedings, allowed corporations to bring small claims in his court, handled claims against defendants who were outside his jurisdiction and granted default judgments against defendants who had not been properly served with notice of the proceeding. Such a series of fundamental errors, the Commission concluded, creates the appearance of favoritism, which is no less to be condemned than the impropriety itself.

Judge Zapf did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of Benno G. Spiehs

The Commission determined that Benno G. Spiehs, a justice of the Willet Town Court, Cortland County, should be

admonished for failing to perform properly his judicial duties in connection with a particular civil case. (Judge Spiehs is not a lawyer.)

In its determination dated October 28, 1987, the Commission found that over a 14-month period, Judge Spiehs made numerous administrative and other errors -- including delays -- that were prejudicial to the parties and to the administration of justice in a particular civil matter, including: advising the plaintiff to file a claim in excess of the court's jurisdictional limit, failing to provide the parties with proper notice of various court actions (such as the granting of a default judgment), failing to issue a transcript of judgment notwithstanding ten requests that he do so, backdating the transcript of judgment by more than four months when he finally did issue it, and then vacating the transcript of judgment without notifying the plaintiff or giving her an opportunity to be heard.

Judge Spiehs did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of Charles R. Cooksey

The Commission determined that Charles R. Cooksey, a justice of the Farmington Town Court, Ontario County, should be admonished for engaging in an improper ex parte communication with a prosecutor and for conditioning dismissal of a criminal case on the defendant's promise to release the municipality from

any claims arising from his arrest. (Judge Cooksey is not a lawyer.)

In its determination dated October 27, 1987, the Commission found that Judge Cooksey declared a recess after the defense lawyer in a trespass case moved for dismissal of the charges, met privately with the assistant district attorney for five minutes to discuss the merits of the case, denied defense counsel's repeated requests to be admitted to the meeting, then told defense counsel that he would consider dismissing the case if the defendant released the county from any claims arising from his arrest. The Commission found that the meeting with the prosecutor violated the rule prohibiting unauthorized ex parte communications. The Commission also found that conditioning dismissal of the charges upon a waiver of liability from a civil claim against the county was wrong; if the case should have been dismissed on its merits, Judge Cooksey should have done so without coercing the defendant to forego his legal right to a civil claim.

Judge Cooksey did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Matter of Penny M. Wolfgang

The Commission determined that Penny M. Wolfgang, a justice of the Supreme Court, Eighth Judicial District, Erie County, should be admonished for lending the prestige of her

judicial office to advance certain business interests and charitable activities. (Judge Wolfgang is a lawyer.)

In its determination dated November 19, 1987, the Commission found that Judge Wolfgang: (1) participated in a radio commercial for a professional soccer team, (2) participated in a home and garden show, which featured the "Judge Penny Wolfgang Interior Design Room," and (3) participated in a fund-raising event of the Cystic Fibrosis Foundation by serving on a panel that chose the winner of "Buffalo's Sexiest Baldy Contest," sponsored by that organization. The Commission concluded that the judge's conduct violated specific ethical provisions which bar a judge from lending the prestige of judicial office to advance the private interests of others, engaging in conduct that detracts from the dignity of judicial office, and participating in charitable fund-raising. The Commission noted that Judge Wolfgang participated in two of these events notwithstanding a prior letter of dismissal and caution from the Commission specifically calling her attention to the applicable ethical standards.

Judge Wolfgang did not request review by the Court of Appeals of the Commission's determination, which thus became final.

Dismissed Formal Written Complaints

The Commission disposed of 14 Formal Written Complaints in 1987 without rendering public discipline.

In two of these cases, the Commission determined that the judge's misconduct had been established but that public discipline was not warranted, dismissed the Formal Written Complaint and issued the judge involved a confidential letter of dismissal and caution.

In nine cases, the Commission closed the matter in view of the vacancy of the judge's office (e.g. by resignation, retirement or failure to win re-election).

In the remaining three cases, the Commission found that misconduct was not established and dismissed the Formal Written Complaint.

One case in which a Formal Written Complaint was dismissed warrants particular comment because of an unusual procedural sequence that led to the dismissal. A full-time judge was charged with (i) having continued the practice of law more than six months after taking the bench and (ii) having circulated separate campaign petitions for a candidate seeking a local non-judicial position. On a motion for summary determination in which both sides agreed on the facts, the Commission dismissed the Formal Written Complaint, finding that the charges had not been established; it also issued a letter of dismissal and caution to the judge, advising him to avoid conduct similar to that with which he had been charged. Thereafter, the Commission's Administrator moved to rescind the letter of dismissal and caution and to dismiss the matter outright, on the ground that there was no basis for the caution since the Formal Written

Complaint had been dismissed. The judge's attorney opposed the motion, arguing that the caution was an appropriate disposition. The Commission granted the Administrator's motion, rescinded the caution and dismissed the charges outright.

Letters of Dismissal and Caution

Pursuant to Commission rule, 22 NYCRR 7000.1(1), a "letter of dismissal and caution" constitutes the Commission's written confidential suggestions and recommendations to a judge.

Where the Commission determines that the misconduct would not warrant public discipline, the Commission, by issuing a letter of dismissal and caution, can privately call a judge's attention to de minimis violations of ethical standards which should be avoided in the future. Such a communication is valuable since it is the only method by which the Commission may caution a judge as to his or her conduct without making the matter public.

Should the conduct addressed by the letter of dismissal and caution continue unabated or be repeated, the Commission may authorize an investigation on a new complaint which may lead to a Formal Written Complaint and further disciplinary proceedings.

In 1987, 42 letters of dismissal and caution were issued by the Commission, two of which were issued after formal charges had been sustained and a determination made that the judge involved had engaged in misconduct. The caution letters addressed various types of conduct.

For example, eight judges were cautioned for failing to disqualify themselves in cases in which their impartiality might reasonably be questioned, including one town justice who presided over cases involving former clients of his law practice and another who presided over cases in which his son was the arresting officer.

Six judges were cautioned for engaging in improper ex parte communications with prosecutors, litigants and others concerning cases pending before them.

Three judges were cautioned for inordinate delay in deciding or otherwise disposing of cases.

Three judges were cautioned for improperly participating in charitable fund-raising activities.

Three judges were cautioned for improperly participating in political campaigns or activity during periods when they were not themselves candidates for elective judicial office.

Three judges were cautioned for failing to make timely reports and deposits of court funds to the State Comptroller.

Since April 1, 1978, the Commission has issued 355 letters of dismissal and caution, 26 of which were issued after formal charges had been sustained and determinations made that the judges involved had engaged in misconduct.

Matters Closed Upon Resignation

Ten judges resigned in 1987 while under investigation or under formal charges by the Commission.

Since 1975, 162 judges have resigned while under investigation or charges.

The jurisdiction of the temporary and former commissions was limited to incumbent judges. An inquiry was therefore terminated if the judge resigned, and the matter could not be made public. The present Commission may retain jurisdiction over a judge for 120 days following resignation. The Commission may proceed within this 120-day period, but no sanction other than removal may be determined by the Commission within such period. (When rendered final by the Court of Appeals, the "removal" automatically bars the judge from holding judicial office in the future.) Thus, no action may be taken if the Commission decides within that 120-day period following a resignation that removal is not warranted.

Referrals To Other Agencies

Pursuant to statute (Judiciary Law Section 44[10]), the Commission, when appropriate, refers matters to other agencies. For example, complaints received by the Commission against court personnel are referred to the Office of Court Administration, as are complaints that pertain to administrative issues. Indications of criminal activity are referred to the appropriate prosecutor's office. Complaints against lawyers are referred to the appropriate Appellate Division.

In 1987, the Commission referred 39 matters to either the Office of Court Administration or an administrative judge,

involving complaints against court employees or administrative issues.

The Commission also made ten referrals to other agencies. For example, evidence of larceny by a judge was referred to a District Attorney. False testimony by a witness in an investigation was referred to a District Attorney. Unprofessional conduct by two prosecutors was referred to an Appellate Division. Complaints against five lawyers were forwarded to the appropriate Appellate Division disciplinary committees.

SUMMARY OF COMPLAINTS CONSIDERED BY THE TEMPORARY, FORMER AND PRESENT COMMISSIONS

Since January 1975, when the temporary Commission commenced operations, 9571 complaints of judicial misconduct have been considered by the temporary, former and present Commissions.

Of the 9571 complaints received since 1975, 6706 were dismissed upon initial review and 2865 investigations were authorized. Of the 2865 investigations authorized, the following dispositions have been made through December 31, 1987:

-- 1308 were dismissed without action after investigation;

-- 520 were dismissed with caution or suggestions and recommendations to the judge;

-- 208 were closed upon resignation of the judge;

-- 220 were closed upon vacancy of office by the judge other than by resignation; and

-- 476 resulted in disciplinary action.

-- 133 are pending.

Of the 476 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission:[3]

-- 78 judges were removed from office;

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[3]It should be noted that several complaints against a single judge may be disposed of in a single action. This accounts for the apparent discrepancy between the number of complaints which resulted in action and the number of judges disciplined.

-- 4 additional removal determinations are pending review in the Court of Appeals;

-- 3 judges were suspended without pay for six months;

-- 2 judges were suspended without pay for four months;

-- 155 judges were censured publicly;

-- 84 judges were admonished publicly; and

-- 59 judges were admonished confidentially by the temporary or former Commission, which had such authority.

In addition, 162 judges resigned during investigation, upon the commencement of disciplinary proceedings or in the course of those proceedings.

REVIEW OF COMMISSION DETERMINATIONS BY THE COURT OF APPEALS

Determinations rendered by the Commission are filed with the Chief Judge of the Court of Appeals and served by the Chief Judge on the respondent-judge, pursuant to statute. The Judiciary Law allows the respondent-judge 30 days to request review of the Commission's determination by the Court of Appeals. If review is waived or not requested within 30 days, the Commission's determination becomes final.

Since 1978, the Court of Appeals has reviewed 38 determinations of the Commission (30 of these were determinations of removal, seven were determinations of censure and one was a determination of admonition). The Court accepted the sanction determined by the Commission in 29 cases (25 of which were removals). In two cases, the Court increased the sanction from censure to removal. In seven cases, the Court reduced the sanction that had been determined by the Commission (five removals were reduced to censure, and two censures were reduced to admonition). In no case did the Court of Appeals find that the Commission erred in finding misconduct and determining that a public sanction was appropriate.

In 1987, the Court had before it seven requests for review, three of which had been filed in 1986 and four of which were filed in 1987. Of these seven matters, the Court decided five; two are pending. (As of December 31, 1987, two judges had yet to advise the Court whether they requested review of, or

accepted, Commission determinations of removal. See Matter of Roy E. Smith and Matter of Gerard Deckelman in this report.)

Matter of Lawrence L. Rater

On July 25, 1986, the Commission determined that Lawrence L. Rater, a justice of the Sherman Town Court, Chautauqua County, should be removed from office for his mishandling of public monies and his neglect of judicial responsibilities. Judge Rater requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated February 12, 1987, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Rater, 69 NY2d 208 (1987).

The Court concluded that the sanction of removal was warranted by the judge's failure to make timely deposits in the court account and timely reports and remittances to the State Comptroller over a two-year period after a previous censure for similar misconduct. As the Court stated, "in the absence of any mitigating factors, the failure to make timely deposits in the court account and timely reports and remittances to the State might very well lead to removal (citations omitted)." Id. at 209. The Court noted that "[f]ailure to heed a prior censure is an aggravating factor militating in favor of the strictest sanction," especially where the prior censure was based, in part, on the same misconduct. Id. The Court adopted the Commission's

finding that the judge's "repetition of his misconduct 'further erodes public trust in his ability to properly perform his judicial duties.'" Id.

Matter of Patrick T. Maney

On September 12, 1986, the Commission determined that Patrick T. Maney, a justice of the East Greenbush Town Court, Rensselaer County, should be removed from office for engaging in improper political activity. Judge Maney requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated June 2, 1987, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. 70 NY2d 27 (1987).

The Court found that the judge had "violated both the letter and spirit of the rules forbidding political activity by judges," which require that judges "must hold themselves aloof to and refrain from engaging in political activity, except to the extent necessary to pursue their candidacies during their public election campaigns." Id. at 30. Judge Maney violated those rules, the Court found, by becoming "involved in partisan political maneuvering immediately after his public campaign for reelection had ended and nearly four years before his next one was to begin." As described by the Court, Judge Maney "openly engaged in a long-term struggle for control of the local Democratic Party leadership," "actively solicited support for his own faction among party members and assumed a partisan stance in the

relatively public setting of a party caucus." Id. The Court rejected the judge's assertion that such conduct was necessitated by the political realities that face elected judges, stating that "the boundaries of permissible political activities are clearly delineated in the Rules Governing Judicial Conduct and the Canons of Judicial Ethics." Id. at 30-31. The Court concluded that the judge's "ongoing immersion in the affairs of a political party represents a flagrant disregard of ethical restraints." Id. at 31.

Matter of Lee Vincent

On October 23, 1986, the Commission determined that Lee Vincent, a justice of the Burke Town Court, Franklin County, should be removed from office for his mishandling of public monies, his delays in disposing of cases, and his neglect of judicial responsibilities. Judge Vincent requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated June 30, 1987, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. 70 NY2d 208 (1987).

The Court found that over a five-year period the judge had grossly neglected his judicial duties, repeatedly failing to make timely deposits and remittals of court monies to the State Comptroller and to dispose of his small caseload (some 50 cases per year) in a timely manner. The Court found that the judge's arbitrary dismissal and unconditional discharge of numerous cases

(after a State Police investigator had prodded the judge to catch up on his record-keeping) was "an aggravating factor which erodes the public's confidence and justifies the sanction of removal." Id. at 209.

Matter of Bertram R. Gelfand

On March 20, 1987, the Commission determined that Bertram R. Gelfand, Surrogate of Bronx County, should be removed from office for engaging in improper conduct, including misuse of his judicial position, in the course of a personal relationship with his law assistant, and for lack of candor in the Commission proceedings. Judge Gelfand requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated June 30, 1987, the Court accepted the sanction determined by the Commission and ordered Judge Gelfand's removal from office. 70 NY2d 211 (1987).

The Court found that, as charged by the Commission, Judge Gelfand engaged in eight separate acts of misconduct over a five-month period, motivated by animus toward his law assistant because of a personal and sexual relationship between them. His misconduct, as described by the Court, included making administrative and personnel decisions, taking official actions, and making implicit and explicit threats to court officials and others in order to prolong a sexual relationship with the law assistant and, later, to exact personal vengeance when she refused to continue their affair. The Court found that such

conduct -- coupled with Judge Gelfand's lack of candor throughout the proceedings before the Commission -- was "in conflict with the standards of integrity and propriety required of members of the judiciary, and inimical to his role as a Judge." Id. at 216. The Court stated:

> By allowing his personal relationships to influence both his judgment and the administration of the court over which he presides he could not help but impair public confidence in his integrity and impartiality. [Citations omitted.] The effectiveness of the judicial system is dependent upon the public's trust and violations such as these which undermine that trust are so contrary to the ethical obligations required of judges in conducting their personal and judicial duties that removal is essential. [Citations omitted.]
>
> Id.

The Court criticized the Commission for basing its determination in part on events which preceded the dates covered by the Formal Written Complaint. The Court rejected Judge Gelfand's request for a new hearing, however, concluding that the conduct charged and proved at the hearing constituted sufficient cause for removal.

Subsequently, Judge Gelfand filed a petition for a writ of certiorari in the United States Supreme Court, which was denied.

Matter of Ernest J. Conti

On March 23, 1987, the Commission determined that Ernest J. Conti, a justice of the Amsterdam Town Court, Montgomery County, should be removed from office for misconduct in connection with the disposition of two speeding tickets and for improperly dismissing, or adjourning in contemplation of dismissal, 31 cases without notice to the prosecutor.

Judge Conti requested review of the Commission's determination by the Court of Appeals.

In its unanimous decision dated October 22, 1987, the Court, finding that the judge's conduct "demonstrated a level of dishonesty and lack of judgment that is unacceptable for a member of our State's judiciary," accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Conti, ___NY2d___, No. 254, slip op. at 2 (Oct. 22, 1987).

The Court found specifically that the two ticket-fixing charges (one involving the judge's personal attorney) were convincingly established by the evidence and that the judge's testimony regarding the circumstances of the dismissals was patently lacking in candor. The Court found, as "a further aggravating circumstance," that the judge "demonstrated an unacceptable degree of insensitivity to the demands of judicial ethics when he asserted his view that he could properly adjudicate his personal attorney's traffic violation case because a dismissal of the charges was anticipated." Slip op. at 3. Such

"a serious lack of judgment," the Court stated, "led to both an appearance of impropriety and the potential for a conflict of interest." Id. Accordingly, the sanction determined by the Commission was accepted.

CHALLENGES TO COMMISSION PROCEDURES

The Commission's staff litigated three matters in 1987 involving important constitutional and statutory issues relative to the Commission's jurisdiction and procedures.

John Doe v. Commission

On September 9, 1987, by order to show cause, a judge (identifying himself as "John Doe, a judge of the unified court system") commenced an Article 78 proceeding against the Commission in Supreme Court, Monroe County. The petitioner sought an order prohibiting the Commission from conducting a hearing or proceeding further on a formal written complaint against him, and dismissing the pending formal written complaint. The petitioner argued that the Commission was acting in excess of its jurisdiction by proceeding against him and alleging violations of Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct, pertaining to conduct which had occurred prior to the time that he became a judge and for which he had previously been cautioned as an attorney.

In a decision dated October 15, 1987, Supreme Court Justice Thomas P. Flaherty granted the Commission's cross-motion to dismiss. Judge Flaherty found that the Commission's "authority to investigate and proceed against a judge for conduct preceding his tenure in office has been clearly recognized under the present system," under its mandate to review complaints with

respect to a judge's "fitness" for judicial office. Judge Flaherty also found that the petitioner's discipline as an attorney did not preclude the Commission's investigation and proceedings. Judge Flaherty denied the petitioner's application to seal the records of the Article 78 proceeding.

Sims v. Wachtler et al.

On March 16, 1987, former Buffalo City Court Judge Barbara M. Sims, who was removed by the Court of Appeals in 1984 on review of a Commission determination, filed a complaint in Supreme Court, New York County, against the Chief Judge, the Chief Administrative Judge, and the Administrator of the Commission. The complaint sought a declaratory judgment that the defendants' conduct in investigating and removing her from office was discriminatory and unconstitutional, and that various provisions of the Constitution of the State of New York and the Judiciary Law, under which she was removed, are "unlawful, invalid, unconstitutional, void and unenforceable."

The Administrator filed a motion to dismiss dated April 22, 1987, on the grounds of lack of jurisdiction, failure to state a cause of action, collateral estoppel, res judicata and the statute of limitations. The other defendants moved to dismiss, on similar grounds, on May 15, 1987. The plaintiff filed a cross-motion for summary judgment on June 12, 1987, and an amended cross-motion, for partial summary judgment, on July 11, 1987. The motions are pending.

Matter of James R. Lenney

The Commission determined in 1987 that Herkimer Village Court Justice James R. Lenney should be removed from office. Thereafter, Judge Lenney made a motion for leave to reopen and reargue the matter before the Commission. He also requested review by the Court of Appeals of the Commission's determination of removal. In a determination and order dated September 24, 1987, the Commission denied the motion in all respects.

Judge Lenney requested that the Court of Appeals review the Commission's determination and order denying the motion to reopen and reargue. By order dated November 24, 1987, the Court of Appeals, citing the New York State Constitution, Article VI, Section 22, and the Judiciary Law, Section 44, dismissed that request, sua sponte, upon the ground that the Court does not have jurisdiction to entertain a request for review of an order denying reconsideration of the Commission's determination of removal.

Judge Lenney's request for review of the determination of removal is pending in the Court of Appeals.

POLICIES AND PRACTICES OF THE COMMISSION

From time to time, various Commission practices and procedures are challenged -- by individual judges, judicial associations and others -- as being unfair to judges under inquiry. Sometimes these issues are raised in legal challenges, and at other times they are expressed in other forums.

In scores of challenges raised in the courts over the years, covering over a hundred separate issues -- typically in proceedings brought by judges pursuant to Article 78 of the CPLR, or in the course of review by the Court of Appeals of Commission determinations -- the rules and procedures of the Commission have always been sustained. In the history of this Commission, no rule or operating procedure has been voided by the courts. No statutory grant of authority has ever been held to be overbroad or otherwise unconstitutional. (In this and previous annual reports, we have reported on the major challenges filed and decided by the courts in the preceding 12 months.)

Despite this record, there is persistent debate on the Commission's procedures as well as other matters, such as the size of our budget, the merits of our determinations and the scope of our administrative and legislative recommendations. In September 1987, the Judiciary Committee of the State Assembly, in furtherance of its oversight responsibilities, held a one-day hearing on Commission operations, eliciting much the same complaints decided in the Commission's favor by the courts and otherwise raised before the Judiciary Committee at its last

public hearing on the Commission in 1981. (No legislative changes resulted from the 1981 hearing.)

In view of the continuing public discussion over Commission policies, practices and procedures, it seems appropriate to address the issues in this report.

The Commission's Budget

The amount of funds available to an investigative-disciplinary body will affect the scope of investigations and the time and resources that may be devoted to pending matters. Underfinanced commissions on judicial conduct tend to be less effective than their adequately-funded counterparts.

Every budget request by the Commission is supported by detailed documentation and is meticulously scrutinized by the executive branch's Bureau of the Budget, prior to inclusion in the Governor's annual budget submission to the Legislature. The budget is then analyzed by the Senate Finance Committee and the Assembly Ways and Means Committee before it is approved by the Legislature. It is a "line item" budget which accounts for every dollar and which the Bureau of the Budget monitors throughout the year.[4] Funds are spent in accordance with policies and directives of the State Comptroller.

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[4]The Commission's 1987-88 budget figures are appended.

Any reference to the size of our budget should be considered in two contexts: the history of judicial discipline in New York, and the comparative activity of commissions in other states.

In the 100 years preceding the establishment in 1975 of the Commission in New York, only 23 judges were publicly disciplined throughout this state. In the past 12 years with an active, adequately-funded commission, more than 300 judges have been publicly disciplined, including 78 who were removed from office. In addition, several hundred have been privately cautioned, and more than 160 have resigned while under inquiry.

These statistics, which reflect far greater activity over the past decade than in the preceding century, are not the only measure of the Commission's activity. Equally important is the heightened awareness of ethical standards among the state's judiciary, due in large part to the Commission's educational efforts and the deterrence value of public disciplinary determinations. New York has contributed more case law on judicial discipline in the past decade than most other states combined. The determinations of the Commission, and the decisions of the Court of Appeals on Commission cases, are nationally recognized.

None of this would be possible without an adequately financed Commission. Ironically, we have been meeting our professional obligations with a smaller staff and a budget that has been virtually constant in terms of real dollars since 1978.

In 1978-79, the Commission had a full-time staff of 58 (plus 40 part-time employees) and a budget of 1.644 million dollars. In 1987-88, our staff has 42 full-time and one part-time employee, and our budget is $2.155 million, representing an annual budget growth of only 2.7% in ten years, which is substantially below inflation rates and dramatically lower than the budgets of other state agencies. Four times since 1979, we requested budgets no greater or even less than the previous year's amount, and we were apprised by the Bureau of the Budget that ours was the only agency to seek less than before.

Moreover, much of our budgetary expense involves fixed and unavoidable costs. Our rent, for example, is more than $300,000 a year. Leasing of photocopiers and the cost of supplies and equipment have increased over the years for essentially the same number of machines, supplies and equipment. Court reporting fees and other contractual services, some of which are controlled by State bargaining agreements, have gone up dramatically in the last ten years, and State-mandated salary increases have averaged approximately 7% per year.

By any reasonable standard, the Commission has spent its money frugally and responsibly.

Comparing New York's Commission budget to that of other state commissions reveals not that New York allocates too much but that other states either allocate too little or provide for some commission appropriations in the budgets of other government

agencies. Any comparison, of course, must take into account more than a simple dollar amount.

For example, no other state has more judges than New York. (Only one -- Texas -- has an equivalent number.) New York's Commission has jurisdiction over approximately 3500 judges throughout a state of 49,576 square miles. The most populous state in the union -- California -- has about 1360 judges (or about 39% of New York's total) and an annual budget of $900,000 (or 42% of New York's total). Yet investigators and lawyers handling California's judicial disciplinary hearings are supplied and paid for by the state attorney general's office -- a practice not followed in New York, where the Commission's own staff not only conducts investigations and trials but also litigates state and federal claims against the Commission. Moreover, in one instance when the California Commission had to undertake a complex and highly sensitive investigation, the state made special provision to pay a $500,000 fee to a private law firm to conduct the investigation. Not only has the State of New York not allocated any supplementary funds to meet the needs of our Commission, but in some years a portion of the Commission's funds has been returned to the State because it had not been spent.

On a dollars-to-judges basis, California spends about $662 per judge per budget year, not counting hidden costs, such as services rendered by the attorney general's office. New York spends about $616 per judge with no hidden costs. Michigan, with

an annual budget of over $500,000 and 581 judges, spends $861 per judge per year.

Other states have chosen to have less active commissions than New York, and the results are reflected not only in their budgets but their performance. The average commission budget in the United States is less than $200,000 a year. (New York's rent alone, at $300,000, exceeds this average.) Published reports of the American Judicature Society demonstrate that few of the country's state commissions on judicial conduct are active. In 1985 (the latest available statistical year), there were 12 judges removed from office throughout the entire country; eight were from New York. Of the 33 judges publicly admonished or censured in that year, ten were from New York. Only three states, New York among them, had as many as eight employees.

New York State has recognized the value of an appropriately-vigorous judicial disciplinary system and has funded its judicial conduct commission adequately to do the job. New York State has been a recognized leader in disciplining judges and the New York State Commission has met its obligations fully while maintaining a minimal budget growth.

The Commission's "Mandate"

The State Commission on Judicial Conduct is a disciplinary agency whose mandate is to enforce promulgated rules of ethical behavior incumbent upon judges and justices of the state unified court system.

Some have suggested that the Commission has investigated and disciplined judges for minor or trivial matters. Such criticism misapprehends the Commission's purpose.

The Commission's mandate for ethics enforcement should not be confused with a grand jury or District Attorney's mandate to prosecute crimes. It was never expected, for example, that the Commission would expose crime (such as bribery and other corruption) among the judiciary. Indeed, the traditional powers of a prosecuting agency were not given to the Commission by the Legislature. We do not have the broad prosecutorial options and tools of wiretapping, electronic surveillance, informants, undercover "stings" or the ability to persuade prospective "targets" to cooperate at the risk of going to jail. Nor do we need such options and tools, for the Commission was never meant to supersede the District Attorney's role.

The Commission's authority is to receive conduct-related complaints against individual judges and to discipline those judges when the complaints prove meritorious. Here again, the Commission's ethics enforcement role is plainly different from the prosecutor's criminal law enforcement role. The Commission, for example, lacks the broad discretion given to law enforcement agencies to commence investigations on the basis of mere suspicion; a Commission inquiry must be based on a written complaint, and (pursuant to court decisions) the scope of the inquiry must be limited to subject matter that is related to that complaint. When misconduct is established, the determinations

available to the Commission are disciplinary in nature, including public admonition, public censure and removal from office -- not incarceration, or a fine, or probation or some other penalty rooted in criminal law.

Ethics violations are not "minor" matters. A judge who transgresses an ethical rule -- who, for example, asserts the prestige of office to influence another judge or a third party, makes sexist or racist remarks, is grossly negligent in the handling of court funds, or otherwise violates ethics standards -- may not be committing a crime; but the adverse consequences upon public confidence in the integrity of the judiciary, and upon the fair and proper administration of justice, are serious indeed and cannot be minimized.

In each case before it, the Commission strives to impose the discipline most appropriate to the particular situation. While individuals may disagree on the merits of particular sanctions, no one can reasonably argue that the Commission ever erred in addressing its attention to the subject matter involved in the disciplined judge's ethical violation. Indeed, it would be a gross dereliction of the Commission's duty to decline enforcing one promulgated rule while vigorously enforcing another on the grounds that the former, by some facile definition, was "minor" while the latter was "significant." Mitigating circumstances should serve to mitigate the punishment for violating an ethical stricture, not vitiate the underlying ethical rule.

We believe that, over the years, we have met our mandate well, acting to remove those judges who have demonstrated by their conduct that they are unfit to serve as judges, to impose lesser public disciplinary action when appropriate, to caution those judges privately when non-public action seems reasonable, to educate judges so as to deter them from future misconduct, and always to underscore by our actions the extremely important place of ethical behavior in the administration of justice.

"Concentration" On Town And Village Justices

One issue before the Assembly Judiciary Committee in 1987 was whether the Commission "concentrates" on town and village justices.

There are approximately 3500 judges and justices in the state unified court system over whom the Commission has disciplinary jurisdiction. Approximately 2400 (about 68%) are part-time town and village justices -- also referred to as "local magistrates." Nearly 2000 of these 2400 magistrates are not lawyers.

During the Commission's inquiry into ticket-fixing (approximately 1977-81), which primarily involved the town and village courts, the criticism was made that the Commission was focusing on town and village justices. (The overwhelming percentage of cases in town and village courts involve traffic violations, whereas most cities have administrative agencies that handle such matters.)

A part-time lay justice has authority not only to dispose of traffic cases but also to issue warrants, arraign criminal defendants, decide bail applications even in felony cases, conduct misdemeanor trials, incarcerate defendants for up to one year, adjudicate small claims cases and otherwise exercise considerable power. As the Court of Appeals has held, there is no reasonable basis to suggest that the statewide rules governing ethical judicial behavior should apply differently to local magistrates than to judges of higher courts. Matter of Fabrizio, 65 NY2d 275 (1985). The public has reposed great power in part-time judges, and it should expect that those judges be held to high standards of conduct.

In considering allegations of misconduct, the Commission does not take into account whether "too few" or "too many" judges of a particular court have been disciplined in a given year. Each complaint is treated on its merits, which is the only acceptable standard. A person who files a complaint against a town or village justice has a right to have it considered on its merits, without regard to the number of town or village justices who may have been disciplined previously.

Moreover, the Commission's authority is limited to taking action on complaints. Even when it decides to initiate an investigation on its own motion, it can do so only upon the filing of a "complaint" by the Commission's Administrator. (Judiciary Law, Section 44, paragraph 2.) Accordingly, it must have a clear basis on which to proceed, and the courts have

underscored the absence of any legislative authority to conduct random inquiries. Commission v. Doe, 61 NY2d 56 (1984).

No single year's statistics can accurately reflect the Commission's overall record with regard to judges of one court or another. For example, in 1986, of the 16 judges publicly disciplined, 15 were part-time town or village justices. In 1987, however, of the 22 judges publicly disciplined, 13 were part-time town or village justices and nine were judges of higher courts. Thus, town and village justices comprise approximately 68% of the State's judiciary but in 1987 accounted for about 59% of the Commission's determinations; judges of courts other than town and village courts comprise approximately 32% of the State's judiciary, and in 1987 they accounted for approximately 41% of the Commission's determinations.

It cannot fairly be said that in 1986 the Commission "concentrated" on local magistrates or in 1987 the Commission "concentrated" on other judges. Indeed, many of the cases resolved in 1987 were begun in 1986 or earlier. In any single year, a large percentage of concluded cases may involve judges of a particular level, and in another year the converse may be true.

A review of the Commission's statistics over a period of time reveals that the percentage of town and village justices disciplined is roughly equivalent to the percentage of such justices in the court system. In the last five years, there have been 100 disciplinary determinations, of which 71 (or 71%) involved local magistrates, who comprise 68% of the judiciary.

Surely, by these accounts, neither the Commission's policy to consider complaints on the merits nor the Commission's overall statistical record can support a claim that it "concentrates" on town and village justices or any other level of the court system. We "concentrate" only on judicial misconduct, without regard to the particular judge's rank within the court system.

The "One-Tier" Versus "Two-Tier" Systems

There are basically two types of judicial disciplinary commissions -- (i) those which investigate complaints and, when appropriate, recommend that a court or some other body commence a formal hearing and adjudicate the matter and (ii) those which supervise the investigation of complaints, decide whether charges should be filed, and determine or recommend disciplinary sanctions. The former arrangement is known as a "two-tier" system (since two separate entities are involved). The latter arrangement -- in which investigative and limited adjudicative functions are combined within the same agency -- is known as a "one-tier" system.

New York is one of 42 states with a one-tier system, which was established in a constitutional amendment overwhelmingly approved by the electorate in 1977. (Up until then the Commission had been acting pursuant to a grant of authority by the Legislature.)

The combination of investigative and adjudicative functions is a system that has worked well in New York for ten years. The constitutionality of the system has been upheld by the courts,[5] and the due process rights of judges under inquiry have been fully protected.

In Commission proceedings, there is, where appropriate, a clear separation of investigative and judicial functions. For

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[5]It is well-settled law that a combination of investigative and judicial functions in a single agency does not violate due process. See Withrow v. Larkin, 421 US 35 (1975); Halleck v. Berliner, 427 F. Supp. 1225, 1243-44 (D.D.C. 1977), and cases cited therein. The constitutionality of the one-tier system for judicial discipline has specifically been upheld. See, e.g., In re Nowell, 237 SE2d 246 (N.C. 1977); Matter of Mikesell, 243 NW2d 86 (Mich. 1976). In New York, the Commission's procedures have repeatedly been upheld when judges have attacked the combination of investigative and adjudicative functions in the Commission. See Matter of Sims, 61 NY2d 349, mot. for rearg. denied, 62 NY2d 884 (1984); Anonymous Town Justice v. State Comm. on Judicial Conduct, 96 Misc2d 541 (Sup. Ct. Erie Co. 1978); O'Connor v. State Comm. on Judicial Conduct, No. 2671-78 (Sup. Ct. Alb. Co., Mar. 21, 1978). As the Court stated in O'Connor:

> [T]he combination of investigative and judicial functions in a single agency does not violate due process (Friedman v. State of New York, 24 NY2d 528). An agency such as the Commission is not disqualified from deciding cases which arise out of its own investigations even though during the course of the investigation the agency may have reached conclusions concerning the cases....

See also Friedman v. State of New York, 24 NY2d 528 (1969), in which the Court of Appeals held that it was not an improper combination of functions for the Court on the Judiciary (a special court which conducted judicial disciplinary proceedings in New York prior to the Commission) to review and approve charges, to appoint counsel to prosecute, and to sit in judgment on the case.

example, the Commission has promulgated a rule prohibiting members of staff who investigate or try cases against a judge from later assisting the Commission in rendering its determination. Indeed, the Commission has bifurcated its professional staff, appointing a clerk who does not participate in an investigative or adversarial capacity in any case, and who assists the Commission and Commission-designated referees. At the same time, the Commission prohibits its investigative and litigating personnel from assisting or advising the Commission in its deliberations at any stage of formal proceedings.

Prior to the advent of the one-tier system in New York, judicial discipline was the province of the courts. The four Appellate Divisions and a Court on the Judiciary shared responsibility for hearing and deciding charges of judicial misconduct. A major goal in the change to a one-tier commission system was to relieve judges of the responsibility for disciplining their colleagues, a system which gave rise to legislative and public concern. Another important concern was to invigorate a basically inactive system of judicial discipline characterized by disparate procedures in each department and no statewide body with uniform procedures and rules to receive, investigate and litigate complaints. The two-tier system in New York had not succeeded in identifying judicial misconduct, disciplining those judges whose ethical transgressions so warranted, or improving public confidence in the courts and the accountability of the judiciary.

In devising a one-tier structure, the New York State Legislature wisely did not remove the courts from the judicial disciplinary process. The Court of Appeals has the power to review Commission determinations, and the Commission is subject to the jurisdiction of the courts on procedural and other matters raised by judges. Upon the request of a judge who is the subject of a Commission determination, the Court of Appeals is empowered to accept or reject the Commission's findings, conclusions and determined sanction, or to make its own de novo findings and conclusions. If the Court disagrees with the determination, it may substitute its own judgment for the Commission's and render any prescribed discipline or no discipline at all. At that stage, the Commission's determination is no more than a recommendation.

Thus, it is the Court of Appeals that has the final authority to impose discipline on a subject judge unless the judge chooses to accept the Commission's determination. Moreover, cases are "prosecuted" by staff whose recommendations to the Commission as to misconduct and sanctions are by no means uniformly accepted, as public records reveal.

New York's present Commission system, enacted by constitutional amendment, has worked well, is fair, and has fulfilled its mandate. A change from a one-tier to a two-tier system is simply not justified.

Education Of Judges

Among the concerns that have been expressed is that the Commission spends too much of its time disciplining judges and not enough time educating them as to the ethics rules incumbent upon them. This point of view not only misapprehends the Commission's purpose, but is inaccurate.

The Commission is a disciplinary agency whose constitutional mandate is to investigate complaints and, where appropriate, discipline individual judges for ethical violations. Nowhere in the Constitution or Judiciary Law is there an educational or training mandate conferred upon the Commission. The training and education roles are properly assigned to and performed by the Office of Court Administration, which has both the mandate and the resources to conduct seminars, orientations, training programs and other such events for judges throughout the state.

Notwithstanding its role as a disciplinary agency, the Commission has done a great deal over the years to help educate, inform and otherwise assist judges as to their ethics obligations.

For example, every year in our annual report, we discuss in considerable detail various topics on judicial conduct and ethical behavior, so as to inform judges of potential trouble spots they may then take care to avoid. We reproduce each public disciplinary determination rendered during the year, thus making the subject matter available to all judges. We distribute each

annual report by mail to each and every judge of the state unified court system, as well as to bar associations, libraries, civic associations and other organizations that might benefit from its information.

Most judicial conduct commissions do not prepare such detailed, informative annual reports as the Commission does in New York. Indeed, the typical annual report in states other than ours simply offers a statistical analysis of the year's work and a cursory description of the individual disciplinary decisions rendered.

We believe that a detailed, descriptive annual report contributes to a better-informed judiciary and an improved administration of justice, and we will continue to use it as an important educational tool.

The Commission also promotes judicial education by participating in various training, education and other informational programs run throughout the year by the Office of Court Administration, associations of judges, civic organizations and others. Last year, for example, Commission members or staff participated in numerous such programs, including: the annual meeting of the State Magistrates Association; OCA's training and orientation program for newly-elected judges; OCA's statewide continuing education program for all full-time judges; the annual meeting of the Association of Towns; two public forums run by the Fund for Modern Courts; and a meeting of town and village

justices and clerks organized by the Town and Village Clerks Association for the Eighth Judicial District.

Moreover, over the years, the Commission has met numerous times with representatives of various associations of judges, bar association committees and others endeavoring in the field of judicial ethics, to discuss procedures, relevant law and other topics.

Between 1979 and 1984, we also published three indexed volumes of all Commission determinations over a six-year period (1978-83). These volumes were distributed to every judge in the unified court system and to libraries, law schools and other appropriate institutions. These publications supplemented our annual reports (which on a year-by-year basis contain our determinations) with a readily-accessible, indexed reference. They were especially beneficial to respondent judges in disciplinary proceedings. The volumes are no longer published because funds for them were specifically deleted from our budget, over our objection. Our objection to the deletion of this item from our budget was based on the value of these volumes as a resource to judges, lawyers and the public.

Through these efforts, it is evident that the Commission devotes a significant portion of its time and resources to educating the judiciary on ethics standards and helping to reduce future incidents of misconduct.

Confidentiality Of Commission Proceedings

Sections 44 and 45 of the Judiciary Law require that all Commission proceedings and records be confidential, with three exceptions. First, a judge under inquiry has the right to a public hearing upon written request, pursuant to Section 44. Second, a judge may waive confidentiality as to certain Commission records, pursuant to Section 45. Third, upon the Commission's determination to admonish, censure, remove or retire a judge, the entire record of the proceeding becomes public, pursuant to Section 44. The Commission does not have the discretion to make a pending proceeding public; only the judge is given that right.

In a number of public discussions, and in at least one Article 78 proceeding, the Commission has been accused of conducting "star chamber" proceedings. The pejorative connotation of the charge is obvious. The Star Chamber was an English court in the 15th, 16th and 17th centuries, characterized primarily by secrecy and often viewed as arbitrary and oppressive.

It is ironic that some members of the judiciary have criticized the confidentiality of the Commission's proceedings in such terms, since only the judge and not the Commission has the authority to make a hearing public, and since the overwhelming majority of judges under inquiry decline to do so. In the history of the Commission, out of more than 300 formal disciplinary proceedings, only six judges have chosen to exercise the right to a public proceeding. Moreover, when the legislation

setting forth the Commission's procedures was enacted, it was the Commission itself which sought to make hearings public, while various judicial associations, among others, sought to keep them confidential.

There are, of course, certain legitimately debatable shortcomings in a system cloaked in confidentiality. For example, is it in the public interest, once "probable cause" is found and formal charges are preferred, to shield the Commission from scrutiny as it disposes of cases? With the confidentiality statute imposing a virtually eternal silence as to matters the Commission dismisses, it would be impossible for the Legislature and public to know whether the Commission ever improperly dismissed a case. As the law now stands, there can be no evaluation of the Commission's work as to matters it dismisses.

The unavailability of material in dismissed cases also presents problems for lawyers representing judges in subsequent Commission proceedings. There is no mechanism that both preserves confidentiality and allows access to useful precedents that lie buried with dismissed Formal Written Complaints. The only case law presently available is that which derives from Formal Written Complaints resulting in public discipline -- admonition, censure, removal or retirement. If a judge's lawyer seeks information on charges similar to those against his or her client but that were dismissed as to another judge, there is no way to provide it.

Perhaps the most sensible way to deal with the problems caused by confidentiality is to make misconduct hearings public. At present, 24 states conduct some or all parts of their judicial disciplinary proceedings in public. Indeed, prior to 1978, public proceedings were the rule in New York.

During a period of three decades, 1947 to 1980, Court on the Judiciary proceedings were public, following the filing of public charges. Hearings were public before Court-designated hearing officers. From 1976 to 1980, during a period when Courts on the Judiciary were being phased out but still had jurisdiction over already-commenced cases, nearly 30 disciplinary cases were aired in public proceedings. In the period prior to 1976, some of the judicial disciplinary proceedings held under the authority of the Appellate Divisions were public.

Once a judge was served with formal charges -- whether by the Commission, the Court on the Judiciary or the Appellate Division -- the matter became public, and, even where dismissal of charges was the result, the record became available to lawyers in subsequent cases for use in defense of other judges.

The Commission is proud of its record and would welcome public scrutiny not only as to its public decisions[6] but also as

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[6]The Commission notes that in every one of its 38 cases reviewed to date by the Court of Appeals, the Court has accepted the Commission's finding that the judge involved committed misconduct and should be disciplined. In 29 of those cases, the Court also accepted the specific sanction recommended by the
(Footnote Continued)

to its dismissals. We also recognize the value that dismissed cases would have to judges in subsequent proceedings who wish to make use of precedents beneficial to their defense. We recommend that the Legislature amend the Judiciary Law so as to make public all proceedings upon service of a Formal Written Complaint.

(Footnote Continued)
Commission. In seven cases the Court imposed a lesser public discipline. In two cases the Court imposed a greater sanction. Furthermore, in more than 100 procedural issues raised by judges and litigated in the courts, the Commission's jurisdictional authority and procedures have been sustained every time.

SPECIFIC PROBLEM AREAS IDENTIFIED BY THE COMMISSION

In the course of its inquiries and other duties, the Commission has identified certain types of inappropriate conduct which appear to recur periodically and sometimes frequently. In furtherance of both (i) our obligation to advise the judiciary of these matters so that potential misconduct may be avoided and (ii) our authorization in law to make administrative and legislative recommendations in our annual reports, we have commented over the years on certain specific problem areas which we believe warranted attention. Rules changes have been proposed. Legislation has been recommended.

As to each commentary and recommendation we have offered -- some of which have resulted in rules amendments, action by the Office of Court Administration or other appropriate change -- our goal has been to improve the administration of justice.

Many of the subjects addressed below have been raised in our previous annual reports. We comment on them again in order to identify troublesome issues that still exist, indicate action that has been taken to correct certain problems, and propose appropriate changes.

Gender Bias

When the courts were essentially a male-dominated province, populated overwhelmingly by male judges, lawyers and

professional personnel, sensitivity to the manner in which women were addressed and otherwise treated was minimal. Moreover, there was no forum to which complaints of gender bias could be referred. As more and more women have turned to the practice of law and become litigators, court-employed professionals (such as law secretaries and law assistants) and judges -- and as our society at large has become more sensitive to the treatment of women -- the courts, as well as other institutions of government and enterprise, have had to keep pace.

The Rules Governing Judicial Conduct require judges to act with courtesy, patience and dignity toward lawyers, litigants and all others who appear before them in their official capacity (Section 100.3[a][3]). For years, the Commission has considered that this rule was violated by condescending or otherwise offensive remarks by judges about or to the women who appear before them. Since 1983, when we first publicly disciplined a judge for inappropriate, gender-related comments, a public record has been developing with respect to this issue. In that landmark case, a Supreme Court justice was admonished for "insulting and belittling" a female attorney in a case before him by calling her "little girl." The judge's behavior was found to "diminish the dignity of the court." See Matter of Jordan in the Commission's 1984 Annual Report.

The following year, the Commission censured a county court judge who commented publicly that the victim in a pending

rape case "ended up enjoying" herself. See Matter of Fromer in our 1985 Annual Report.

In 1985, the Commission admonished a district court judge for repeatedly commenting, inter alia, about the physical attributes of women attorneys appearing before him. See Matter of Doolittle in our 1986 Annual Report.

Last year, we admonished an acting justice of the Supreme Court for swatting at a female lawyer's hand during a bench conference and, in response to the lawyer's reaction, saying, "I like to hit girls because they are soft." See Matter of Blangiardo in this report.

Such conduct by judges is particularly insensitive in view of the widespread attention the issue of gender bias in the court system has received. See the "Report of the New York Task Force on Women in the Courts," reprinted in 15 Fordham Urban Law Journal 8 (1986-87). Steps to implement the task force's recommendations are underway. For example, a Committee To Implement Recommendations of the New York Task Force on Women in the Courts has been established, and the Office of Court Administration recently prepared a seminar for judges on the subject of gender bias.

Gender-based derogations of those who appear in the courts should be as seriously regarded as racially or ethnically motivated remarks. It has long been established in New York that racist language and behavior have no rightful place in the courts, and numerous judges have been publicly disciplined, in

whole or in part, over the years for such misbehavior.[7] With a developing body of law on gender-based misconduct, judges throughout the system should understand that the issue is one to be regarded seriously.

Conflicts Of Interest

The Rules Governing Judicial Conduct require a judge to "disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned..." (Section 100.3[c][1]). The rule then gives examples of conflicts which require disqualification, "including but not limited to" such matters in which the judge is a material witness or has knowledge of disputed evidentiary facts; the judge had served as a lawyer in the case; the judge's spouse or close relative is a party, lawyer or material witness in the case; or the judge has a financial interest in the matter.

As to certain conflicts, such as matters in which the judge has a financial interest or is a close relative of a key participant in the proceeding, the judge -- in lieu of withdrawing from the case -- may opt to disclose on the record the basis of the disqualification. If thereafter the parties and lawyers,

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[7] See Matter of Fabrizio, 65 NY2d 275 (1985); Matter of Agresta, 64 NY2d 327 (1985); Matter of Cerbone, 61 NY2d 93 (1984); Matter of Aldrich, 58 NY2d 279 (1983); Matter of Bloodgood, 1982 Annual Report; and Matter of Kuehnel, 49 NY2d 465 (1980).

independent of the judge, decide that the financial interest is insubstantial or the close relationship is immaterial, the judge may participate in the case if all agree in writing. (Section 100.4[d] of the Rules.)

The failure of judges to disqualify themselves notwithstanding discernible, significant conflicts of interest has been a serious problem for years. Indeed, the Commission's first removal case (after the constitutional expansion of its authority in 1978) involved a town justice who had failed to disqualify himself in six cases in which his brother was a principal. (See Matter of Adams in our 1979 Annual Report.) The following year, another town justice was removed from office for having presided over his son's traffic case and then failing to report it. (See Matter of Schultz in our 1980 Annual Report.)

In 1980, a Supreme Court justice was removed from office in part for having awarded fiduciary appointments to his own son and to his son's law partner. Matter of Kane, 50 NY2d 360 (1980).

In virtually every year of its existence, including 1987, the Commission has disciplined judges for conflicts of interest. For example, a city court judge was censured in part for involving himself in the preparation of a defendant's case while presiding over it (Matter of Finley, 1981 Annual Report). A town justice was removed in part for presiding over two cases involving his son (Matter of Seaton, 1981 Annual Report).

Another town justice was removed for presiding over cases involving his brother (Matter of Deyo, 1981 Annual Report).

A town and village justice was censured for presiding over cases involving relatives (Matter of Dally, 1982 Annual Report). A part-time city court judge was removed in part for practicing law in his own court and for permitting the practice in his court of other part-time lawyer-judges (Matter of Harris, 56 NY2d 365 [1982]). Another (full-time) city court judge was removed in part for presiding over a case involving a friend and presiding over cases in which he had personally witnessed the arrests of the defendants (Matter of Scacchetti, 56 NY2d 980 [1982]).

A town justice was censured in part for presiding over a traffic case in which his brother was the defendant (Matter of Rater, 1983 Annual Report). Another town justice (who served part-time and also practiced law) was censured in part for presiding over a case in which the defendant owed money to a client of the judge's law practice (Matter of Pritchard, 1983 Annual Report). A town justice was removed from office in part for failing to disqualify himself in a criminal proceeding in which he owed a private debt to the defendant (Matter of George, 1983 Annual Report). Another town justice was removed for presiding over four cases involving his relatives (Matter of Pulver, 1983 Annual Report). A Supreme Court justice was censured for presiding over a case involving an insurance

commission-sharing practice in which he himself had participated (Matter of Roncallo, 1983 Annual Report).

A town justice (who served part-time and was otherwise employed outside the court system) was censured for presiding over cases in which his employer was a party (Matter of Whalen, 1984 Annual Report). A city court judge was censured for failing to disqualify himself in cases involving his law firm (Matter of Sullivan, 1984 Annual Report). Another city court judge was removed from office for signing an arrest warrant or orders in cases involving her son or the clients and former clients of her husband or herself (Matter of Sims, 61 NY2d 349 [1984]). A town justice was admonished for presiding over a case involving a client (Matter of Jacon, 1984 Annual Report).

A town justice was admonished in part for presiding over a case in which the defendant was a former client (Matter of Darby, 1985 Annual Report).

A town justice was admonished for acting in cases in which the complainant was a client of the judge's private business (Matter of DelPozzo, 1986 Annual Report). Another town justice was removed from office for presiding over several of his relatives' cases (Matter of Wait, 67 NY2d 61 [1986]). A third town justice was admonished for signing arrest warrants in cases in which he and a relative were complainants (Matter of Tobey, 1986 Annual Report). Another town justice was removed from office for failing to disqualify himself in a case involving his son (Matter of Myers, 67 NY2d 550 [1986]).

In last year's annual report, we reported on the censure of a town justice who disposed of cases involving clients of his insurance business (Matter of Latremore, 1987 Annual Report). Another town justice was admonished in part for failing to disqualify himself in a case involving a defendant with whom he had extra-judicial dealings and against whom he had suggested one of the charges to the arresting officer (Matter of Edwards, 1987 Annual Report).

In this annual report, we relate that one town justice was censured for permitting clients of his private business to appear before him (Matter of Orloff), and that a second town justice was removed from office, in part for failing to disqualify himself in a case involving his personal attorney (Matter of Conti).

It is obvious from this partial history that conflicts of interest arise in a variety of situations and involve judges of higher courts as well as those of town and village courts. It is equally evident that the problem is not abating.

By calling attention to the subject in this fashion, we hope to impress upon the judiciary that great care must be taken to adhere to the applicable rules and avoid such conflicts of interest, which undermine public confidence in the integrity and impartiality of the judiciary.

The Right To A Public Trial

In last year's annual report, we commented extensively on the infringement of the right to a public trial created in part by localities which do not provide appropriate courtroom facilities to their town and village justices, and in part by judges who choose to conduct in private certain proceedings which should be public.

Over the last three years or so, the Office of Court Administration has made special efforts to improve the facilities available to full-time judges around the state. By upgrading equipment, seeking State Dormitory Authority funds for improvements and other means, OCA has demonstrated its commitment to providing proper court facilities. However, as to most court facilities throughout the state, OCA's role is limited, since it is the local municipality, not the State, which is usually responsible for providing appropriate space. Problems persist.

The facilities available to magistrates vary considerably throughout the state. Judges in some towns and villages, for example, are compelled to hold court in places other than courthouses, simply because adequate facilities are not provided. As a result, court may be held at the judge's house or place of business, impairing the litigant's right to a public trial, impairing the public's right to be present at court proceedings, and impairing the effective supervision of court business by court administrators. Even if in theory such sessions are open to the public, few people are likely to know about or attend

proceedings in the judge's house. Yet, with certain specific exceptions, such as in cases involving "youthful offenders," statute requires all court proceedings to be public (Section 4 of the Judiciary Law). Case law has further addressed the issue. A judge may not hold court in a police barracks or schoolhouse, for example, because buildings to which access is limited or which are not truly open to the public do not satisfy the constitutional and statutory mandates for public proceedings.[8] These standards, as we have reported in the past, are not strictly enforced.

Sometimes, even when a municipality provides a facility for court business, the judge has difficulty using it. In some communities, for example, the court must share its facilities with other local government bodies, and regularly scheduled court hours can be pre-empted by a village board meeting, a public hearing on an area zoning matter, or some other important local matter. The judge is thus left to deal with the various litigants who appear as scheduled, only to find the courtroom already in use for non-judicial purposes.

Apart from the logistical problems created by municipalities that do not provide adequate court facilities, and the resulting infringement on the right to a public proceeding, there

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[8] People v. Schoonmaker, 65 Misc2d 393, 317 NYS2d 696 (Co. Ct. Greene Co. 1971); People v. Rose, 82 Misc2d 429, 368 NYS2d 387 (Co. Ct. Rockland Co. 1975).

is the matter of those judges who choose deliberately to hold court in private settings, even when proper courtroom facilities are available. Last year, for example, we reported on our experiences with a number of local magistrates who used their courtrooms as waiting or reception areas and held court in small offices or rooms from which the public was excluded. While some facets of a public case must be conducted in confidential settings (e.g. settlement discussions or arguments between lawyers on certain evidentiary matters), litigation (e.g. taking testimony, making objections and other on-the-record proceedings) is supposed to be public.

Where the private discharge of public court business constitutes misconduct (e.g. a judge's deliberate, wrongful exclusion from the courtroom of a person who has a right to be present), the Commission will act. (See Matter of Burr in our 1984 Annual Report.)

Where circumstances not within the judge's control play a deciding role -- such as a municipality's failure to provide proper courtroom facilities -- we urge OCA and the Legislature to actively encourage municipal governments throughout this state to provide facilities where presently there are none, and to improve the quality of those facilities which currently are provided but which may be inadequate.

The Assertion Of Influence

The Rules Governing Judicial Conduct prohibit judges from lending the prestige of their office to advance the private interests of others and from otherwise allowing personal relationships to influence their judicial conduct and judgment. (Section 100.2 of the Rules.)

Between 1984 and 1986, the Commission disciplined several judges for asserting the influence of their judicial office in furtherance of a private interest. (See discussion in our 1987 Annual Report, pages 37-40.)[9]

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[9]A particular form of the improper assertion of influence was uncovered and reported on extensively by the Commission in the late 1970's, when we discovered evidence that hundreds of judges, mostly from town and village courts, had sought and obtained favors from other judges on behalf of friends and relatives charged with traffic offenses. The practice of "ticket-fixing" had become so routine that many judges regularly filed their favor-seeking letters in court files and otherwise kept records of such requests. From 1979 to 1982, five judges were removed, one suspended, 70 censured and 31 admonished for ticket-fixing and related activity, often for multiple acts of influence assertion. In Matter of Reedy, 64 NY2d 299 (1985), the Court of Appeals held that even a single incident of ticket-fixing may warrant the judge's removal from office. In Matter of Edwards, 67 NY2d 153 (1986), the Court of Appeals held that removal from office may be too severe under certain circumstances, but the Court censured the judge for his serious misconduct in writing a letter in a pending traffic case to the judge who had jurisdiction.

The assertion of influence, of course, is not limited to ticket-fixing activity. As reported in this Annual Report, several judges were disciplined in 1987 alone for the improper assertion of influence, making the problem worthy of discussion and, unfortunately, anything but stale or passe.

Any communication by a judge seeking some benefit or advantage on behalf of a friend or a relative or a former client or someone else may constitute an improper request for special consideration. In 1987, one village justice was removed from office, in part because he used his judicial position to influence the police to investigate a complaint made by his own son. (See Matter of Straite in this report.) The Commission censured a city court judge for intervening with the police on behalf of the son of a former colleague. (See Matter of LoRusso in this report.) A town justice was admonished in part for sending debt-collection letters on court stationery on behalf of prospective plaintiffs. (See Matter of Zapf in this report.)

Judges are required by the Rules Governing Judicial Conduct to exercise circumspection in both their official and off-the-bench activities so as to avoid even the appearance of asserting the prestige of office for their own or another's benefit. A judge who is improperly approached by a colleague asserting special influence is obliged not only to refuse the request but also to report the misconduct. (See Matter of Gassman in our 1987 Annual Report.)

Raising Funds For Charitable, Civic Or Other Organizations

For several years, the Commission has been calling attention to violations of the rules prohibiting judges from raising funds on behalf of civic or charitable organizations. Despite our having raised the subject in our annual reports and

our having cautioned several judges for transgressions of the applicable rules, the practice persists. In 1987, we cautioned two more judges for their conduct in violation of the rules, and we publicly admonished a third judge who not only engaged in prohibited fund-raising activity but used his courtroom for a staged event in furtherance of the charity's fund-raising effort. See Matter of Turner in this report. A fourth judge was admonished in 1987 for, inter alia, participating in a charitable fund-raising event, notwithstanding a previous private caution by the Commission against such conduct. See Matter of Wolfgang in this report.

While a charity may be worthy and a judge may participate in some of its activities, the Rules do not permit conduct which trades on the prestige and influence of judicial office.

Section 100.5 of the Rules Governing Judicial Conduct outlines the types of extra-judicial activities in which a judge may engage. Speaking, writing and teaching on non-legal subjects is permitted, for example, to the extent such conduct does not interfere with the performance of the judge's duties or detract from the dignity of judicial office.

A judge may also participate in civic and charitable activities, with several specific limitations. For example, if a particular organization is likely to be engaged in proceedings that would ordinarily come before the court, a judge may not serve as an officer, director, trustee or advisor of the organization (Section 100.5[b][1] of the Rules). Nor shall a judge

"solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of the office for that purpose" (Section 100.5[b][2]). However worthy the cause, a judge cannot promote a charity's fund-raising event. Indeed, a judge may not even be listed on a charity's stationery which is used for fund-raising purposes. Similarly, the Rules specifically prohibit a judge from being a speaker or the guest of honor at an organization's fund-raising events, though attendance at such events is permitted (Section 100.5[b][2]). (A recent amendment of the rule makes an exception for bar association functions, at which judges may speak or be guest of honor.)

The intent of these provisions is to preserve the independence and impartiality of the judiciary, to protect against the prestige of judicial office being used to advance private (albeit sometimes worthy) causes, and to guard against the duress an attorney or other citizen might feel to participate in a function involving a judge.

It is troubling that, despite our addressing this problem for years, and cautioning or publicly admonishing judges who do not heed these rules, many judges either are unaware of these restrictions, knowingly ignore them or believe that they may assist in raising funds for valid public causes despite the rules -- and the valid policy reasons behind them -- barring such conduct.

"Screening" Of Potential Lawsuits By Judges

In our last annual report, we discussed a practice by some judges (typically in town or village courts) of "screening" potential lawsuits, i.e. preventing certain individuals from commencing an action.

An individual who wishes to commence a civil action, and who complies with the prescribed statutory and jurisdictional procedures, is entitled to file a claim in court. Periodically, the Commission receives complaints alleging that, when a claimant appears in court to commence a civil action (typically a small claim in a town or village court), the local justice will question the individual about the merits of the claim, comment upon its validity, and sometimes refuse to permit the individual to file the claim. Such a "screening" of complaints by judges, when based on the supposed merits, is improper.

We have no quarrel, of course, with the obligation of the judge to decide a case on the merits after both parties make their presentations to the court, or to explore the possibility of settlements between parties to a lawsuit. But preventing a party from even getting into court, based on a judge's informal assessment of the claim at the time the claimant seeks to file it with the court, is wrong and violates the Rules Governing Judicial Conduct. A judge is required by the Rules to "accord to every person who is legally interested in a matter, or his or her lawyer, full right to be heard according to law..." (Section 100.3[a][5]).

Pursuant to Section 1803 of the Uniform Justice Court Act, a claimant may commence a small claims action in a town or village court by filing "a statement of his cause" with the clerk, and paying a filing fee of two dollars plus mailing costs. In many courts, where there is no clerk, the potential claimant deals directly with the judge at this stage. The statute provides for "an early hearing upon and determination of such claim," and the procedures for a hearing are described (UJCA Sections 1803, 1804). Clearly, a judge who interviews potential plaintiffs, and then refuses to permit them to commence an action if the judge decides that their claims lack merit, deprives them of the right to a full hearing as provided by law.

In 1987, the Commission cautioned two town justices for refusing to allow two individuals to commence civil claims within the jurisdiction of their courts. Each of the aggrieved individuals had the right to file a claim and have it decided on the merits after a proper hearing by the judge.

Any "screening" of complaints by judges necessarily raises questions as to the judge's impartiality. A judge who attempts to dissuade a potential plaintiff from filing a claim, or who tells a claimant, at the time the action is commenced, that the claim is meritless, creates the appearance of having prejudged the merits of the matter. Conversely, when a claim is accepted after screening the merits of the claim, the judge has conveyed the appearance of prejudice in favor of the plaintiff. Judges should avoid conduct or statements that deprive claimants

of their right to a full hearing before a jurist who not only is but appears to be impartial.

Access To Public Court Records

In the course of conducting investigations, it is often necessary for Commission staff to review court records and files in connection with particular complaints of misconduct. For the most part, our experience has been that court personnel and administrators are courteous and cooperative in providing access to those public records needed by our staff. This general impression is also true of those town and village courts in which court staff and facilities are limited and the judge under inquiry is likely to be the person responsible for keeping the files.

However, several times a year, Commission staff will encounter difficulties in attempting to review public court records. This is especially so when the municipality does not provide adequate court facilities and the judge operates court business from home. The inconvenience to the judge in such circumstances is unfortunate, but the effective sequestering of public records is improper and contrary to public policy.

Beyond the occasional inconvenience to the judge, there is the more serious problem of judges -- mostly town and village justices -- who regard court records as their own and who seem deliberately to make it difficult for Commission staff and others to review them. We have had experience with judges who make

appointments with our staff and then do not keep them; judges who claim to be too busy to make appointments for weeks at a time; judges who insist on our obtaining some sort of formal approval prior to their "releasing" public records.

In such instances, we patiently but swiftly explain that public records do not "belong" to the individual judge and cannot be withheld from anyone wishing to see them, particularly a constitutionally empowered commission pursuing a duly authorized investigation. The Commission, of course, has subpoena power, but we are reluctant to invoke it in the case of public court records that ought to be made available without resort to subpoena. Indeed, it is far more convenient for the judge to make the records available at the court -- and our investigators almost always assume the burden of traveling to where the judge and records are located -- than to respond to a subpoena by bringing the records to one of our offices in Albany, Rochester or New York City.

When necessary, we address the subject in communications with individual judges as problems arise. (In 1987, one judge was cautioned for refusing to turn court records over to a local government board authorized by law to audit the court's records.)

The matter seems to be one of education. Town and village justices especially must be better informed as to what constitutes a public record that must be made available at reasonable hours upon request.

Ex Parte Communications With And Improper Reliance Upon Prosecutors

In last year's annual report, we addressed the problem of judges who improperly discuss the merits of particular cases on an ex parte basis with prosecutors. In 1987, the Commission determined that three judges should be disciplined for such violations.

Because the practice appears not to be isolated, and in view of the serious consequences it has on the impartiality of the judiciary and the fair and proper administration of justice, we repeat our discussion of the issue and update this report with references to the new cases now on the public record in this area.

Section 100.3(a)(4) of the Rules Governing Judicial Conduct states in part that a judge, "except as authorized by law, [shall] neither initiate nor consider ex parte or other communications concerning a pending or impending matter."

The Commission has become aware of instances in which both full-time and part-time judges meet routinely with local prosecutors before court sessions to discuss pending criminal cases. For example, at the hearing in Matter of Sardino, 58 NY2d 286 (1983), an assistant district attorney, attempting to show how conscientious the judge was, testified that he and the judge (a full-time city court judge with legal education and experience) regularly held early morning meetings to review cases on the calendar that day and make judgments as to the merits.

Some non-lawyer town and village justices, perhaps lacking confidence in their ability to handle criminal procedures, seem especially interested in obtaining advice from prosecutors. Many are "briefed" by police officers in traffic and criminal cases, and some often look to the District Attorney's office for guidance and assistance. One judge, who acknowledged having ex parte discussions concerning pending cases with the arresting officers, so confused his own role with that of the prosecutor that he believed it was the District Attorney's responsibility to assign counsel to an indigent defendant. Matter of McGee, 59 NY2d 870 (1983).

In a recent case, resulting in the censure of a town justice, a criminal defense lawyer noticed that the judge's decision denying a pre-trial motion was remarkably similar in style, typing and stationery to the answering affidavit submitted by the District Attorney's office. After defense counsel requested that the judge disqualify herself, the prosecutor acknowledged that the judge's decision had been typed by a secretary in the DA's office. It developed that, in an ex parte conversation, the judge had advised the prosecutor that she would deny the motion, then accepted the prosecutor's offer to "draft" the decision. While acknowledging that she subsequently accepted every word of the prosecutor's "draft," the judge insisted that the defendant was not harmed in any way by such an arrangement. The judge explained that she often relied on the DA's office for ex parte advice and assistance, and that she would discuss cases

with an assistant district attorney when she needed a "sounding board." Indeed, even after the judge's conduct had been questioned by defense counsel, the judge called the DA's office and asked a secretary to draft an order transferring the case to another court. See Matter of Rider in this report.

In another 1987 case, the Commission determined that a town justice should be removed from office, in part for engaging in several unauthorized ex parte communications with the local prosecutor and for having delegated to the local prosecutor (in this instance a deputy village attorney) various judicial duties, including accepting guilty pleas, determining the amount of fines and entering dispositions of cases on official court records. See Matter of Greenfeld in this report.

Another 1987 admonition involved a town justice who engaged in unauthorized ex parte communications with a prosecutor and, at one point, went so far as to deny defense counsel entry into the office in which an improper ex parte communication was taking place. See Matter of Cooksey in this report.

Ex parte practices in which judges rely for advice on prosecutors or other law enforcement personnel are clearly improper and undermine a fundamental judicial obligation to hear both sides in a dispute fully and fairly in order to render judgment impartially. It distorts the judicial process for the presiding judge to discuss the merits of a case with one side in private. At the very least, such communications give rise to an appearance of impropriety. At worst, they offer one side a means

of influencing the judge with information that the other side does not know is before the judge and therefore cannot rebut.

Of course, a judge who needs assistance with legal research and other such matters -- particularly in town and village courts, where law secretaries and law assistants are not provided -- should have some recourse other than to communicate privately with one side or another. We recommend that the Office of Court Administration consider assigning a small unit of staff attorneys whose function would be to assist the court system's 2400 part-time town and village justices (about 2000 of whom are not lawyers) as legal research problems arise.

Reducing Or Dismissing Charges Without Notice To The Prosecutor

The converse of the problem of the judge who communicates improperly with or relies improperly on the prosecutor is the judge who reduces or dismisses charges without notice to the District Attorney's office.

Various provisions of the Criminal Procedure Law (e.g. Sections 170.45, 170.55 and 210.45) set forth the procedure for dismissing charges with notice to the prosecutor as to an indictment, an information, a simplified traffic information, a prosecutor's information or a misdemeanor complaint.

Section 100.2 of the Rules Governing Judicial Conduct requires a judge to "respect and comply with the law."

In the course of investigating various complaints, it sometimes comes to our attention that a particular matter was

disposed of by a judge without proper notice to the District Attorney. Even where the DA would have had no objection to the particular disposition, the failure to give notice is improper and inevitably appears as if the judge is doing a favor for the defense.

In 1987, the Commission determined to remove from office a town justice for various acts of misconduct which included the dismissal (or adjournment in contemplation of dismissal) of 31 cases without notice to the DA. See Matter of Conti in this report.

Often, the fundamental problem as to judges who do not comply with mandatory notice requirements is the lack of understanding what is required by law. Town and village justices -- the overwhelming majority of whom are not lawyers and have had no formal legal training -- need especially to be prepared and refreshed on the fundamental procedures relevant to the types of cases they most often handle.

Mishandling Court Funds

In 1987, the Commission determined that three town justices should be removed from office, in part, for their egregious mishandling of court funds and their persistent disregard of statutory recordkeeping requirements. See Matter of Lenney, Matter of Smith and Matter of Deckelman in this report. Also in 1987, the Court of Appeals accepted a Commission determination to remove from office a town justice whose deposits of

court funds were $1,125 in arrears over a six-month period, whose reports to the State Comptroller were up to five months late and who had been disciplined previously for failing to make timely reports and remittances of court funds. Matter of Rater, 69 NY2d 208 (1987).

The Court also accepted a Commission determination to remove another town justice who, inter alia, kept undeposited court funds in his briefcase for as long as seven months and who failed to make reports and remittances for as long as six and a half months. Matter of Vincent, 70 NY2d 208 (1987).

The Commission confidentially cautioned three town justices in 1987 for their failure to observe various financial reporting, depositing and remitting requirements mandated by statute. Since 1978, approximately 40 cautions have been issued for relatively minor violations of the various financial accounting rules.

Although the Commission has fewer financial "audit and control" cases than it did five years ago, improper and neglected accountings of court monies continue to be a problem, particularly in those town and village courts in which the judge handles official funds (e.g., fines, fees and bail) and has insufficient clerical or administrative assistance. Also, the State Department of Audit and Control only has the resources to audit on a periodic basis the financial records of individual judges -- usually only once per judge every four or five years. This precludes the Commission from having regular up-to-date reports

on court finances, and it prevents the State from expeditiously monitoring funds to determine if they are being properly and promptly deposited into official accounts.

While irregularities in financial management and records keeping most often result from honest mistakes, they sometimes indicate serious misconduct. The Commission only renders public discipline where the case involves serious misconduct. A judge whose deposits are late by a short period of time because of honest scheduling problems, for example, need not be concerned. But where the delays are lengthy and repeated -- or where even a single day's delay is motivated by misconduct, such as a judge converting court funds to his or her private use -- the Commission will act, as it has in the past.

In many cases, cash deficiencies result from the judge's failure to make prompt deposits of court monies in official court bank accounts, and from failure to make timely remittances of those funds to the State Comptroller as required by law. In some instances, substantial amounts of court funds are kept for long periods under the judge's personal control, resulting in the inevitable suspicion that the money is being used by the judge. Even where venality is not an issue, negligence sometimes is. The Commission has previously reported its public discipline of town or village justices who kept court funds at home, in a shoebox or a freezer.

Clearly, town and village court justices need greater clerical assistance. Where a town board has available resources,

it should make a greater commitment to court administration. In addition, as we have previously recommended, the State Comptroller's Office of Audit and Control should consider sending teams of financial managers around the state to help the local justices set up and maintain appropriate bookkeeping and record keeping systems. The cost of operating such a modest program would be more than offset by the prompt reporting and remitting of funds to the State Comptroller and by the consequent decline in the number and cost of disciplinary proceedings against judges whose financial records raise misconduct issues.

Advisory Opinions

Judges throughout the state have for some time sought a source for advisory opinions on whether particular activities not specifically addressed in the Rules Governing Judicial Conduct would be permissible.

In the past, the Office of Court Administration offered advisory opinions on ethical questions posed by judges who were uncertain as to the intent of the Rules. In 1979, the State Bar Association's Committee on Professional Ethics compiled and published all OCA advisory opinions. These opinions were very helpful, both to the judges who requested advice and to others who were guided by them. While the opinions were not binding on the Commission, they would carry weight.

In 1980, OCA discontinued its practice of issuing advisory opinions, leaving judges who sought guidance on specific

situations with few alternatives. While some entities -- such as the Attorney General's office, the State Bar Association and the Association of Supreme Court Justices -- made noteworthy attempts to provide advisory opinions, there was no substitute for the expeditious, professional statewide service provided by OCA.

For several years, the Commission has recommended that OCA resume the role of issuing advisory opinions. We are especially pleased, therefore, to note that in 1987, with authority from the Court of Appeals, the practice of providing advisory opinions to judges has been reinstituted. A distinguished group of judges from around the state has been appointed as a body to oversee the process, and requests for advisory opinions can be directed to them through OCA.

ADMINISTRATIVE RECOMMENDATIONS MADE BY THE COMMISSION AS TO POLITICAL ACTIVITY RULES

Background

For more than a decade, the Commission has been commenting on the problems associated with judges who engage in improper political activity. In our 1985 Annual Report, we included a 20-page supplement on the subject, noting certain ambiguities and including recommendations for review and amendment of the Rules Governing Judicial Conduct as they pertain to political activity. (The Commission is empowered by Judiciary Law Section 42[4] to make legislative and administrative recommendations in its annual reports.)

We are pleased to note that, since the Commission's 1985 Annual Report, certain sections of the Rules have been amended by the Chief Administrative Judge, with the approval of the Court of Appeals.

Recent Amendments

Section 100.7 of the Rules Governing Judicial Conduct was recently amended as indicated in the numbered paragraphs below.

1. During a period when a judge would otherwise be permitted to engage in political activity on his or her own behalf, the judge:

   a. may attend his or her own fund-raiser but not personally solicit contributions there;

   b. may purchase a ticket to a politically-sponsored dinner or affair even where the

regular cost of the ticket exceeds the proportionate cost of the dinner or affair; and

c. may attend a politically-sponsored dinner or affair in support of a slate of candidates, and appear on podiums or in photographs on political literature with that slate of candidates, provided that the judge is part of that slate.

2. A judge who is an announced candidate for judicial office may attend political dinners and affairs in the period beginning nine months before the nomination. If the judge is a candidate in the general election, the rule now permits attendance at such events up to six months after the general election.

3. Except for those periods when a judge is permitted to engage in political activity on his or her own behalf, a judge may not purchase tickets to or attend a politically-sponsored dinner or affair, including those sponsored by a political organization for a non-political purpose.

4. A judge may not be a member of a political club or organization.

Notwithstanding these helpful reforms, and the generally unambiguous language of the political activity constraints, political activity by judges continues to be a problem.

Certain political activity by court personnel -- whether inappropriately permitted by a judge or engaged in without a judge's knowledge and consent -- also continued to create appearances of impropriety, notwithstanding an important recent amendment to the Career Services Rules prohibiting court

employees from holding certain political party leadership posts. (See below, Political Activity By Court Personnel.)

In the sections below, we discuss some of the continuing problems with respect to political activity by judges and court personnel.

Political Activity By Judges

The Rules Governing Judicial Conduct (Section 100.7) prohibit a judge from directly or indirectly participating in any political campaign or activity except his or her own campaign for elective judicial office. Even when the judge is a candidate for elective judicial office, the Rules limit the types of activity which are permissible.

As far back as 1909, when the Canons of Judicial Ethics were adopted by the New York State Bar Association, the inappropriate influence of politics on the judiciary was addressed. Canon 28 specifically warned judges of the "inevitable...suspicion of being warped by political bias" that would result from their partisan political practices; it constrained judges from endorsing candidates for political office and, except on their own behalf, attending political gatherings and making political speeches.

Recent amendments to the Rules Governing Judicial Conduct proscribed even further certain previously permitted activity or clarified ambiguous matters. For example, except for those periods when a judge is permitted to engage in political

activity on his or her own behalf, a judge may not purchase tickets to or attend a politically-sponsored dinner or affair, including those sponsored by a political organization for a non-political purpose. In addition, a judge may not be a member of a political club or organization.

In 1987, the Court of Appeals upheld a Commission determination that a particular town justice be removed from office for having engaged in a series of political acts over a four-year period, including participation in the selection of a local party official. Matter of Maney, 70 NY2d 27 (1987). Among Judge Maney's arguments was that political realities necessitated his participation in the party leadership contest so as to insure the incumbency of a party leader favorable to his own nomination for re-election as a judge. The Court of Appeals plainly rejected such "attempts to justify [the judge's] partisan involvement" by claiming necessity due to supposed "political realities." (70 NY2d at 28.) The Court -- in affirming the political activity prohibitions in the Rules, refusing to subordinate them to a particular judge's own circumstances and removing the judge from office -- thus made plain the seriousness with which violations of the political activity rules must be treated.

Other judges have been cautioned by the Commission in the last two years for violations of the political activity rules. One judge, for example, was cautioned for having collected signatures on a nominating petition for another candidate. Although the judge was a candidate for judicial office at the

time, his name did not appear jointly on the petition he circulated for the other candidate.

Another judge was cautioned for attending a fund-raising event for a public official at a time that the judge was not permitted by the Rules to attend such an event. In this case, the judge claimed an ambiguity in the Rules as to the permissible period for attending political events held in honor of others. Section 100.7 of the Rules is plain on this point. Even a judge who is a candidate for elective judicial office may only attend political fund-raisers or affairs for a period beginning nine months prior to nomination, whether nomination is by primary, convention, caucus or other party meeting. "Nomination," of course, does not mean the moment the individual decides to become a candidate for the position; it means the point at which the individual is officially designated as his or her party's nominee for the position and otherwise meets the legal requirements to be on the general election ballot.

A third judge was cautioned for asking voters to support various non-judicial candidates in a local election at a time that the judge was not himself a candidate and therefore was not part of any slate of candidates. (Section 100.7[a][2][iii] of the Rules permits a candidate-judge to appear on podiums or in photographs on political literature with a slate of candidates, provided that the judge is part of that slate.)

Political Activity By Court Personnel

The Rules Governing Judicial Conduct and the Career Service Rules of the Chief Judge proscribe certain political activities by court personnel. For example, a judge's personal appointees cannot hold political party office or contribute more than $300 a year (in funds or services) to any political campaign or activity. See Section 100.3(b)(5) of the Rules Governing Judicial Conduct and Section 25.43 of the Career Service Rules.

A recent amendment of the Career Service Rules prohibits all employees of the unified court system from holding elected office in a political party, club or organization, except that the employee may be a delegate to a judicial nominating convention or a member of a political party's county committee.

These laudable rules do much to minimize political activity in the courthouse, but they have not eliminated the problem. Appearances of impropriety still arise as a result of activities not addressed by the various rules. For example, in 1987 as in previous years, the Commission became aware of instances in which court personnel apparently solicited political contributions on behalf of a judge of their court. These solicitations were directed at other court personnel and at attorneys who practice in the same courts before the judges on whose behalf contributions are requested.

It is obviously intimidating when a lawyer is requested by a court employee (or a court employee is requested by a colleague) to contribute to the judge's political campaign.

Whether or not the solicitation is at the judge's direction, the solicited party is likely to feel coerced and, at the least, believe the judge is aware of the activity.

Of course, where there is evidence that a judge has sought to evade restrictions on his or her own conduct by enlisting an employee to do the prohibited deed, the Commission will act against the judge. But the Commission's jurisdiction does not extend to court employees. The Commission is therefore powerless to correct the appearances of impropriety that may arise when court personnel, on their own initiative, undertake political chores that benefit the judge, appear to be conducted with the approval of the judge, and affect lawyers, colleagues and others who do business with the court.

We are not precluded, however, from calling attention to the problem, which we believe undermines public confidence in the independence of the judiciary and in the fair and proper administration of justice. Even where the judge is unaware or disapproving of the solicitations made by court employees, his or her esteem is likely to be diminished in the eyes of those who feel coerced and who rightly believe that political activity ought not to occur in the figurative shadow of the courthouse.

Last year we recommended that the Office of Court Administration comprehensively review the political activity rules as they apply to court personnel and address this issue with appropriate changes. We renew the recommendation. For example, the Career Service Rules (Section 25.43[c]) prohibit a

court employee from directly or indirectly using his or her authority or official influence to compel any other court employee from making a political contribution. Yet the rule does not address solicitations by court employees of those who are not employed by, but do business with, the court, such as lawyers, suppliers and others. As to solicitations between court employees, the rule is phrased so as to prohibit the use of official authority by one employee as an inducement to get a contribution from another employee. Yet the politically active employee -- especially a high-ranking one -- need not use heavy-handed tactics for the inducement to be felt by a lower-ranking colleague. One can argue that the very act of solicitation between fellow employees -- mild and unassuming as the particular communication may be -- is intimidating and coercive, especially if the request is by a professional superior.

Another problem concerns contributions to judges' election campaigns by court employees.

While the Rules Governing Judicial Conduct limit the contributions that a judge's personal appointees can make, there is no such limit on what other court employees can contribute. Thus, whereas a judge's law secretary or personal secretary (who is a personal appointee of the judge) is limited to $300 per year per campaign, the same judge's chief clerk or a pool law assistant apparently can contribute more than $300.

The disparity is unreasonable. Even court employees who are not the personal appointees of a particular judge may be

pressured to contribute to that judge's campaign. This is especially so in those courts where the judge also has administrative responsibility, may be influential in promotions and salary raises, and can fire or cause the firing of court employees.

In any event, the potential for coercion, and the appearance of impropriety created by court employees who contribute large sums of money to judicial election campaigns, require that political contributions of all court employees be limited.

CONCLUSION

Public confidence in the integrity and impartiality of the judiciary is essential to the rule of law. The members of the State Commission on Judicial Conduct believe the Commission contributes to that ideal and to the fair and proper administration of justice.

Respectfully submitted,

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

BIOGRAPHIES OF COMMISSION MEMBERS

JOHN J. BOWER, ESQ., is a graduate of New York University and New York Law School. He is a partner in Bower & Gardner in New York City. He is a Fellow of the American College of Trial Lawyers, a Member of the Federation of Insurance Counsel and a Member of the American Law Institute.

DAVID BROMBERG, ESQ., is a graduate of Townsend Harris High School, City College of New York and Yale Law School. He is a member of the firm of Epstein, Becker, Borsody and Green. Mr. Bromberg served as counsel to the New York State Committee on Mental Hygiene from 1965 through 1966. He was elected a delegate to the New York State Constitutional Convention of 1967, where he was secretary of the Committee on the Bill of Rights and Suffrage and a member of the Committee on State Finances, Taxation and Expenditures. He served, by appointment, on the Westchester County Planning Board from 1979 to 1985. He is a member of the Association of the Bar of the City of New York and has served on its Committee on Municipal Affairs. He is a member of the New York State Bar Association and is presently serving on its Committee on the New York State Constitution. He serves on the National Panel of Arbitrators of the American Arbitration Association.

HONORABLE CARMEN BEAUCHAMP CIPARICK is a graduate of Hunter College and St. John's University School of Law. She was elected a Justice of the Supreme Court for the First Judicial District in 1982. Previously she was an appointed Judge of the Criminal Court of the City of New York from 1978 through 1982. Judge Ciparick formerly served as Chief Law Assistant of the New York City Criminal Court, Counsel in the office of the New York City Administrative Judge, Assistant Counsel for the Office of the Judicial Conference and a staff attorney for the Legal Aid Society in New York City. She is a former Vice President, Secretary and Board Member of the Puerto Rican Bar Association. Judge Ciparick is a member of the Mayor's Commission on Hispanic Concerns, the New York City Commission on the Bicentennial of the Constitution, the Board of Directors of the New York Association of Women Judges, and the Board of Trustees of Boricua College.

E. GARRETT CLEARY, ESQ., attended St. Bonaventure University and is a graduate of Albany Law School. He was an Assistant District Attorney in Monroe County from 1961 through 1964. In August of 1964, he resigned as Second Assistant District Attorney to enter private practice. He is now a partner in the law firm of Harris, Beach, Wilcox, Rubin and Levey in Rochester. In January 1969 he was appointed a Special Assistant Attorney General in charge of Grand Jury Investigation ordered by the late Governor Nelson A. Rockefeller to investigate financial irregularities in the Town of Arietta, Hamilton County, New York. In 1970 he was designated as the Special Assistant Attorney General in charge of an investigation ordered by Governor Rockefeller into a student/police confrontation that occurred on the campus of Hobart College, Ontario County, New York, and in 1974 he was appointed a Special Prosecutor in Schoharie County for the purpose of prosecuting the County Sheriff. Mr. Cleary is a member of the Monroe County and New York State Bar Associations, and he has served as a member of the governing body of the Monroe County Bar Association, Oak Hill Country Club, St. John Fisher College, Better Business Bureau of Rochester, Automobile Club of Rochester, Hunt Hollow Ski Club, as a trustee to Holy Sepulchre Cemetery and as a member of the Monroe County Bar Foundation and the Monroe County Advisory Committee for the Title Guarantee Company. He is a former Chairman of the Board of Trustees of St. John Fisher College. He and his wife Patricia are the parents of seven children.

DOLORES DEL BELLO received a baccalaureate degree from the College of New Rochelle and a masters degree from Seton Hall University. She was Regional Public Relations Director for Bloomingdale's until 1986 and is presently President of Salem Concepts, Inc. Mrs. DelBello is a member of the Board of Directors for the Naylor Dana Institute for Disease Prevention; American Health Foundation; Hadassah; the Westchester Women in Communications; Alpha Delta Kappa, the international honorary society for women educators; the Board of Directors for the Hudson River Museum; Board of Directors Universitas Internationalis Coluccio Salutati; and the Advisory Committee, Westchester County Chapter, New York State Association for Retarded Children. She has also been a member of the League of Women Voters, the Board of Trustees of St. Cabrini Nursing Home, Inc., and the Board of Directors, Lehman College Performing Arts Center.

VICTOR A. KOVNER, ESQ., is a graduate of Yale College and the Columbia Law School. He is a partner in the firm of Lankenau Kovner & Bickford. Mr. Kovner served as a member of the Mayor's Committee on the Judiciary from 1969 through 1985. He was a member of Governor Carey's Court Reform Task Force and now serves on the board of directors of the Committee for Modern Courts. Mr. Kovner is Chair of the Committee on the Judiciary of the Association of the Bar of the City of New York, and formerly served as Chair of the Committee on Communications. He serves as a member of the advisory board of the Media Law Reporter. Mr. Kovner formerly served in the House of Delegates of the New York State Bar Association. He formerly served as President of Planned Parenthood of New York City, and he is a trustee of the American Place Theater.

HONORABLE WILLIAM J. OSTROWSKI is a graduate of Canisius College and received law degrees from Georgetown and George Washington Universities. He attended the National Judicial College in 1967. Justice Ostrowski is a Justice of the Supreme Court in the Eighth Judicial District and was elected to that office in 1976. During the preceding 16 years he was a judge of the City Court of Buffalo, and from 1956 to 1960 he was a Deputy Corporation Counsel of the City of Buffalo. He served with the 100th Infantry Division in France and Germany during World War II. He has been married to Mary V. Waldron since 1949 and they have six children and six grandchildren. Justice Ostrowski is a member of the American Law Institute, the Fellows of the American Bar Foundation, the American Bar Association and its National Conference of State Trial Judges; American Judicature Society; National Advocates Society; New York State Bar Association and its Judicial Section; Erie County Bar Association; and the Lawyers Club of Buffalo.

MRS. GENE ROBB is a graduate of the University of Nebraska. She is a former President of the Women's Council of the Albany Institute of History and Art and served on its Board. She also served on the Chancellor's Panel of University Purposes under Chancellor Boyer, later serving on the Executive Committee of that Panel. She served on the Temporary Hudson River Valley Commission and later the permanent Hudson River Valley Commission. She is a member of the Board of the Salvation Army Executive Committee for the New York State Plan. She is on the Board of the Saratoga Performing Arts Center, the Board of the Albany Medical College, the Board of Trustees of Union College and the Board of Trustees of the New York State Museum. Mrs. Robb is a former member of the Advisory Committee of the Center for Judicial Conduct Organizations of the American Judicature Society. She is now a member of the Board of the Society. Mrs. Robb received an honorary degree of Doctor of Law from Siena College, Loudonville, in 1982. She serves on the Visiting Committee for Fellowships and Internships of the Nelson A. Rockefeller Institute of Government. In 1984 Mrs. Robb was awarded the Regents Medal of Excellence for her community service to New York State. She is the mother of four children and grandmother of eleven. Mrs. Robb has been a member of the Commission since its inception. In December 1987, Mrs. Robb received the Samuel J. DuBoff Award given by the Fund for Modern Courts to the layman who contributed most to the improvement of the judicial system of New York State.

HONORABLE ISAAC RUBIN is a graduate of New York University, the New York University Law School (J.D.) and St. John's Law School (J.S.D.). He is presently a Justice of the Appellate Division, Second Department, to which he was appointed by Governor Carey in January 1982 and reappointed by Governor Cuomo in January 1984. Prior to this appointment, Justice Rubin sat in the Supreme Court, Ninth Judicial District, where he served as Deputy Administrative Judge of the County Courts and superior criminal courts. Judge Rubin previously served as a County Court Judge in Westchester County, and as a Judge of the City Court of Rye, New York. He is a director and former president of the Westchester County Bar Association. He has also served as a member of the Committee on Character and Fitness of the Second Judicial Department, and as a member of the Nominating Committee and the House of Delegates of the New York State Bar Association.

HONORABLE FELICE K. SHEA is a graduate of Swarthmore College and Columbia Law School. She is a Justice of the Supreme Court, First Judicial District (New York County), and is the Presiding Justice of the Extraordinary Special and Trial Term of the Supreme Court for the City of New York. She served previously as Judge of the Civil Court of the City of New York. Justice Shea is a Director of the Association of Women Judges of the State of New York, a Director of the New York Women's Bar Association, a Fellow of the American Bar Foundation, and a Fellow of the American Academy of Matrimonial Lawyers. She is a member of the Association of the Bar of the City of New York, serving on its Council on Judicial Administration; a member of New York County Lawyers' Association, serving on its Special Committee on the Bicentennial; and a member of the American and New York State Bar Associations. Justice Shea is a former president of the Alumni Association of Columbia Law School and a recipient of the Alumni Federation Medal for Conspicuous Alumni Service to Columbia University.

JOHN J. SHEEHY, ESQ. is a graduate of the College of the Holy Cross, where he was a Tilden Scholar, and Boston College Law School. He is a partner in the New York office of Rogers & Wells. He is a senior member of the firm's litigation department and a member of the firm's Executive Committee. Mr. Sheehy was an Assistant District Attorney in New York County from 1963 to 1965, when he was appointed Assistant Counsel to the Governor by the late Nelson A. Rockefeller. Mr. Sheehy joined Rogers & Wells in February 1969. He is a member of the bars of the United States Supreme Court, the United States Court of Appeals for the Second and Eighth Circuits, the United States District Court for the Southern, Eastern and Northern Districts of New York, the United States Court of International Trade and the United States Court of Military Appeals. He is a member of the American and New York State Bar Associations and Chairman of the Finance and Administration Committee of Epiphany Church in Manhattan. He is also a Commander in the U.S. Naval Reserve, Judge Advocate General Corps. John and Morna Ford Sheehy live in Manhattan and East Hampton, with their three children.

ADMINISTRATOR OF THE COMMISSION

GERALD STERN, ESQ., is a graduate of Brooklyn College, the Syracuse University College of Law and the New York University School of Law, where he received an LL.M. in Criminal Justice. Mr. Stern has been Administrator of the Commission since its inception. He previously served as Director of Administration of the Courts, First Judicial Department, Assistant Corporation Counsel for New York City, Staff Attorney on the President's Commission on Law Enforcement and the Administration of Justice, Legal Director of a legal service unit in Syracuse, and Assistant District Attorney in New York County. He teaches Professional Responsibility at Pace University School of Law as an adjunct Professor of Law.

DEPUTY ADMINISTRATOR

ROBERT H. TEMBECKJIAN, ESQ., is a graduate of Syracuse University and Fordham Law School. He previously served as Clerk of the Commission, as publications director for the Council on Municipal Performance in New York, staff director of the Governor's Cabinet Committee on Public Safety in Ohio and special assistant to the Deputy Director of the Ohio Department of Economic and Community Development. Mr. Tembeckjian is a member of the Association of the Bar of the City of New York, serving on its Committee on Professional Discipline.

CLERK OF THE COMMISSION

ALBERT B. LAWRENCE, ESQ., is a graduate of the State University of New York and Antioch School of Law. He joined the Commission staff in 1980 and has been Clerk of the Commission since 1983. He is a former newspaper reporter who has written on criminal justice and legal topics. Mr. Lawrence is on the adjunct faculty of the State University where he teaches law, criminal justice and journalism in the Empire State College program.

CHIEF ATTORNEY, ALBANY

STEPHEN F. DOWNS, ESQ., is a graduate of Amherst College and Cornell Law School. He served in India as a member of the Peace Corps from 1964 to 1966. He was in private practice in New York City from 1969 to 1975, and he joined the Commission's staff in 1975 as a staff attorney. He has been Chief Attorney in charge of the Commission's Albany office since 1978.

CHIEF ATTORNEY, ROCHESTER

JOHN J. POSTEL, ESQ., is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission's staff in 1980 as an assistant staff attorney in Albany. He has been Chief Attorney in charge of the Commission's Rochester office since April 1984.

COMMISSION STAFF

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Gerald Stern

DEPUTY ADMINISTRATOR
Robert H. Tembeckjian

CLERK OF THE COMMISSION
Albert B. Lawrence

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Stephen F. Downs
John J. Postel

SENIOR ATTORNEYS
Alan W. Friedberg
Jean M. Savanyu

STAFF ATTORNEYS
Cathleen S. Cenci
Henry S. Stewart

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Janet F. Whelehan

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Brunilda Lopez
Susan A. Totten

LEGAL RESEARCH ASSISTANT
Deborah Ronnen

LAW STUDENTS
Jane A. Conrad
*Sue A. Ginsberg
*Charles R. Haviland, Jr.
*Jeffrey A. Wise

* Denotes individuals who left the Commission staff prior to December 1987.

APPENDIX B

THE COMMISSION'S POWERS, DUTIES AND OPERATIONS

INTRODUCTION

The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of judicial misconduct in New York State. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding their right to decide cases independently.

By offering a forum for citizens with conduct-related complaints, the Commission seeks to insure compliance with established standards of ethical judicial behavior, thereby promoting public confidence in the integrity and honor of the judiciary. The Commission does not act as an appellate court, does not make judgments as to the merits of judicial decisions or rulings, and does not investigate complaints that judges are either too lenient or too severe in criminal cases.

All 50 states and the District of Columbia have adopted a commission system to meet these goals.

In New York, a temporary commission created by the Legislature in 1974 began operations in January 1975. It was made permanent in September 1976 by a constitutional amendment. A second constitutional amendment, effective on April 1, 1978, created the present Commission with expanded membership and jurisdiction. (For the purpose of clarity, the Commission which operated from September 1, 1976, through March 31, 1978, will henceforth be referred to as the "former" Commission. A description of the temporary and former commissions, their composition and workload is included in this Appendix B.)

STATE COMMISSION ON JUDICIAL CONDUCT

Authority

The State Commission on Judicial Conduct has the authority to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings thereon, subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges within the state unified court system. This authority is derived from Article VI, Section 22, of the Constitution of the State of New York, and Article 2-A of the Judiciary Law of the State of New York.

The Commission does not act as an appellate court. It does not review judicial decisions or alleged errors of law, nor does it issue advisory opinions, give legal advice or represent litigants. When appropriate, it refers complaints to other agencies.

By provision of the State Constitution (Article VI, Section 22), the Commission:

> shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system...and may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.

The types of complaints that may be investigated by the Commission include improper demeanor, conflicts of interest, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench.

Standards of conduct are set forth primarily in the Rules Governing Judicial Conduct (originally promulgated by the Administrative Board of the Judicial Conference and subsequently adopted by the Chief Administrator of the Courts with the approval of the Court of Appeals) and the Code of Judicial Conduct (adopted by the New York State Bar Association).

If the Commission determines that disciplinary action is warranted, it may render a determination to impose one of four sanctions, subject to review by the Court of Appeals upon timely request by the respondent-judge. If review is not requested within 30 days of service of the determination upon the judge, the determination becomes final. The Commission may render determinations to:

-- admonish a judge publicly;
-- censure a judge publicly;
-- remove a judge from office;
-- retire a judge for disability.

In accordance with its rules, the Commission may also issue a confidential letter of dismissal and caution to a judge, despite a dismissal of the complaint, when it is determined that the circumstances so warrant. In some cases the Commission has issued such a letter after charges of misconduct have been sustained.

Procedures

The Commission convenes once a month. At its meetings, the Commission reviews each new complaint of misconduct and makes an initial decision whether to investigate or dismiss the complaint. It also reviews staff

reports on ongoing matters, makes final determinations on completed proceedings, considers motions and entertains oral arguments pertaining to cases in which judges have been served with formal charges, and conducts other Commission business.

No investigation may be commenced by staff without authorization by the Commission. The filing of formal charges also must be authorized by the Commission.

After the Commission authorizes an investigation, the complaint is assigned to a staff attorney, who is responsible for conducting the inquiry and supervising the investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge may be asked to respond in writing to the allegations. In some instances, the Commission requires the appearance of the judge to testify during the course of the investigation. The judge's testimony is under oath, and at least one Commission member must be present. Although such an "investigative appearance" is not a formal hearing, the judge is entitled to be represented by counsel. The judge may also submit evidentiary data and materials for the Commission's consideration.

If the Commission finds after an investigation that the circumstances so warrant, it will direct its administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint institutes the formal disciplinary proceeding. After receiving the judge's answer, the Commission may, if it determines there are no disputed issues of fact, grant a motion for summary determination. It may also accept an agreed statement of facts submitted by the administrator and the respondent-judge. Where there are factual disputes that make summary determination inappropriate or that are not resolved by an agreed statement of facts, the Commission will appoint a referee to conduct a formal hearing and report proposed findings of fact and conclusions of law. Referees are designated by the Commission from a panel of attorneys and former judges. (A list of referees who presided in Commission proceedings last year is appended.) Following the Commission's receipt of the referee's report, on a motion to confirm or disaffirm the report, both the administrator and the respondent may submit legal memoranda and present oral argument on issues of misconduct and sanction. The respondent-judge (in addition to his or her counsel) may appear and be heard at oral argument.

In deciding motions, considering proposed agreed statements of fact and making determinations with respect to misconduct and sanction, and in considering other matters pertaining to cases in which Formal Written Complaints have been served, the Commission deliberates in executive session, without the presence or assistance of its administrator or regular staff. The clerk of the Commission assists the Commission in executive session, but does not participate in either an investigative or adversarial capacity in any cases pending before the Commission.

The Commission may dismiss a complaint at any stage during the investigative or adjudicative proceedings.

When the Commission determines that a judge should be admonished, censured, removed or retired, its written determination is forwarded to the Chief Judge of the Court of Appeals, who in turn serves it upon the respondent-judge. Upon completion of service, the Commission's determination and the record of its proceedings become public. (Prior to this point, by operation of the strict provisions in Article 2-A of the Judiciary Law, all proceedings and records are confidential.) The respondent-judge has 30 days to request full review of the Commission's determination by the Court of Appeals. The Court may accept or reject the Commission's findings of fact or conclusions of law, make new or different findings of fact or conclusions of law, accept or reject the determined sanction, or make a different determination as to sanction. If no request for review is made within 30 days, the sanction determined by the Commission becomes effective.

Membership and Staff

The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one each by the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and at least two be lay persons. The Commission elects one of its members to be chairperson and appoints an administrator and a clerk. The administrator is responsible for hiring staff and supervising staff activities subject to the Commission's direction and policies.

The chairwoman of the Commission is Mrs. Gene Robb of Newtonville. The other members are: John J. Bower, Esq., of Upper Brookville; David Bromberg, Esq., of New York City; Honorable Carmen Beauchamp Ciparick of New York City, Justice of the Supreme Court, First Judicial District; E. Garrett Cleary, Esq., of Rochester; Dolores DelBello of South Salem; Victor A. Kovner, Esq., of New York City; Honorable William J. Ostrowski of Buffalo, Justice of the Supreme Court, Eighth Judicial District; Honorable Isaac Rubin of Rye, Justice of the Appellate Division, Second Department; Honorable Felice K. Shea of New York City, Justice of the Supreme Court, First Judicial District; and John J. Sheehy, Esq., of New York City.

The administrator of the Commission is Gerald Stern, Esq. The deputy administrator is Robert H. Tembeckjian, Esq. The chief attorney in Albany is Stephen F. Downs, Esq. The chief attorney in Rochester is John J. Postel, Esq. The clerk of the Commission is Albert B. Lawrence, Esq. (Biographies are appended.)

The Commission has 42 full-time staff employees, including nine attorneys. A limited number of law students are employed throughout the year on a part-time basis.

The Commission's principal office is in New York City. Offices are also maintained in Albany and Rochester.

Temporary State Commission on Judicial Conduct

The Temporary State Commission on Judicial Conduct commenced operations in January 1975. The temporary Commission had the authority to investigate allegations of misconduct against judges in the state unified court system, make confidential suggestions and recommendations in the nature of admonitions to judges when appropriate and, in more serious cases, recommend that formal disciplinary proceedings be commenced in the appropriate court. All disciplinary proceedings in the Court on the Judiciary and most in the Appellate Division were public.

The temporary Commission was composed of two judges, five lawyers and two lay persons. It functioned through August 31, 1976, when it was succeeded by a permanent commission created by amendment to the State Constitution.

The temporary Commission received 724 complaints, dismissed 441 upon initial review and commenced 283 investigations during its tenure. It admonished 19 judges and initiated formal disciplinary proceedings against eight judges, in either the Appellate Division or the Court on the Judiciary. One of these judges was removed from office and one was censured. The remaining six matters were pending when the temporary Commission was superseded by its successor Commission.

Five judges resigned while under investigation. (A full account of the temporary Commission's activity is available in the Final Report of the Temporary State Commission on Judicial Conduct, dated August 31, 1976.)

Former State Commission on Judicial Conduct

The temporary Commission was succeeded on September 1, 1976, by the State Commission on Judicial Conduct, established by a constitutional amendment overwhelmingly approved by the New York State electorate and supplemented by legislative enactment (Article 2-A of the Judiciary Law). The Commission's tenure lasted through March 31, 1978, when it was replaced by the present Commission.

The former Commission was empowered to investigate allegations of misconduct against judges, impose certain disciplinary sanctions* and, when

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*The sanctions that could be imposed by the former Commission were: private admonition, public censure, suspension without pay for up to six months, and retirement for physical or mental disability. Censure, suspension and retirement actions could not be imposed until the judge had been afforded an opportunity for a full adversary hearing; these Commission sanctions were also subject to a de novo hearing in the Court on the Judiciary at the request of the judge.

appropriate, initiate formal disciplinary proceedings in the Court on the Judiciary, which, by the same constitutional amendment, had been given jurisdiction over all 3,500 judges in the unified court system.

The former Commission, like the temporary Commission, was composed of two judges, five lawyers and two lay persons, and its jurisdiction extended to judges within the state unified court system. The former Commission was authorized to continue all matters left pending by the temporary Commission.

The former Commission considered 1,418 complaints, dismissed 629 upon initial review, authorized 789 investigations and continued 162 investigations left pending by the temporary Commission.

During its tenure, the former Commission took action which resulted in the following:

-- 15 judges were publicly censured;
-- 40 judges were privately admonished;
-- 17 judges were issued confidential letters of suggestion and recommendation.

The former Commission also initiated formal disciplinary proceedings in the Court on the Judiciary against 45 judges and continued six proceedings left pending by the temporary Commission.

Those proceedings resulted in the following:

-- 1 removal
-- 2 suspensions
-- 3 censures
-- 10 cases closed upon resignation by the judge
-- 2 cases closed upon expiration of the judge's term
-- 1 proceeding closed without discipline and with instruction by the Court on the Judiciary that the matter be deemed confidential.

The remaining 32 proceedings were pending when the former Commission expired. They were continued by the present Commission.

In addition to the ten judges who resigned after proceedings had been commenced in the Court on the Judiciary, 28 other judges resigned while under investigation by the former Commission.

Continuation in 1978, 1979 and 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions

Thirty-two formal disciplinary proceedings which had been initiated in the Court on the Judiciary by either the temporary or former Commission were pending when the former Commission was superseded on April 1, 1978, and were continued without interruption by the present Commission.

The last five of these 32 proceedings were concluded in 1980, with the following results, reported in greater detail in the Commission's previous annual reports:

-- 4 judges were removed from office;
-- 1 judge was suspended without pay for six months;
-- 2 judges were suspended without pay for four months;
-- 21 judges were censured;
-- 1 judge was directed to reform his conduct consistent with the Court's opinion;
-- 1 judge was barred from holding future judicial office after he resigned; and
-- 2 judges died before the matters were concluded.

The 1978 Constitutional Amendment

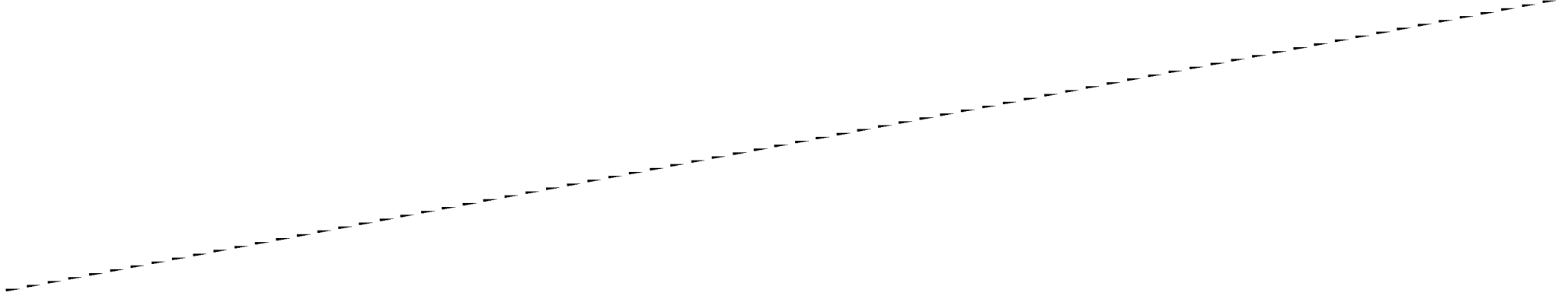
The present Commission was created by amendment to the State Constitution, effective April 1, 1978. The amendment created an 11-member Commission (superseding the nine-member former Commission), broadened the scope of the Commission's authority and streamlined the procedure for disciplining judges within the state unified court system. The Court on the Judiciary was abolished, pending completion of those cases which had already been commenced before it. All formal disciplinary hearings under the new amendment are conducted by the Commission.

Subsequently, the State Legislature amended Article 2-A of the Judiciary Law, the Commission's governing statute, to implement the new provisions of the constitutional amendment.

APPENDIX C

REFEREES WHO PRESIDED IN COMMISSION PROCEEDINGS IN 1987

REFEREE	CITY	COUNTY
Edward Brodsky, Esq.	New York	New York
Bruno Colapietro, Esq.	Binghamton	Broome
Alexander C. Cordes, Esq.	Buffalo	Erie
Edward C. Cosgrove, Esq.	Buffalo	Erie
C. Benn Forsyth, Esq.	Rochester	Monroe
Walter Gellhorn, Esq.	New York	New York
Bernard H. Goldstein, Esq.	New York	New York
Gerald Harris, Esq.	New York	New York
Hon. Bertram Harnett	New York	New York
Robert E. Helm, Esq.	Albany	Albany
Hon. Matthew J. Jasen	Buffalo	Erie
H. Wayne Judge, Esq.	Glens Falls	Warren
Michael M. Kirsch, Esq.	Brooklyn	Kings
John F. Luchsinger, Jr., Esq.	Syracuse	Kings
Francis J. Offermann, Jr., Esq.	Buffalo	Erie
Hon. James A. O'Connor	Waterford	Saratoga
John T. O'Friel, Esq.	Central Valley	Orange
Peter Preiser, Esq.	Albany	Albany
Shirley Adelson Siegel, Esq.	New York	New York
Hon. Morton B. Silberman	White Plains	Westchester
Edward S. Spector, Esq.	Buffalo	Erie
Hon. Donald J. Sullivan	White Plains	Westchester
Nancy F. Wechsler, Esq.	New York	New York
Michael Whiteman, Esq.	Albany	Albany



APPENDIX D

BUDGETS FOR COMMISSION ON JUDICIAL CONDUCT (1978-1987)

	1978-79	1979-80	1980-81	1981-82	1982-83
Personal Service (includes: salaries, temporary services, referees, Commission members)	1,132,400	1,154,000	1,130,000	1,260,670	1,196,659
Non-Personal Services (includes: supplies, travel, rent, equipment, etc.)	511,600	430,000	400,000	421,000	596,241
TOTAL BUDGET	$1,644,000	$1,584,000	$1,530,000	$1,681,670	$1,792,900

BUDGETS FOR COMMISSION ON JUDICIAL CONDUCT (1978-1987)

(Cont'd.)

	1983-84	1984-85	1985-86	1986-87	1987-88
Personal Service (includes: salaries, temporary services, referees, Commission members)	1,163,900	1,272,400	1,198,200	1,363,000	1,435,500
Non-Personal Services (includes: supplies, travel, rent, equipment, etc.)	589,700	616,800	665,800	688,500	719,100
TOTAL BUDGET	$1,753,600	$1,889,200	$1,864,000	$2,051,500	$2,154,600

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

FRANK J. BLANGIARDO,

a Judge of the Civil Court of the City of New York, and Acting Supreme Court Justice, 1st Judicial District, New York County.

Determination

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Weiss, Molod, Berkowitz & Godosky, P.C. (By Richard Godosky) for Respondent

The respondent, Frank J. Blangiardo, a judge of the New York City Civil Court, New York County, and acting justice of the Supreme Court, First Judicial District, was served with a Formal Written Complaint dated July 29, 1986, alleging that during a court proceeding he swatted an attorney's hand and said, "I like to hit girls because they are soft." Respondent filed an answer dated August 20, 1986.

By order dated September 16, 1986, the Commission designated the Honorable Morton B. Silberman as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 5, 1986, and the referee filed his report with the Commission on February 12, 1987.

By motion dated April 22, 1987, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report and for a finding that respondent be admonished. Respondent opposed the motion on May 5, 1987. The administrator filed a reply on May 14, 1987.

On May 21, 1987, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a judge of the New York City Civil Court and an acting justice of the Supreme Court. He has been a judge since January 1, 1959.

2. During the night session beginning February 8, 1986, respondent presided in an arraignment part of the New York City Criminal Court.

3. Margaret Alverson, a Legal Aid Society lawyer, appeared before respondent in People v. Carabalo and Allison.

4. During legal arguments at a bench conference, Ms. Alverson reached for a law book that was laying on respondent's bench.

5. Respondent swatted at Ms. Alverson's hand with some legal papers that he was holding and told her that she was rude.

6. Ms. Alverson asked respondent why he had swatted at her.

7. Respondent was embarrassed. In an attempt to relieve the tension between Ms. Alverson and him, he replied, "I like to hit girls because they are soft."

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.3(a)(3) of the Rules Governing Judicial Conduct; Canons 1, 2 and 3A(3) of the Code of Judicial Conduct, and Sections 604.1(e)(1) and 604.1(e)(5) of the Special Rules Concerning Court Decorum of the Appellate Division, First Department. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Whatever his motivation, respondent's references to Ms. Alverson as a "girl" and "soft" were demeaning and undignified. Such remarks undermine an attorney's role in a courtroom by indicating that she is not to be taken seriously and may hinder her from properly representing her client.

Respondent's remarks were insensitive in view of recent attention in the court system to eliminating gender bias. See, "Report of the New York Task Force on Women in the Courts," reprinted in 15 Fordham Urban Journal 8 (1986-87). Respondent should have been aware of the offensive nature of the term "girl" in referring to a female attorney. Matter of Jordan, 1984 Annual Report 104 (Com. on Jud. Conduct, Jan. 26, 1983). Although the circumstances here are significantly different from those in Jordan, that well-publicized decision put judges on notice that expressions such as "girl" are "insulting, belittling and inappropriate" and "diminish the dignity of the court." Jordan, supra at 106.

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

Mrs. Robb, Mr. Bromberg, Mrs. DelBello, Judge Ostrowski, Judge Shea and Mr. Sheehy concur.

Mr. Bower, Judge Ciparick and Judge Rubin dissent as to sanction only and vote that respondent be issued a confidential letter of dismissal and caution.

Mr. Cleary and Mr. Kovner did not participate.

Dated: July 23, 1987

tate of New York
ommission on Judicial Conduct

the Matter of the Proceeding Pursuant to Section 44,
bdivision 4, of the Judiciary Law in Relation to

J. MICHAEL BRUHN,

Determination

Judge of the Kingston City
ourt, Ulster County.

APPEARANCES:

Gerald Stern (Stephen F. Downs and Cathleen S. Cenci, Of Counsel) for the Commission

Cook, Tucker, Netter and Cloonan, P.C. (By Robert E. Netter) for Respondent

The respondent, J. Michael Bruhn, a judge of the Kingston City Court, Ulster County, was served with a Formal Written Complaint dated June 17, 1986, alleging certain conflicts between his judicial duties and his private practice of law and that he presided over two cases involving family members. Respondent filed an answer dated July 7, 1986.

By order dated July 11, 1986, the Commission designated Michael M. Kirsch, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 29 and 30, 1986, and the referee filed his report with the Commission on February 23, 1987.

By motion dated August 19, 1987, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings and conclusions and for a finding that respondent be removed from office. Respondent opposed the motion by cross motion on October 6, 1987. The administrator filed a reply on October 19, 1987.

On October 23, 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.

As to Charge I of the Formal Written Complaint:

1. Respondent is a judge of the Kingston City Court and has been since January 1, 1982.

2. Respondent is a part-time judge who also practices law in Kingston. From 1974 until January 1, 1985, respondent practiced law in a partnership with Edward T. Feeney. After January 1, 1985, respondent and Mr. Feeney no longer shared profits but continued to share office space, practice under the name Feeney & Bruhn, maintain a checking account under that name for the holding of escrow funds and otherwise hold themselves out to the public to be partners in the practice of law.

3. Edward T. Feeney is also a judge of the Kingston City Court.

4. Respondent acted as an attorney in seven cases that originated in his court, as set forth in Appendix A hereto, in violation of Section 16 of the Judiciary Law.

5. Respondent acted as an attorney in three cases that had been before him in his official capacity, as set forth in Appendices A and B hereto, in violation of Section 17 of the Judiciary Law and Disciplinary Rule 9-101(A) of the Code of Professional Responsibility.

6. Respondent presided over three cases involving clients or former clients of his law partnership, as set forth in Appendix C hereto.

7. Respondent permitted his law partner to act as attorney in eleven cases that had originated in respondent's court, as set forth in Appendix D hereto, in violation of Section 471 of the Judiciary Law.

As to Charge II of the Formal Written Complaint:

8. On February 14, 1984, John R. Parete was charged with Issuing A Bad Check. The case was returnable in respondent's court.

9. Mr. Parete is respondent's brother-in-law.

10. A criminal summons to Mr. Parete was issued by the court over respondent's signature on April 16, 1984.

11. The case came before respondent on April 30, 1984. Respondent did not disqualify himself, as required by Section 14 of the Judiciary Law.

12. Mr. Parete did not appear. Respondent adjourned the case for one week.

13. On May 7, 1984, Mr. Parete again failed to appear. Respondent again adjourned the matter for a week.

14. Respondent did not issue a warrant for Mr. Parete's arrest to secure his appearance in court, as permitted by Section 130.50 of the Criminal Procedure Law.

15. On February 5, 1986, respondent testified before a member of the Commission that "because of my relationship with Mr. Parete, I just felt he was--it was inappropriate for me to issue a warrant for his arrest." Respondent continued, "I would hope that anybody could understand the situation. It is kind of difficult to issue a warrant of arrest for somebody who is an in-law...."

16. The case was put on Judge Feeney's calendar on July 27, 1984. Again, Mr. Parete did not appear, and the matter was adjourned.

17. On September 4, 1984, after the case had been in his court for nearly seven months, respondent disqualified himself and asked that the case be transferred to another court.

18. In the Spring of 1983, respondent's brother, Robert L. Bruhn, consulted respondent about bringing a claim against his former associates. Respondent advised his brother to file a small claim in respondent's court.

19. Robert Bruhn filed the claim, Bruhn v. Lowe and Edelstein, on April 19, 1983.

20. On May 17, 1983, the court issued a subpoena over respondent's signature for the defendants' records. The subpoena was returnable before respondent on May 24, 1983.

21. After service of the subpoena, the parties agreed out of court to payment of the claim on an incremental basis.

22. Thereafter, Mr. Bruhn requested an adjournment of the May 24, 1983, court date.

23. The case was scheduled on respondent's calendar six times between May 24 and October 18, 1983. Each time, Mr. Bruhn asked for an adjournment after he received an incremental payment from the defendants.

24. Mr. Bruhn advised respondent out of court as to the status of his collection efforts.

25. Although the adjournments were granted by court clerks, respondent was aware of them, and court records indicate that he approved three of them personally.

26. When Mr. Bruhn felt that he had received payment in full, he asked that the matter be discontinued. It was marked off the calendar on October 18, 1983.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(b)(3), 100.3(c)(1), 100.3(c)(1)(i), 100.3(c)(1)(iv), 100.3(c)(2), 100.5(c)(1), 100.5(f) and 100.5(h) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3B(3), 3C(1), 3C(1)(a), 3C(1)(d), 3C(2) and 5C(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established. Respondent's cross motion is denied.

A part-time judge may practice law, subject to certain restrictions designed to eliminate conflict and the appearance of conflict between the two roles.

Section 16 of the Judiciary Law prohibits a judge from practicing law "in an action, claim, matter, motion or proceeding originating in [his or her] court." Although neither the statute nor case law define the term "originating," we believe its meaning is clear: any claim or charge initiated in respondent's court, whether or not he took any action on it, originated in his court. In seven cases that originated in his court, respondent violated the statute by later advising or appearing on behalf of a party in another court.

Section 17 of the Judiciary Law further prohibits a judge from acting as an attorney in any matter in which he took official action as a judge. In three of the above-mentioned seven cases, respondent made appearances in other courts after he had taken some judicial action in his own court.

Section 471 of the Judiciary Law prohibits representation by a judge's law partner in any case which originated before the judge. In eleven cases that were initiated in respondent's court, his law partner later represented a party in another court. Respondent's practice of transferring cases out of his court so that his law partner could represent the parties created the impression that the courts were being manipulated to benefit respondent's private law practice, to the possible inconvenience of the parties and to the burden of other courts that had to assume an additional caseload.

As a further restriction on the dual role of a practicing lawyer-judge, ethical standards require disqualification in a proceeding in which a judge's impartiality might reasonably be questioned. Section 100.3(c)(1) of the Rules Governing Judicial Conduct. This prohibits a judge from taking action in a case involving a business client or former client. Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349 (1984); Matter of Filipowicz, 54 AD2d 348, 350 (2d Dept. 1976); Matter of Latremore, 1987 Annual Report 97 (Com. on Jud. Conduct, May 30, 1986); Matter of Sullivan, 1984 Annual Report 152 (Com. on Jud. Conduct, Apr. 22, 1983). Respondent took action in the cases of three clients or former clients of his law firm, including final disposition in two of the cases.

It appears that respondent was unaware of most of these prohibitions. Nonetheless, we find that he failed to comply with the law and failed to take scrupulous care to distinguish his judicial function from his private practice of law.

In addition, respondent's actions in the two cases involving relatives constitute serious misconduct. His admissions with respect to the Parete case illustrate the reasons a judge should immediately disqualify himself from a case involving a close relative. Respondent was simply unable to issue a warrant for the defendant's arrest because the defendant was his brother-in-law. As a result, he allowed the case to languish on his calendar for nearly seven months. Respondent's actions in his brother's case were even more egregious. In effect, he permitted the court to be used to aid his brother's collection efforts. Any judicial action in a relative's case constitutes misconduct, even those short of final disposition. Matter of Myers, 67 NY2d 550 (1986).

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

Mrs. Robb, Mr. Bower, Mr. Bromberg, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Rubin, Judge Shea and Mr. Sheehy concur, except that Judge Shea dissents as to that aspect of Charge I in which it is found that it constituted misconduct for respondent to act as an attorney in matters which were initiated in his court but in which he took no action as a judge.

Judge Ciparick and Mr. Cleary dissent as to that aspect of Charge I in which it is found that it constituted misconduct for respondent to act as an attorney in matters which were initiated in his court but in which he took no action as a judge. Judge Ciparick and Mr. Cleary also dissent as to sanction and vote that respondent be admonished.

Dated: December 24, 1987

APPENDIX A

Respondent acted as an attorney in seven cases that originated in his court.

Callejo v. Bigge, a small claims case, was filed in respondent's court on August 1, 1985. Respondent disqualified himself on September 19, 1985. The matter was transferred to the Ulster Town Court on September 20, 1985. Respondent counseled Mr. Bigge out of court as to what he might expect when he appeared on his own behalf in the Ulster Town Court. After judgment was rendered against Mr. Bigge, respondent prepared and filed a notice of appeal on his behalf.

Chazen v. Massa, a small claims case, was filed in respondent's court on July 6, 1984, and was dismissed on October 29, 1984, after neither party appeared. It was refiled on August 28, 1985. Respondent disqualified himself on August 29, 1985. On September 10, 1985, the case was transferred to the Esopus Town Court. Thereafter, respondent appeared in the Esopus Town Court on behalf of Mr. Massa.

In Croswell v. Beacon Federal Savings and Loan, respondent represented the plaintiff and advised him to file this small claim in respondent's court. It was filed on March 1, 1985. Respondent disqualified himself on March 14, 1985, and the case was transferred to the Ulster Town Court on April 1, 1985. Respondent did not appear but submitted an affidavit to the Ulster Town Court arguing his client's position.

Kelderhouse v. Gill, a small claims case, was filed in respondent's court on August 30, 1985. Respondent disqualified himself on September 19, 1985, and the matter was transferred to the Ulster Town Court on September 20, 1985. Thereafter, respondent advised the defendants as to how to proceed in the Ulster Town Court.

Kier v. Massa, a small claims case, was filed in respondent's court on May 15, 1984, after the plaintiff discussed the facts of the case and the nature of his claim in court with respondent, and respondent advised him that he could file the claim. Respondent disqualified himself on May 31, 1984, and the case was transferred to the Ulster Town Court on June 8, 1984. A hearing was held in the Ulster Town Court on November 5, 1984. Respondent represented Mr. Massa and cross-examined Mr. Kier. After judgment for Mr. Kier, respondent's law firm filed a notice of appeal on behalf of Mr. Massa and proposed a settlement to Mr. Kier.

People v. Charles Long, in which the defendant was charged with two counts of Harassment, was returnable in respondent's court on August 9, 1983. Mr. Long did not appear, and respondent issued a warrant for his arrest on August 11, 1983. Respondent disqualified himself on October 17, 1983, and the case was transferred to the Ulster Town Court on October 18, 1983. On December 14, 1983, respondent appeared in the Ulster Town Court on behalf of Mr. Long.

In People v. Lawrence Williams, in which the defendant was charged with Criminal Impersonation, Second Degree, respondent signed an arrest warrant on October 5, 1983. Respondent disqualified himself on October 17, 1983, and the matter was transferred to the Ulster Town Court on October 18, 1983. On October 19, 1983, respondent appeared at Mr. Williams' arraignment in the Ulster Town Court.

APPENDIX B

Respondent acted as an attorney in the following three cases that had been before him in his official capacity, as more fully described in Appendix A hereto:

Kier v. Massa
People v. Charles Long
People v. Lawrence Williams

APPENDIX C

Respondent presided over three cases involving clients or former clients of his law partnership.

In People v. Stanley Perzanowski, respondent arraigned the defendant on October 15, 1985, on charges of Assault, Third Degree, and Harassment, and dismissed the charges on October 21, 1985, notwithstanding that his law firm had represented Mr. Perzanowski on another charge earlier the same year.

In People v. Margaret Syvertsen, respondent signed a warrant on January 8, 1985, for the defendant's arrest on a charge of Issuing A Bad Check. On February 4, 1985, respondent accepted a guilty plea to a reduced charge of Disorderly Conduct and fined Ms. Syvertsen $25, notwithstanding that she was a former client of his law firm.

In People v. Lawrence Williams, in which the defendant was charged with 33 vehicle and traffic violations, respondent arraigned the defendant on December 14, 1983, and committed him to jail on a charge of Violation Of Parole, notwithstanding that respondent's law firm was then representing Mr. Williams in another court on a charge of Criminal Impersonation, Second Degree.

APPENDIX D

Respondent permitted his law partner to act as attorney in the following eleven cases that had originated in respondent's court:

Defendant	Date	Charge
Dennis Ahearn	1/26/84	Petit Larceny
Dennis Ahearn	2/22/84	Driving While Ability Impaired
William Blair	12/30/84	Driving While Intoxicated Driving With More More Than .10% Blood Alcohol Content Insufficient Lights
John Brady	1/28/85	Driving While Intoxicated No Seat Belt
Charles Long	8/6/83	Harassment (two counts)
Susan Mackey	1/3/85	Failing To Stop At A Stop Sign
Stanley Perzanowski	2/19/85	Driving While Intoxicated
Richard Richards	7/15/84	Driving While Intoxicated Driving With More Than .10% Blood Alcohol Content Leaving The Scene Of An Incident
Margaret Syvertsen	10/3/83	Criminal Mischief

Defendant	Date	Charge
James Van Loan	9/9/84	Driving While Intoxicated Driving With More Than .10% Blood Alcohol Content Speeding Passing A Red Light Unregistered Motor Vehicle Reckless Driving No Insurance No Inspection
Lawrence Williams	10/4/83	Criminal Impersonation

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

ERNEST J. CONTI,

a Justice of the Amsterdam Town Court, Montgomery County.

Determination

APPEARANCES:

Gerald Stern (Henry S. Stewart, Of Counsel) for the Commission

Michael Raphael for Respondent

The respondent, Ernest J. Conti, a justice of the Amsterdam Town Court, Montgomery County, was served with a Formal Written Complaint dated December 3, 1985, alleging that he improperly dismissed a case pending before another judge, that he failed to disqualify himself in a case in which his personal attorney was a party and that he improperly dismissed 31 cases without hearing the prosecutor. Respondent filed an answer dated December 11, 1985.

By order dated January 10, 1986, the Commission designated Marjorie E. Karowe, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 25 and June 17, 1986, and the referee filed her report with the Commission on November 25, 1986.

By motion dated December 31, 1986, 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. Oral argument was waived.

On February 19, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent is a justice of the Amsterdam Town Court and has been since January 1, 1978.

2. On September 18, 1984, John G. Reedy was issued a ticket for Speeding in the Town of Amsterdam by Trooper John Cuddy of the State Police. The ticket was returnable before Judge Helen Bieniek of the Amsterdam Town Court.

3. Trooper Cuddy prepared several copies of the ticket, all alleging a violation of Section 1180(d) of the Vehicle and Traffic Law (Speeding). Trooper Cuddy did not make any cross-outs or alterations on any of the copies of the ticket.

4. On September 27, 1984, Mr. Reedy was arraigned on the Speeding charge before Judge Bieniek. He pled not guilty, and Judge Bieniek adjourned the matter to October 25, 1984, in her court.

5. When Mr. Reedy appeared, Judge Bieniek had before her a copy of the traffic information charging a violation of Section 1180(d) of the Vehicle and Traffic Law. The information contained no cross-outs or alterations, and Judge Bieniek made no cross-outs or alterations on the ticket.

6. After Mr. Reedy's appearance, Judge Bieniek placed the ticket and other documents in the case in a filing cabinet accessible only to Judge Bieniek, respondent and the court clerk, Deborah Szwarnowicz.

7. Judge Bieniek then reported in writing to the district attorney's office that Mr. Reedy had pled not guilty and asked the prosecutor for a recommendation as to disposition of the case.

8. Ms. Szwarnowicz was ill on September 27, 1984, and did not see the Reedy ticket until she returned to the court on October 2, 1984. She made no alterations or cross-outs on the ticket but found the file on her desk on October 2, 1984, with the original offense charged crossed out and the ticket altered to charge a violation of Section 375(35)(c) of the Vehicle and Traffic Law (Bald Tire). A notation that the case was "dismissed 9/25/84" was added to the top of the ticket.

9. The case did not come before Judge Bieniek between September 27 and October 2, 1984. She did not make the alterations to the ticket, did not reduce the charge or dismiss the case.

10. Respondent or someone at his direction altered the ticket. Respondent reduced the charge from Speeding to Bald Tire and dismissed the case.

11. Respondent reduced the charge and dismissed the case without informing or hearing the district attorney's office or the arresting officer

and without having a written motion before him, as required by Section 170.45 of the Criminal Procedure Law.

12. Respondent lacked candor when he testified in this proceeding that he received the Reedy ticket from Trooper Cuddy at his home already bearing the alterations in the charge and that Mr. Reedy personally appeared before respondent and contended that he had repaired the bald tire.

13. Mr. Reedy is the son of James H. Reedy, former justice of the Galway Town Court, Saratoga County. Respondent knew Judge Reedy during the 23 years that respondent was a state trooper. Respondent had been in Judge Reedy's home many times in the course of his business as a trooper.

14. On October 16, 1984, the district attorney's office consented by sending a form to Judge Bieniek to a reduction in the charge against Mr. Reedy to Section 1120(a) of the Vehicle and Traffic Law and recommended a fine of $100 based on a second conviction within 18 months.

As to Charge II of the Formal Written Complaint:

15. On November 1, 1984, Trooper Cuddy issued a ticket to Richard A. Insogna, charging him with Speeding in the Town of Amsterdam. Trooper Cuddy knew Mr. Insogna to be an Amsterdam attorney.

16. The ticket was returnable on November 13, 1984, before respondent.

17. Respondent and Mr. Insogna have been personal friends for 20 years. Mr. Insogna represented respondent continuously in a divorce action and in a medical malpractice claim from 1981 to late 1985.

18. A few days after Mr. Insogna received the ticket, respondent called by telephone and told him that he need not appear on the return date, that there had been a mistake and that the charge was being withdrawn or dismissed. Respondent told Mr. Insogna that the arresting officer had informed respondent that the police radar had malfunctioned and that the ticket should be dismissed.

19. Trooper Cuddy never contacted respondent or any court personnel to request that the ticket be withdrawn or dismissed.

20. On November 6, 1984, one week before the return date, respondent dismissed the Speeding charge against Mr. Insogna without making any record of his reasons.

21. Mr. Insogna had been convicted of another Speeding violation within the previous ten months and had accumulated six points on his driver's license within the previous 22 months.

22. Respondent dismissed the case without notifying or hearing Trooper Cuddy or the district attorney's office and without a written motion before him, as required by Section 170.45 of the Criminal Procedure Law.

23. Respondent lacked candor when he testified in this proceeding that he based the dismissal on a conversation with Trooper Cuddy, who indicated that the radar was not operating properly and that the charge should be dismissed.

As to Charge III of the Formal Written Complaint:

24. Between January 3, 1984, and January 22, 1985, respondent dismissed charges against 23 defendants, as set forth in Schedule A of the Formal Written Complaint, without notifying or hearing the district attorney's office, as required by Section 170.45 of the Criminal Procedure Law.

25. In four of the 23 cases (Reedy, Tambasco, Page and Valikonis), respondent granted the dismissal before the adjourned date, notwithstanding that the district attorney's office had recommended in writing a reduction of the charge and a fine.

26. In two of the 23 cases (Gutkowski and Frank J. Conti), respondent dismissed the charges, notwithstanding that the district attorney had refused to consent to any reduction in view of the prior records of the defendants and had stated his readiness for trial.

27. Between January 5, 1984, and January 8, 1985, respondent adjourned in contemplation of dismissal charges against eight defendants, as set forth in Schedule A of the Formal Written Complaint, notwithstanding that he had not notified or heard the district attorney's office or obtained its consent to the disposition, as required by Section 170.55 of the Criminal Procedure Law.

28. At the time, respondent was familiar with the provisions of Section 170.55 of the Criminal Procedure Law.

29. In one of the eight cases (Mahoney), respondent granted the adjournment in contemplation of dismissal, notwithstanding that the district attorney had recommended reduction of the charge or trial.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(a)(4) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(4) and 3C(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

With respect to the Reedy matter, the credible evidence establishes that respondent reached out to take a case pending before another judge, altered documents to reflect that a less serious offense had been charged and improperly dismissed the case without hearing the prosecutor. Such extraordinary circumstances lead to the conclusion that respondent intervened in the case as a matter of favoritism. That respondent knew the defendant's father, who was also a judge, supports that conclusion.

Respondent's disposition of the Insogna matter also conveyed an unmistakable appearance of favoritism. Without a motion before him by either party and without notifying the prosecutor, respondent dismissed a charge against his personal attorney who was also a long-time friend, ignoring legal procedures and a requirement that he disqualify himself in matters in which his impartiality might reasonably be questioned. Section 100.3(c)(1) of the Rules Governing Judicial Conduct.

The granting of special consideration by a judge is wrong and has always been wrong. Matter of Byrne, 47 NY2d(b) (Ct. on the Judiciary 1978). It has long been condemned by the courts and this Commission (Matter of Dixon v. State Commission on Judicial Conduct, 47 NY2d 523 [1979]; Matter of Bulger v. State Commission on Judicial Conduct, 48 NY2d 32 [1979]; "Ticket-Fixing: The Assertion of Influence in Traffic Cases," Interim Report by the State Commission on Judicial Conduct [June 20, 1977]), and may warrant removal from office upon a single transgression (Matter of Reedy v. State Commission on Judicial Conduct, 64 NY2d 299 [1985]).

Respondent compounded his misconduct by testifying falsely in this proceeding as to his reasons for dismissing the Reedy and Insogna cases. 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); Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 78 (fn.) (1980).

In addition, respondent failed to comply with the law by dismissing or adjourning in contemplation of dismissal 31 cases without giving the prosecutor the opportunity to be heard.

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

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

Mr. Cleary and Judge Rubin were not present.

Dated: March 23, 1987

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

CHARLES R. COOKSEY,

a Justice of the Farmington Town Court, Ontario County.

Determination

APPEARANCES:

Gerald Stern (Henry S. Stewart, Of Counsel) for the Commission

Zimmerman and Tyo (By John E. Tyo) for Respondent

The respondent, Charles R. Cooksey, a justice of the Farmington Town Court, Ontario County, was served with a Formal Written Complaint dated October 23, 1986, alleging that he engaged in an ex parte communication and that he conditioned dismissal of a criminal case on the promise of the defendant to release the municipality from any claims arising out of his arrest. Respondent filed an answer dated December 2, 1986.

On July 3, 1987, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for by Section 44, subdivision 4, of the Judiciary Law; and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on July 20, 1987.

The administrator submitted a memorandum as to sanction. Respondent did not submit a memorandum and waived oral argument.

On August 28, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Farmington Town Court and has been since January 1985.

2. On December 5, 1985, Bernard Richardson appeared before respondent on a charge of Trespass. Mr. Richardson was represented by an attorney, Richard E. Chase. Respondent arraigned Mr. Richardson, who pled not guilty. Respondent scheduled a trial for December 12, 1985. The trial was subsequently adjourned to December 19, 1985.

3. On December 19, 1985, Mr. Chase and John G. Herriman, an Ontario County assistant district attorney assigned to prosecute the case, appeared before respondent. Mr. Herriman requested an adjournment so that he might have more time to prepare for trial. Mr. Chase objected and moved to dismiss the case for failure to prosecute.

4. Respondent then declared a recess and asked Mr. Herriman to meet with him in an adjoining room. Mr. Chase objected and asked to be present. Respondent refused to allow Mr. Chase to be present.

5. Respondent and Mr. Herriman then entered an office adjoining the courtroom, and respondent closed the door.

6. Mr. Chase knocked on the door and asked whether he could join them. Respondent again refused to allow Mr. Chase to be present.

7. After approximately five minutes, respondent called Mr. Chase into the room. Mr. Chase again objected to the private conference.

8. Respondent then told Mr. Chase that he would consider dismissing the case if Mr. Richardson would execute a document, releasing Ontario County from any claims arising from his arrest.

9. Mr. Chase refused to provide such a release.

10. Respondent, Mr. Herriman and Mr. Chase then returned to the courtroom. Respondent denied the motion to dismiss and adjourned the trial to January 2, 1986.

11. On December 20, 1985, Mr. Herriman sent respondent a copy of a letter in which Mr. Herriman indicated that the district attorney's office was withdrawing from prosecution of the case.

12. On January 2, 1986, respondent dismissed the case for failure to prosecute.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2 and 3A(4) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's ex parte meeting with the prosecutor, notwithstanding repeated requests to be present by defense counsel, was a violation of Section 100.3(a)(4) of the Rules Governing Judicial Conduct. That respondent proposed a disposition immediately after the private meeting makes it obvious that the merits of the case were discussed.

It was also improper for respondent to lend the prestige of his judicial office to advance the prosecutor's interest in obtaining a waiver of liability from a civil claim. If the case should have been dismissed on its merits, respondent should have dismissed it without attempting to coerce the defendant into foregoing his legal right to pursue a civil claim.

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

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

Mr. Bromberg and Mr. Cleary were not present.

Dated: October 27, 1987

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

GERARD DECKELMAN,

a Justice of the Fremont Town Court, Sullivan County.

Determination

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

The respondent, Gerard Deckelman, a justice of the Fremont Town Court, Sullivan County, was served with a Formal Written Complaint dated July 31, 1987, alleging certain reporting, remitting and depositing deficiencies and alleging that he failed to perform his adjudicative and administrative responsibilities in numerous cases. Respondent did not answer the Formal Written Complaint.

By motion dated October 8, 1987, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be deemed established. Respondent did not file any papers in response thereto. By determination and order dated November 18, 1987, the Commission granted the administrator's motion and found respondent's misconduct established.

The administrator filed a memorandum as to sanction. Respondent neither filed any papers nor requested oral argument. On December 17, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent is a justice of the Fremont Town Court and has been since January 1984.

2. From January 1984 to April 1987, respondent failed to remit funds or report cases in a timely manner to the Department of Audit and Control, as set forth in Schedule A of the Formal Written Complaint, in violation of Sections 2020 and 2021(1) of the Uniform Justice Court Act, Section 27(1) of the Town Law and Section 1803 of the Vehicle and Traffic Law. Respondent's reports were late in 39 of the 40 months of the period. They were from 3 to 216 days late, or an average of 62 days late.

As to Charge II of the Formal Written Complaint:

3. Between May 1985 and June 1987, respondent failed to deposit funds in his official court account in a timely manner, as set forth in Schedule B of the Formal Written Complaint, in violation of Section 30.7(a) of the Uniform Justice Court Rules in effect until January 6, 1986, and thereafter in violation of Section 214.9(a) of the Uniform Civil Rules for the Justice Courts.

4. Respondent kept undeposited court funds in a briefcase and a filing cabinet.

As to Charge III of the Formal Written Complaint:

5. Respondent failed to dispose of five cases pending in his court for between 7 and 18 months, as set forth in Schedule C of the Formal Written Complaint.

6. Respondent failed to maintain a cashbook, in violation of Section 105.1 of the Recordkeeping Requirements for Town and Village Courts in effect until January 6, 1986, Section 30.9 of the Uniform Justice Court Rules in effect until January 6, 1986, and thereafter in violation of Section 214.11(a)(3) of the Uniform Civil Rules for the Justice Courts.

7. Respondent failed to maintain case files and indices of cases, in violation of Sections 107, 2019 and 2019-a of the Uniform Justice Court Act, Section 105.1 of the Recordkeeping Requirements for Town and Village Courts in effect until January 6, 1986, Section 30.9 of the Uniform Justice Court Rules in effect until January 6, 1986, and thereafter in violation of Sections 214.11(a)(1) and 214.11(a)(2) of the Uniform Civil Rules for the Justice Courts.

8. In ten cases, respondent failed to issue receipts to defendants who had paid fines to the court, as set forth in Schedule D of the Formal Written Complaint, in violation of Section 31(1)(a) of the Town Law.

9. Between February 1986 and June 1987, respondent failed to notify law enforcement agencies and the Department of Motor Vehicles of the disposition of cases, in violation of Section 91.12 of the Regulations of the Commissioner of the Department of Motor Vehicles.

10. Respondent failed to maintain complete and adequate dockets in eight cases, as set forth in Schedule E of the Formal Written Complaint, in violation of Sections 107, 2019 and 2019-a of the Uniform Justice Court Act and Section 105.3 of the Recordkeeping Requirements for Town and Village Courts in effect until January 6, 1986.

11. On October 12, 1986, in People v. Michael Rigney, respondent failed to properly advise the defendant of his rights at arraignment, in violation of Section 180.10(4) of the Criminal Procedure Law. Respondent set bail at $500 but did not deposit it in his official court account until June 8, 1987, nearly eight months after he received it, because he did not know what to do with it, he testified before a member of the Commission on June 16, 1987. Respondent also failed to keep any record of the case.

12. From January 1984 to June 1987, respondent handled fewer than 25 cases. Although he sits once a week, he never hears more than two cases, and in many court sessions he has no cases at all. In his testimony before a member of the Commission, he attributed his failures to carelessness and procrastination.

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(a)(1), 100.3(a)(5) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(1), 3A(5) and 3B(1) of the Code of Judicial Conduct. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Despite an extremely small caseload (fewer than 25 cases in three and a half years), respondent has neglected nearly every aspect of his adjudicative and administrative duties. He failed to promptly dispose of cases. He failed to keep proper court records. He mishandled public moneys by keeping them in his personal possession instead of depositing them in his official account and turning them over to the state as the law requires.

By his disdain for the responsibilities of a judge, respondent has demonstrated that he is not fit to hold judicial office. Matter of Vincent v. State Commission on Judicial Conduct, 70 NY2d 208 (1987); Matter of Petrie v. State Commission on Judicial Conduct, 54 NY2d 807 (1981); Bartlett v. Flynn, 50 AD2d 401 (4th Dept. 1976).

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

Mrs. Robb, Mr. Bower, Mr. Bromberg, Judge Ciparick, Mrs. DelBello, Mr. Kovner, Judge Shea and Mr. Sheehy concur.

Mr. Cleary, Judge Ostrowski and Judge Rubin were not present.

Dated: December 21, 1987

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

EDWARD T. FEENEY,

a Special Judge of the Kingston City Court, Ulster County.

Determination

APPEARANCES:

Gerald Stern (Stephen F. Downs and Cathleen S. Cenci, Of Counsel) for the Commission

H. Clark Bell for Respondent

The respondent, Edward T. Feeney, a judge of the Kingston City Court, Ulster County, was served with a Formal Written Complaint dated June 17, 1986, alleging certain conflicts between his judicial duties and his private practice of law. Respondent filed an answer dated July 7, 1986.

By order dated August 6, 1986, the Commission designated William V. Maggipinto, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 17 and 18, 1986, and the referee filed his report with the Commission on April 17, 1987.

By motion dated August 19, 1987, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional conclusions of law and for a finding that respondent be removed from office. Respondent opposed the motion by cross motion on October 7, 1987. The administrator filed a reply on October 19, 1987.

On October 23, 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 a judge of the Kingston City Court and has been since January 1982.

2. Respondent is a part-time judge who also practices law in Kingston. From 1974 until January 1, 1985, respondent practiced in a partnership with J. Michael Bruhn. After January 1, 1985, respondent and Mr. Bruhn no longer shared the profits of their law practice but continued to share office space, practice under the name Feeney & Bruhn, maintain a checking account under that name for the holding of escrow funds and otherwise hold themselves out to the public to be partners in the practice of law.

3. J. Michael Bruhn is also a judge of the Kingston City Court.

4. Respondent accepted employment as an attorney in twelve cases which had originated in his court before Judge Bruhn, as set forth in the appendix hereto, in violation of Sections 16 and 471 of the Judiciary Law.

5. On August 20, 1984, a complaint was filed in respondent's court against Margaret Syvertsen for Issuing A Bad Check. A criminal summons to Ms. Syvertsen was issued by the court over respondent's signature on October 2, 1984.

6. Respondent had previously represented Ms. Syvertsen in a matrimonial matter and represented her from October 1983 to February 1984 on a charge of Criminal Mischief before the Ulster Town Court.

7. The Bad Check case appeared on respondent's court calendar on October 19, November 9 and November 16, 1984. Respondent failed to disqualify himself.

8. On each of the scheduled court dates, Ms. Syvertsen failed to appear in response to the summons, and respondent adjourned the matter. Respondent did not issue a warrant for her arrest, as permitted by Section 130.50 of the Criminal Procedure Law.

9. Respondent testified in this proceeding that he had "no idea" why he did not issue a warrant for Ms. Syvertsen's arrest.

10. On January 8, 1985, Judge Bruhn issued a warrant for Ms. Syvertsen's arrest. On February 4, 1985, she pled guilty before Judge Bruhn to a reduced charge of Disorderly Conduct and was fined $25.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(b)(3), 100.3(c)(1), 100.5(c)(1), 100.5(f) and 100.5(h) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3B(3), 3C(1) and 5C(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, except as it refers to the case of Massa v. Boucher, and respondent's misconduct is established. Respondent's cross motion is denied.

A part-time judge may practice law, subject to certain restrictions designed to eliminate conflict and the appearance of conflict between the two roles.

Section 16 of the Judiciary Law prohibits a judge from practicing law "in an action, claim, matter, motion or proceeding originating in [his or her] court." Although neither the statute nor case law define the term "originating", we believe its meaning is clear: any claim or charge initiated in respondent's court, whether or not he took any action on it, originated in his court. Section 471 of the Judiciary Law also prohibits the law partner of a judge from accepting employment in any cause which originated before the judge. In twelve cases that originated in the Kingston City Court before Judge Bruhn, respondent violated these statutes by later appearing in other courts on behalf of a party.

This practice of transferring cases out of the court so that respondent could represent a party created the impression that the courts were being manipulated to benefit respondent's private law practice, to the possible inconvenience of the parties and to the burden of other courts that had to assume an additional caseload.

As a further restriction on the dual role of a practicing lawyer-judge, ethical standards require disqualification in a proceeding in which a judge's impartiality might reasonably be questioned. Section 100.3(c)(1) of the Rules Governing Judicial Conduct. This prohibits a judge from taking action in a case involving a business client or former client. Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349 (1984); Matter of Filipowicz, 54 AD2d 348, 350 (2d Dept. 1976); Matter of Latremore, 1987 Annual Report 97 (Com. on Jud. Conduct, May 30, 1986); Matter of Sullivan, 1984 Annual Report 152 (Com. on Jud. Conduct, Apr. 22, 1983). Respondent's failure to disqualify himself from the Syvertsen Bad Check case did not comply with this standard. By leaving the case on his calendar without issuing a warrant for her arrest as permitted by law when she failed to appear, respondent created the appearance that Ms. Syvertsen was being favorably treated because she was a former client of respondent.

Respondent has testified that he was unaware of most of these prohibitions. Nonetheless, we find that he failed to comply with the law and failed to take scrupulous care to distinguish his judicial function from his private practice of law.

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

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

Judge Ciparick, Mr. Cleary and Judge Shea dissent as to that aspect of the charge in which it is found that it was misconduct for respondent to act as an attorney in cases which were initiated in his court but in which he took no action as a judge. Judge Ciparick, Mr. Cleary and

Judge Shea also dissent as to sanction and vote that respondent be admonished.

Mr. Bromberg did not participate.

Dated: December 24, 1987

APPENDIX

Respondent accepted employment as an attorney in the following twelve cases which had originated in his court before Judge Bruhn:

Case	Date	Charge
People v. Dennis Ahearn	1/24/84	Petit Larceny
People v. Dennis Ahearn	2/17/84	Driving While Ability Impaired
People v. William Blair	12/30/84	Driving While Intoxicated Driving With More Than .10% Blood Alcohol Content Insufficient Lights
People v. John Brady	1/28/85	Driving While Intoxicated No Seat Belt
People v. Charles Long	8/06/83	Harassment (two counts)
People v. Susan Mackey	1/03/85	Failure To Stop At A Stop Sign
People v. Stanley Perzanowski	2/19/85	Driving While Intoxicated
People v. Richard Richards	7/15/84	Driving While Intoxicated Driving With More Than .10% Blood Alcohol Content Leaving The Scene Of An Incident
People v. Margaret Syvertsen	10/03/83	Criminal Mischief, Fourth Degree

Case	Date	Charge
People v. James Van Loan	9/09/84	Driving While Intoxicated Driving With More Than .10% Blood Alcohol Content Speeding Passing A Red Light Unregistered Motor Vehicle Reckless Driving No Insurance No Inspection
People v. Lawrence Williams	10/04/83	Criminal Impersonation, Second Degree
Jeffrey Warren v. Mary Ann McCutcheon	8/26/85	Small Claims

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.

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.

Dated: March 20, 1987

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

BERTRAM R. GELFAND,

CONCURRING OPINION
BY MR. BOWER

Surrogate, Bronx County.

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

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 GOLDSTEIN,

a Justice of the Supreme Court,
10th Judicial District, Nassau County.

Determination

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Lyman & Tenenbaum, P.C. (By Irving Tenenbaum) for Respondent

The respondent, Joseph Goldstein, a justice of the Supreme Court, 10th Judicial District, was served with a Formal Written Complaint dated February 13, 1986, alleging that he removed a witness from the stand, accused him of perjury and conveyed the impression that he was in custody and that, in another case, respondent conveyed the impression that he was interested in a matter before another judge. Respondent filed an answer dated April 14, 1986.

On November 10, 1986, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for in Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on November 14, 1986.

The administrator and respondent submitted memoranda as to sanction. On December 12, 1986, 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.

As to Charge I of the Formal Written Complaint:

1. Respondent is a justice of the Supreme Court, 10th Judicial District, and was a judge of the District Court, Nassau County, for seven years.

2. On February 8 and 9, 1984, in District Court, Nassau County, respondent presided over People v. John G. A___, in which the defendant was charged with Criminal Mischief and Harassment.

3. Several days earlier respondent had presided over another trial in the same matter which had resulted in a mistrial.

4. In the second trial on February 9, 1984, Detective Robert Ryder of the Old Brookville Police Department testified as a witness for the prosecution. Detective Ryder testified that he had taken one of five police photographs marked as exhibits at the trial and that another witness had taken the other four photographs.

5. At the first trial, Detective Ryder had testified that he had taken several of the photographs.

6. At the second trial, when Detective Ryder testified that he had taken only one of the photographs, respondent announced a recess. Out of the presence of the jury in chambers, respondent declared that Detective Ryder may have committed perjury.

7. Respondent advised the prosecutor, Assistant District Attorney Robert Schroeder, to speak to his superiors and "get rid" of the case.

8. At respondent's direction, court personnel took Detective Ryder's gun from him.

9. Respondent restricted Detective Ryder's movements to the courtroom and chambers for one hour and fifteen minutes while the detective waited for his superior and his attorney to come to court. Respondent conveyed the impression to Detective Ryder and others that the detective was in custody.

As to Paragraph 6 of Charge II of the Formal Written Complaint:

10. On July 27, 1984, respondent entered a District Court courtroom in which Judge Joseph Saladino was presiding over People v. Daniel S___. The courtroom had been ordered closed to the public by Judge Saladino because the defendant was eligible for youthful offender status.

11. While in the courtroom, respondent learned that the S___ case was being heard by Judge Saladino. Respondent had previously recused

himself from presiding over S_____ because the defendant was accused of anti-semitic acts against students of the Hebrew Academy of Nassau County, a private school of which respondent was a trustee.

12. During a recess, respondent followed Judge Saladino into chambers. Respondent told Judge Saladino that he could not discuss the S_____ case. Judge Saladino received the impression that respondent knew the family of the complaining witness in the case. In actuality, respondent did not know the complaining witness' family, although some members of the family had attended the Hebrew Academy.

13. Later that day, Judge Saladino declared a mistrial, in part, because of respondent's statements to him.

14. Respondent's purpose in speaking to Judge Saladino was not to influence his decision in S_____, but respondent inadvertently conveyed the impression that he was interested in the outcome of the case and that he was in favor of the prosecution.

15. Respondent now recognizes that he should not have spoken to Judge Saladino under the circumstances.

As to Paragraph 7 of Charge II of the Formal Written Complaint:

16. The allegation is not sustained and is, therefore, dismissed.

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. Charge I and Paragraph 6 of Charge II of the Formal Written Complaint are sustained, and respondent's misconduct is established. Paragraph 7 of Charge II is dismissed.

Respondent clearly overreacted to a relatively common occurrence in a courtroom: a witness' testimony varied from that in a previous statement. Instead of leaving it to opposing counsel to challenge the witness' credibility, respondent declared a recess, excused the jury, disarmed the witness, implied that he was guilty of perjury, suggested that the prosecutor agree to dismiss the case and conveyed the impression that the witness was in custody for more than an hour.

Such behavior amounts to an abuse of judicial power and deviates from the high standards of conduct expected of every judge. Matter of Sharpe, 1984 Annual Report 134 (Com. on Jud. Conduct, June 7, 1983).

In another proceeding, respondent entered a closed courtroom where another judge was hearing a case from which respondent had disqualified himself. Instead of leaving the courtroom when he realized what case was

being tried, respondent followed the presiding judge into chambers and created the impression that he was interested in the outcome of the case, thereby causing a mistrial.

A judge must avoid even the appearance of impropriety. Section 100.2 of the Rules Governing Judicial Conduct. A judge whose actions create an appearance of favoritism harms the administration of justice. Matter of Suglia, 36 AD2d 326 (1st Dept. 1971).

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

Mrs. Robb, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner and Judge Ostrowski concur.

Judge Ciparick, Judge Shea and Mr. Sheehy dissent as to sanction only and vote that respondent be admonished.

Mr. Bower and Judge Rubin were not present.

Dated: January 29, 1987

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

MICHAEL J. GREENFELD,

a Justice of the Valley Stream Village Court, Nassau County.

Determination

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Lyman & Tenenbaum, P.C. (By Irving Tenenbaum) for Respondent

The respondent, Michael J. Greenfeld, a justice of the Valley Stream Village Court, Nassau County, was served with a Formal Written Complaint dated November 19, 1986, alleging that he improperly delegated his judicial duties and gave false information to an administrative judge. Respondent filed an answer dated December 30, 1986.

On June 1, 1987, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for by Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on June 19, 1987.

The administrator and respondent submitted memoranda as to sanction. On July 17, 1987, the Commission heard oral argument, at which respondent and his counsel were heard, 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. Respondent is a justice of the Valley Stream Village Court and has been since March 10, 1986. Respondent was acting justice of the court from April 1, 1983, to March 9, 1986. As acting justice, respondent substituted for the village justice when he was unable to sit. From April 1, 1983, to May 1, 1985, respondent presided over approximately 30 percent of the cases of the court. From May 1, 1985, to March 9, 1986, respondent presided over all the cases in the court because of the illness of Village Justice James I. Lysaght. Judge Lysaght died on March 4, 1986.

2. Between April 1, 1983, and March 9, 1986, respondent permitted the deputy village attorney, who prosecuted Vehicle and Traffic Law and village ordinance violations in respondent's court, to perform judicial duties in numerous cases in the absence of respondent. The deputy village attorney was permitted to: a) conduct conferences with defendants; b) accept guilty pleas; c) determine the amounts of fines and advise defendants of the amounts of fines to be paid; and, d) enter dispositions of cases on official court records.

3. As a result of respondent's delegation of his duties, numerous defendants were led to believe that the deputy village attorney was the judge disposing of their cases.

4. In delegating his judicial duties to the deputy village attorney, respondent was following a practice established by Judge Lysaght. After his appointment as village justice, respondent changed the practice to require his review of the prosecutor's proposed disposition before defendants could leave the court. The defendants were not required to appear before respondent but were told by the prosecutor that the proposed disposition required respondent's approval.

5. Between March 10, 1986, and June 23, 1986, respondent engaged in several ex parte communications with the deputy village attorney concerning the recommended disposition of cases during which the prosecutor set forth the basis for his recommendations.

As to Charge II of the Formal Written Complaint:

6. On November 26, 1985, an unsigned letter was sent to the Office of Court Administration, complaining, inter alia, that cases in respondent's court were disposed of without defendants ever appearing before a judge.

7. The administrative judge for Nassau County subsequently forwarded the complaint to Judge Lysaght and to respondent and requested a response to the allegations.

8. In January 1986, respondent sent an undated letter to the administrative judge in response to the complaint. The letter was drafted by respondent after consulting with Judge Lysaght and was signed by Judge Lysaght and respondent.

9. The letter stated, "All cases disposed of by plea bargaining are subject to approval by the presiding judge who reviews them the same night." Respondent falsely advised the administrative judge that guilty pleas were subject to the approval of the presiding judge and were reviewed by the presiding judge the same night that the guilty pleas were entered.

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)(4) of the Rules Governing Judicial Conduct and Canons 1, 2A and 3A(4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Over a period of years in numerous cases, respondent abandoned his judicial duties and improperly delegated them to the prosecutor. This created the impression that an interested party in the courtroom was disposing of cases, not a neutral and impartial judge. The improper delegation of judicial functions constitutes misconduct. Matter of Hopeck, 1981 Annual Report 133 (Com. on Jud. Conduct, Aug. 15, 1980); Matter of Caponera, 2 Commission Determinations 332 (Com. on Jud. Conduct, Apr. 21, 1981). To place adjudicative responsibilities in the hands of an advocate in the case is especially egregious. Matter of Rider, unreported (Com. on Jud. Conduct, Jan. 30, 1987).

We do not accept respondent's arguments that as an acting justice he was compelled to follow the practices established by the elected village justice. Although the elected justice in a village may establish some administrative procedures which the acting justice may find it necessary to follow, the acting justice is a duly-authorized judge who must act independently in exercising his judicial functions. The acting justice is required to comply with the law and adhere to ethical standards, regardless of whether the village justice does so or not.

Respondent's misconduct was not limited to the improper delegation of duties. He acknowledged that he made false statements in a letter to his administrative judge in an attempt to conceal his improper practices and, thus, prevented the administrative judge from taking steps to correct them. 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, 554 (1986); Matter of White, 1987 Annual Report 153, 156 (Com. on Jud. Conduct, Aug. 8, 1986).

Respondent failed to change his practice even after the adminstrative judge's inquiry, though at the time respondent was conducting all the business of the court due to the elected judge's illness, thus

further exacerbating the misconduct. Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349, 357 (1984).

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

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

Mr. Bower and Mr. Bromberg were not present.

Dated: September 2, 1987

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

JAMES R. LENNEY,

a Justice of the Herkimer Village Court, Herkimer County.

Determination

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

The respondent, James R. Lenney, a justice of the Herkimer Village Court, Herkimer County, was served with a Formal Written Complaint dated December 3, 1986, alleging that he neglected his judicial duties and failed to cooperate with the Commission. Respondent did not answer the Formal Written Complaint.

By motion dated February 19, 1987, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be deemed established. Respondent did not oppose the motion or file any papers in response thereto. By determination and order dated March 18, 1987, the Commission granted the administrator's motion and found respondent's misconduct established.

The administrator filed a memorandum as to sanction. Respondent neither filed any papers nor appeared for oral argument.

On April 14, 1987, the Commission considered the record of the proceeding and thereafter made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent is a justice of the Herkimer Village Court and has been since 1974.

2. Since June 1981, respondent has failed to diligently discharge his administrative and adjudicative responsibilities in 35

criminal cases and six civil cases, as denominated in Schedule A of the Formal Written Complaint, with the result that the matters remained pending in his court for between 10 and 59 months.

3. Respondent failed to schedule or delayed in scheduling for trial 26 of the 35 criminal cases.

4. After scheduling 30 of the 35 cases for trial, respondent repeatedly permitted the cases to be adjourned because attorneys or defendants failed to appear. Respondent failed to take legal remedies available to him to compel their appearance and, thereby, established a system in which attorneys or defendants could delay cases and avoid the consequences of disposition simply by failing to appear in court.

5. In 16 of the 35 cases, respondent failed to issue bench warrants, failed to remit forfeited bail to the State Comptroller or failed to suspend defendants' licenses, as required by Sections 420.10(3), 530.70 and 540.10 of the Criminal Procedure Law, Section 4-410(1)(b) of the Village Law and Section 510.4-a of the Vehicle and Traffic Law, when the defendants failed to appear in court to pay fines or restitution imposed by the court.

6. In five of the 35 cases, respondent failed to transmit felony cases to the county court or grand jury or otherwise properly dispose of them, as required by Section 180.30, 180.50 and 180.70 of the Criminal Procedure Law.

7. In all of the 35 criminal cases, respondent failed to maintain complete and accurate records and dockets, as required by Sections 2019 and 2019-a of the Uniform Justice Court Act.

8. In five small claims cases, respondent failed to schedule trials or delayed in scheduling trials, as denominated in Schedule A of the Formal Written Complaint.

9. In two civil cases, respondent failed to render judgment within 30 days from the time the matters were submitted to him, as required by Section 1304 of the Uniform Justice Court Act.

As to Charge II of the Formal Written Complaint:

10. In February 1981, Ferrari v. Barone, a small claims case, was filed in respondent's court. A hearing was held before respondent on February 24, 1981.

11. On April 15, 1981, the plaintiff's attorney requested that the matter be transferred to the civil calendar of respondent's court, and respondent granted the request.

12. On September 11, 1981, the plaintiff's attorney, Thomas C. Walsh, requested that the matter be scheduled for trial as soon as possible.

13. On October 12, 1981, Mr. Walsh again asked that the matter be scheduled. Respondent replied on October 14, 1981, by suggesting that the attorneys agree on a date and notify him.

14. On October 21, 1981, Mr. Walsh proposed November 3, 1981, as a date for the trial. Respondent scheduled it for November 11, 1981, but adjourned it at the request of the defendant's attorney, George F. Aney. No new date was set.

15. On March 17, 1982, respondent wrote the attorneys, inquiring as to the status of the case.

16. On April 14, 1982, Terrence M. Walsh, on behalf of the plaintiff, wrote to respondent and requested that a trial date be set and that "no further adjournments be granted, so that this matter can finally be resolved."

17. On June 4, 1982, Mr. Walsh again requested a trial date. Respondent replied on June 6, 1982, and again suggested that the attorneys agree on a date.

18. One year later, on June 6, 1983, respondent wrote to the attorneys, inquiring as to the status of the case.

19. On October 25, 1983, respondent scheduled the matter for trial on November 10, 1983. The trial was held on that date.

20. On March 6, 1984, Mr. Walsh wrote to respondent, requesting a decision in the case.

21. On March 14, 1984, more than three years after the case was filed, respondent rendered a decision, finding for the plaintiff in the amount of $325 plus costs.

22. On November 19, 1984, Deborah Ferro DiMezza, on behalf of the plaintiff, requested a certified transcript of judgment. Ms. DiMezza received no response.

23. On April 24, 1985, Ms. DiMezza made a second request and again received no response.

24. On October 2, 1985, Ms. DiMezza called respondent by telephone and asked for the transcript of judgment. Respondent said that he would look into the matter and get back to her.

25. Ms. DiMezza received no response. On October 16, 1985, she wrote to respondent again, requesting the transcript of judgment and enclosing a check for the fee.

26. When respondent did not reply, Ms. DiMezza filed a complaint with the Commission on November 13, 1985.

27. Respondent was served with a copy of Ms. DiMezza's complaint and was asked to testify before a member of the Commission on May 13, 1986. Respondent did not forward the transcript of judgment upon receipt of Ms. DiMezza's complaint.

28. On June 6, 1986, after his appearance before a member of the Commission, respondent furnished Ms. DiMezza with the transcript of judgment but erroneously listed the amount of damages as $281.49, instead of the $325 he had awarded in his decision.

29. On July 2, 1986, Ms. DiMezza requested a corrected transcript of judgment.

30. As of January 30, 1987, nearly six years after the claim was filed, Ms. DiMezza had not received the corrected transcript of judgment.

As to Charge III of the Formal Written Complaint:

31. From June 1984 to July 1986, respondent failed to report and remit court funds to the State Comptroller within ten days of the month following collection, as required by Section 2021(1) of the Uniform Justice Court Act, Section 4-410(1)(b) of the Village Law and Section 1803 of the Vehicle and Traffic Law.

As to Charge IV of the Formal Written Complaint:

32. Respondent failed to cooperate with the Commission in that he failed to respond to letters dated June 20, July 9, July 22, and September 17, 1986, from Commission staff, requesting information in connection with a duly-authorized investigation.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(a)(5) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(5) and 3B(1) of the Code of Judicial Conduct. Charges I through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent has engaged in a persistent and pervasive pattern of neglect of his judicial and administrative duties. Because he permitted lawyers and litigants to continually adjourn cases, simple criminal, traffic and small claims matters took years to conclude.

Nowhere was this more evident than in the Ferrari v. Barone case, a claim for $325 in damages. It took respondent two years and nine months to get the case on his trial calendar. It took four months for him to render a decision. It took more than two years and a Commission investigation before respondent issued a flawed transcript of judgment. Despite a written request and his knowledge of the Commission's interest in

the case, respondent did not correct the judgment in the next seven months. The result of these continued delays was that in six years before respondent's court, the plaintiff was unable to collect on this small claim.

Such egregious neglect and repeated disregard of statutory requirements constitute serious misconduct and impair public confidence in the proper administration of justice. Matter of Cooley v. State Commission on Judicial Conduct, 53 NY2d 64 (1981); Matter of Petrie v. State Commission on Judicial Conduct, 54 NY2d 807 (1981).

Respondent's misconduct is compounded by his failure after he knew of the Commission's inquiry to conclude the Ferrari v. Barone case, which had initiated the investigation. Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349, 357 (1984).

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 was not present.

Dated: June 23, 1987

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

J. DAVID LITTLE,

Determination

a Justice of the Queensbury Town Court, Warren County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

Thomas J. McDonough for Respondent

The respondent, J. David Little, a justice of the Queensbury Town Court, Warren County, was served with a Formal Written Complaint dated October 28, 1986, alleging that he improperly handled a housing matter and that he granted special consideration in another case. Respondent filed an answer dated December 5, 1986.

By order dated December 12, 1986, the Commission designated Peter Preiser, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 27 and March 3, 1987, and the referee filed his report with the Commission on July 6, 1987.

By motion dated August 27, 1987, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be censured. Respondent opposed the motion on September 15, 1987. The administrator filed a reply on September 28, 1987.

On October 23, 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.

Preliminary findings:

1. Respondent is a justice of the Queensbury Town Court and has been continuously since 1974. He also served an appointed term in 1970.

2. Respondent, a part-time judge, also practices law in the firm of Little & O'Connor and has since 1972.

3. Since the 1970s, respondent's law firm has represented Home and City Savings Bank in real estate closings.

4. William L. Potvin is vice president and branch manager of the bank and has been for more than 30 years. Mr. Potvin does not employ counsel for the bank but is responsible for administering loans and closings.

5. Respondent's law partner, Michael J. O'Connor, handles most of the firm's business with the bank and speaks with Mr. Potvin weekly. Respondent occasionally handles the bank's business when his partner is unavailable. He speaks with Mr. Potvin about once a month.

6. Mr. Potvin is also vice president and one of three shareholders in Homestead Village, Inc., a trailer park.

As to Charge I of the Formal Written Complaint:

7. On September 9, 1985, respondent presided over Homestead Village, Inc. v. Terry Pratt, a summary proceeding to recover possession of real property for non-payment of rent.

8. The petition initiating the proceeding was signed by Mr. Potvin, and respondent was aware that he was a principal in the corporation.

9. Mr. Pratt, a tenant of the trailer park, appeared without an attorney. The corporation was represented by Debra Greenough, manager of the trailer park. Ms. Greenough is not a lawyer. Respondent did not require that the corporation appear by an attorney, as required by Section 321(a) of the Civil Practice Law and Rules.

10. No witnesses were sworn, and no testimony was taken. Mr. Pratt and Ms. Greenough agreed that $90 was owed the corporation. Mr. Pratt agreed to pay the $90 and vacate the premises by January 1, 1986, in settlement of the dispute.

11. On September 11, 1985, respondent found on his desk a warrant of eviction prepared by Ms. Greenough and delivered to respondent's chambers by his court clerk. Respondent signed the warrant of eviction, notwithstanding that no court hearing had taken place and that no judgment had been entered by the court, as required by Section 749 of the Real Property Actions and Proceedings Law.

12. The warrant was subsequently served on Mr. Pratt, and he moved from the trailer park pursuant to an agreement between the parties.

As to Charge II of the Formal Written Complaint:

13. In August 1985, Mr. Potvin called respondent at his law office and asked him to reduce a traffic ticket that Mr. Potvin's daughter, Leeanne, had received as the result of an automobile accident. Mr. Potvin told respondent that he was concerned that insurance premiums on the car would be raised as a result of a conviction of the offense charged, Unsafe Lane Change.

14. Respondent agreed to reduce the charge to a parking violation, Parking On The Pavement. Respondent told Mr. Potvin to have his daughter plead guilty by signing the back of the ticket and to send a $100 fine to the court.

15. At the time of the conversation with Mr. Potvin, respondent had no knowledge as to whether Ms. Potvin's case was scheduled to come before him or the other judge of the court.

16. When respondent received the ticket, he reduced the charge as promised and noted the reduction on the face of the ticket, notwithstanding that Section 1805(e) of the Vehicle and Traffic Law permits a guilty plea by mail to be made only to the offense charged.

17. Respondent did not obtain the consent of any prosecuting authority before reducing the charge, as required by Sections 220.10(3) and 340.20 of the Criminal Procedure Law.

18. Respondent testified in this proceeding that it is his practice to grant such requests when made by "a person of integrity." If respondent does not know the person making the request, he would ascertain the circumstances of the arrest from the arresting officer, respondent testified.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(4) and 100.3(c) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(4) and 3C of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings enumerated herein, and respondent's misconduct is established.

Respondent was required to disqualify himself from the Pratt case because of his law firm's connection with Mr. Potvin. A reasonable person might question respondent's ability to be impartial in a case in which a principal of the corporate plaintiff was also an officer of a long-standing client of respondent's law firm. See Section 100.3(c) of the Rules Governing Judicial Conduct.

Respondent's errors of law in handling the Pratt case contributed to the appearance of partiality. He allowed the corporate plaintiff to be represented by a non-attorney, and, more significantly, he signed a warrant of eviction without a legal basis to do so. By respondent's own testimony, the proceeding before him concluded with a settlement. No hearing or decision was

rendered by the court. No judgment was entered upon which to base a warrant of eviction, as required by law. By issuing such a warrant without a hearing to determine the rights and liabilities of the parties or that there was evidence that the settlement had been abrogated, respondent failed to comply with the law and denied the parties full right to be heard.

By granting a reduction in the Leanne Potvin case based on an ex parte request from the defendant's father, respondent engaged in malum in se misconduct. Such favoritism is wrong and has always been wrong. Matter of Reedy v. State Commission on Judicial Conduct, 64 NY2d 299 (1985); Matter of Conti v. State Commission on Judicial Conduct, ____ NY2d ____, No. 254 (Oct. 22, 1987); Matter of Byrne, 47 NY2d (b) (Ct. on the Judiciary 1978).

Respondent's testimony that he routinely grants such requests when made by "persons of integrity" illustrates that he administered a dual system of justice. Those that were known to him could get favored treatment that others could not.

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

All concur.

Dated: November 19, 1987

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

ANTHONY P. LoRUSSO,

a Judge of the Buffalo City Court, Erie County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Moot & Sprague (By Joseph V. Sedita) for Respondent

The respondent, Anthony P. LoRusso, a judge of the Buffalo City Court, Erie County, was served with a Formal Written Complaint dated March 21, 1986, alleging that he intervened with the police on behalf of the son of a former court employee. Respondent filed an answer dated April 9, 1986.

By order dated May 1, 1986, the Commission designated the Honorable John S. Marsh as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 19 and 20, 1986, and the referee filed his report with the Commission on January 28, 1987.

By motion dated March 23, 1987, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be censured. Respondent opposed the motion by cross motion on April 20, 1987. The administrator filed a reply on May 1, 1987.

On May 22, 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 a judge of the Buffalo City Court and has been since 1976.

2. On August 8, 1985, Mark A. DeNisco was arrested in the Town of Evans, Erie County, on a charge of Disorderly Conduct. Mr. DeNisco was jailed by the Evans Town Police, who scheduled his release for 8:00 A.M. on the grounds that he was intoxicated and might cause further trouble.

3. Mr. DeNisco's father, Joseph, is a retired employee of the City of Buffalo who had worked with respondent over a period of several years in housing court.

4. At about 1:30 A.M. on August 8, 1985, the elder Mr. DeNisco called respondent by telephone at home and asked him to contact an Evans town justice to secure the son's immediate release from jail.

5. The elder Mr. DeNisco was emotional and expressed concern for his 17-year-old son's safety at the jail. Respondent was aware that the elder Mr. DeNisco suffered from cancer.

6. Respondent refused to call another judge to obtain Mark DeNisco's release but consented to call the Evans Town Police to request that the defendant be allowed to post station house bail or be released at 6:00 A.M. so that he could attend summer school.

7. At 1:43 A.M., respondent called Dispatcher Robert D. Stoessel, Jr., of the Evans Town Police.

8. Respondent identified himself as a judge of the Buffalo City Court, said that he was calling on behalf of the elder Mr. DeNisco, asked why the defendant was not being released, expressed concern about the defendant's health and requested that station house bail be set or that the defendant be released earlier than scheduled.

9. Respondent expressed irritation and indignation with Dispatcher Stoessel, questioned police practices and chastised him when he failed to reply immediately to respondent's questions. Respondent told Dispatcher Stoessel to summon Lt. Kevin M. Walters, the officer in charge and the arresting officer in the DeNisco case, and have him contact respondent.

10. At about 2:00 A.M., respondent spoke by telephone with Lieutenant Walters. Respondent identified himself as a Buffalo City Court judge, expressed concern about the defendant's condition and requested that $250 bail be set or that the defendant be released at 6:00 A.M.

11. When Lieutenant Walters refused the requests, respondent twice stated that they would have to "do it the hard way" and expressed anger and indignation at the decision.

12. When Lieutenant Walters referred to respondent as "Mr. LoRusso," respondent reminded him to address him as judge.

13. Respondent testified at the hearing in this proceeding that he is now embarrassed by the tone and tenor of his conversations with the police and acknowledged that it was improper for him to request the early release of Mr. DeNisco. However, in a similar situation in the future, he would still call the police, vouch for a parent's credibility and ask the police to allay the parent's anxiety, respondent testified.

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. Respondent's cross motion is denied.

Respondent used the prestige of his judicial office to advance the private interests of a professional acquaintance, Mr. DeNisco, by seeking his son's release from jail earlier than scheduled. Such misconduct clearly violates Section 100.2 of the Rules Governing Judicial Conduct and has repeatedly been held to warrant public sanction, even when the consideration sought is not intended to reach the final disposition of a case. Matter of Lonschein v. State Commission on Judicial Conduct, 50 NY2d 569 (1980); Matter of Calabretta, 1985 Annual Report 112 (Com. on Jud. Conduct, Apr. 11, 1984); Matter of Hansel L. McGee, 1985 Annual Report 176 (Com. on Jud. Conduct, Apr. 12, 1984); Matter of Gassman, 1987 Annual Report 89 (Com. on Jud. Conduct, Mar. 25, 1986). This is so regardless of respondent's motives. Lonschein, supra; Matter of Figueroa, 1980 Annual Report 159 (Com. on Jud. Conduct, Nov. 1, 1979); Matter of DeLuca, 1985 Annual Report 119 (Com. on Jud. Conduct, July 2, 1984).

Respondent's persistence with the police in attempting to secure Mr. DeNisco's release, his repeated mention of his judicial office and his failure to fully recognize that he should not have made the call and should not do so again indicate that a strong sanction is warranted. Matter of Shilling v. State Commission on Judicial Conduct, 51 NY2d 397 (1980); Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349 (1984); Matter of Agresta v. State Commission on Judicial Conduct, 64 NY2d 327 (1985).

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

Mrs. Robb, Mr. Bower, Mr. Bromberg, Mrs. DelBello, Judge Rubin and Mr. Sheehy concur.

Judge Ciparick and Judge Shea dissent as to sanction only and vote that respondent be admonished.

Judge Ostrowski did not participate.

Mr. Cleary and Mr. Kovner were not present.

Dated: June 29, 1987

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

JOHN C. ORLOFF,

a Justice of the Northampton Town Court, Fulton County.

Determination

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

Caputo, Aulisi and Skoda (By Richard T. Aulisi; Robert M. Cohen, Of Counsel) for Respondent

The respondent, John C. Orloff, a justice of the Northampton Town Court, Fulton County, was served with a Formal Written Complaint dated April 21, 1986, alleging, inter alia, that he permitted clients of his private business to appear before him. Respondent submitted an answer dated May 16, 1986.

By order dated May 21, 1986, the Commission designated the Honorable James C. O'Shea as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 30 and July 21, 1986, and the referee filed his report with the Commission on December 28, 1986.

By motion dated March 3, 1987, the administrator of the Commission moved to confirm the referee's report, to adopt additional findings and conclusions and for a finding that respondent be removed from office. Respondent opposed the motion on March 25, 1987.

On April 14, 1987, the Commission heard oral argument, at which respondent appeared by counsel, 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. Respondent is a part-time justice of the Northampton Town Court and has been since February 1985.

2. Respondent, a retired police officer, also operates a private investigation business in which he conducts investigations and serves process. Approximately 50 percent of his clients are attorneys or litigants referred to respondent by lawyers.

3. Richard T. Aulisi and his law firm are regular clients of respondent's private investigation business. At almost all times, respondent is working on a pending file for the Aulisi firm and has since he opened his private investigation business in 1972.

4. Since becoming a judge, respondent has conducted three or four accident investigations for Mr. Aulisi.

5. Between July and December 1985, Mr. Aulisi appeared before respondent in People v. Scott M. Anderson.

6. Between April and November 1985, Mr. Aulisi appeared before respondent in People v. Scott H. Hook.

7. Respondent was conducting a private investigation for Mr. Aulisi while the Hook matter was pending in respondent's court.

8. Between May and July 1985, Mr. Aulisi appeared before respondent in People v. Daniel R. Thum, Jr.

9. George Abdella and his law firm have been clients of respondent's private investigation business for four or five years.

10. Since becoming a judge, respondent has conducted three or four investigations for Mr. Abdella.

11. Between August and October 1985, Mr. Abdella appeared before respondent in People v. Charles H. Ashley, Jr.

12. Edward S. Lomanto and his law firm are clients of respondent's private investigation business.

13. Between February and May 1985, Mr. Lomanto appeared before respondent in People v. Lewis H. Buseck. During this time period, respondent obtained a signature on an affidavit for Mr. Lomanto's law firm.

14. In August 1985, Mr. Lomanto's firm appeared in respondent's court in People v. Fred E. Oare, Jr.

15. In June 1985, Mr. Lomanto appeared before respondent in People v. John R. Proper.

16. Roger L. Paul and his law firm have been clients of respondent's private investigation business since 1983.

17. Since becoming a judge, respondent has conducted an investigation and served process six to eight times for Mr. Paul.

18. In July and August 1985, respondent presided over and disposed of a case in which Mr. Paul was charged with Speeding.

19. In May 1985, Mr. Paul appeared before respondent in People v. Darryl M. Blowers.

20. In March and April 1985, Mr. Paul appeared before respondent in People v. Lauraine G. Demers.

21. In May and June 1985, Mr. Paul appeared before respondent in People v. William T. Dunham.

22. In July and August 1985, Mr. Paul appeared before respondent in People v. Mark E. Roberts.

23. In July and August 1985, Mr. Paul appeared before respondent in People v. Eric J. Livers.

24. Respondent served process for Mr. Paul six to eight times in 1985 and was paid approximately $200.

25. Joseph T. Wilkinson has been a client of respondent's private investigation business since before respondent became a judge.

26. Between July and October 1985, Mr. Wilkinson appeared before respondent in People v. William D. Gifford.

27. Paul L. Wollman has been a client of respondent's private investigation business for three or four years.

28. Since becoming a judge, respondent has conducted two investigations and has served process for Mr. Wollman.

29. In August 1985, Mr. Wollman called respondent by telephone on behalf of the defendant in People v. Peter J. Sheckton, a case then pending before respondent.

As to Charge II of the Formal Written Complaint:

30. On July 27, 1985, Roger L. Paul was ticketed for Speeding in the Town of Northampton. The ticket was returnable in respondent's court.

31. Mr. Paul and his law firm are clients of respondent's private investigation business. Respondent served process for Mr. Paul six to eight times in 1985.

32. After receiving the ticket, Mr. Paul talked with the district attorney, William H. Gritsavage, who agreed to reduce the charge.

33. Upon the district attorney's recommendation, respondent granted a reduction of the charge from Speeding, a three-point violation, to Unattended Motor Vehicle, which carries no points on a driver's license, and granted a conditional discharge.

34. Respondent acknowledged that he ordinarily does not permit a reduction from a three-point violation to a no-point violation. It was the only case in which respondent has consented to such a reduction.

35. Respondent conceded in testimony before a member of the Commission that the district attorney wanted to give Mr. Paul "a break" and the respondent went "along with it."

As to Charge III of the Formal Written Complaint:

36. On July 9, 1985, Eric J. Livers was charged in the Village of Northville with Assault, Third Degree. The matter was returnable in respondent's court.

37. An issue arose in the proceeding as to whether the injury sustained by the victim of the alleged assault was of sufficient severity to warrant a charge of assault.

38. Outside of court and outside the presence of the parties, respondent called a physician who had treated the victim and discussed the nature of the injury. From his conversation with the physician, respondent concluded that the injury was not sufficient to warrant a charge of assault.

39. Respondent then discussed the matter with the prosecutor in the case, and he agreed to reduce the charge from Assault to Harassment.

40. On August 6, 1985, Mr. Livers pled guilty to a charge of Harassment and was given a conditional discharge and a suspended sentence of 15 days.

41. On August 5, 1985, Charles H. Ashley, Jr., was charged with Speeding and Modified Exhaust. The matter was returnable in respondent's court.

42. Outside of court and outside the presence of the parties, respondent conferred with the arresting officer and determined that the Speeding charge was based on a visual estimate of the defendant's speed.

43. Thereafter, respondent conferred with the prosecutor, who recommended a reduction of the charges to Failure to Obey a Stop Sign.

44. On October 4, 1985, the defendant pled guilty to the stop sign charge in satisfaction of both charges and was fined $75.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(4), 100.3(c)(1) and 100.5(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(4), 3C(1) and 5C(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 ex parte communications with a physician in one case and with the arresting officer in another were clear violations of Section 100.3(a)(4) of the Rules Governing Judicial Conduct. Matter of Loper, 1985 Annual Report 172 (Com. on Jud. Conduct, Jan. 25, 1984); Matter of Racicot, 1982 Annual Report 99 (Com. on Jud. Conduct, Feb. 6, 1981).

It was also improper for respondent to hear the case in which Mr. Paul was a party. Respondent's impartiality might reasonably have been questioned inasmuch as Mr. Paul was a frequent client of respondent's private business. Respondent was, therefore, required to disqualify himself. Section 100.3(c)(1) of the Rules Governing Judicial Conduct; Matter of DelPozzo, 1986 Annual Report 77 (Com. on Jud. Conduct, Jan. 25, 1985); Matter of Whalen, 1984 Annual Report 157 (Com. on Jud. Conduct, Jan. 20, 1983). Respondent compounded his misconduct in this case by granting Mr. Paul a disposition that he never allowed any other defendants, thus creating the appearance of favoritism. Matter of Wait v. State Commission on Judicial Conduct, 67 NY2d 15 (1986); Matter of Latremore, 1987 Annual Report 97 (Com. on Jud. Conduct, May 30, 1986); Matter of Winick, unreported (Com. on Jud. Conduct, Jan. 29, 1987).

A different question is raised as to respondent's practice of presiding over cases in which Mr. Paul and other attorneys who were clients represented parties in respondent's court. We conclude that this, too, was improper in that it raises reasonable questions concerning respondent's ability to be impartial and in that respondent engaged in financial and business dealings that involved him in frequent transactions with lawyers

likely to come before the court, in violation of Section 100.5(c)(1) of the Rules Governing Judicial Conduct.

We do not find, however, that respondent's professional employment as a private investigator is necessarily incompatible with his role as a judge. The nature of respondent's work apparently involves investigations in civil cases and, therefore, does not inherently align him in the public eye with the prosecution. Although respondent testified that 50 percent of his clients are attorneys, it has not been demonstrated that all of these attorneys appear regularly before him. Nor has it been shown that if respondent were to disqualify himself in all cases in which his clients appear, he would be unable to share equally in the work of the court.

Furthermore, respondent's counsel has represented that respondent is seeking to divest his business and seek other employment and will avoid such conflicts in the future.

While it was improper for respondent to preside over cases in which his current or former clients were parties or attorneys, it does not seem that such conduct must be repeated in the future, impairing respondent's usefulness as a judge. The conflict may be avoided if respondent refrains from accepting as clients lawyers who are likely to appear before him, if he changes his primary occupation or if he disqualifies himself from all cases in which his clients or former clients appear.

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

Mrs. Robb, Judge Ciparick, Mr. Cleary, Mr. Kovner, Judge Ostrowski and Mr. Sheehy concur.

Mr. Bromberg, Mrs. DelBello, Judge Rubin and Judge Shea dissent as to sanction only and vote that respondent be removed from office.

Mr. Bower was not present.

Dated: May 28, 1987

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

JOHN C. ORLOFF,

a Justice of the Northampton Town Court, Fulton County.

DISSENTING OPINION BY JUDGE SHEA, IN WHICH MR. BROMBERG, MRS. DELBELLO AND JUDGE RUBIN JOIN

I agree with the majority that the charges against respondent have been sustained and that he is guilty of misconduct. However, I believe that respondent has violated the ethical obligations of his office and cannot be counted on to adhere to them in the future. Accordingly, removal from office is the appropriate sanction.

Unlike the majority, I find that respondent's work as a private investigator and process server conflicts and is incompatible with his role as a judge. Since at least 50 percent of respondent's clients are attorneys, and respondent sits in a small town, his clients frequently appear before him in court. During the year that the Commission was considering charges of misconduct against respondent, he has persisted in his view that his impartiality could not be reasonably questioned when he is presiding over those cases in which lawyers appear for whom he works. He sees no conflict of interest or appearance of impropriety for a part-time judge to be engaged in an occupation in which he is employed by attorneys who practice before him.

The majority believes, apparently, that respondent will avoid a conflict of interest in the future by disqualifying himself in those cases in which his clients appear or by seeking other employment. Neither of these alternatives was put forward by respondent in his sworn testimony and thus neither their feasibility nor the likelihood of their occurrence can be assessed. The record reveals no basis for the majority's confidence that serious ethical breaches by respondent will not recur. A representation by respondent's attorney that he believes respondent would abide by the Commission's interpretation of the rules does not suffice.

The respondent's ex parte communications with a physician in the Livers case and with a police officer in the Ashley case, as well as his

failure to disqualify himself in the Paul case, underscore respondent's insensitivity to his judicial responsibilities.

Accordingly, I vote that respondent should be removed.

Dated: May 28, 1987

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

CLAIR A. REYOME,

a Justice of the Malone Town Court, Franklin County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

John E. Aber for Respondent

The respondent, Clair A. Reyome, a justice of the Malone Town Court, Franklin County, was served with a Formal Written Complaint dated February 6, 1987, alleging that he improperly released on bail a defendant whose case was pending in another court. Respondent filed an answer dated April 6, 1987.

By order dated April 8, 1987, the Commission designated H. Wayne Judge, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 1 and 2, 1987, and the referee filed his report with the Commission on August 19, 1987.

By motion dated October 7, 1987, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be censured. Respondent opposed in part and supported in part the motion in papers dated October 21, 1987. Oral argument was waived.

On November 13, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Malone Town Court and has been since September 22, 1970.

2. On July 12, 1986, respondent received a telephone call at home from Ellsworth N. Lawrence, a Malone attorney, former Franklin County district attorney and judge of the Franklin County Court from 1950 to 1977. Respondent had known Mr. Lawrence for more than 30 years.

3. Mr. Lawrence asked respondent to meet him at respondent's court, and respondent agreed.

4. Respondent met Mr. Lawrence at the court. Mr. Lawrence had been retained to represent Michael Dumas, who had been charged in the Town of Westville, Franklin County, with Rape, Second Degree, a felony. Mr. Dumas' parents accompanied Mr. Lawrence to respondent's court.

5. Because the Westville town justice was unavailable, Mr. Dumas had been arraigned earlier in the day before Bangor Town Justice Esther F. Holmes. Judge Holmes had set bail at $5,000 cash or insurance company bond and had committed Mr. Dumas to jail in lieu of bail.

6. Mr. Lawrence advised respondent that the bail was $5,000 cash or insurance company bond and appealed to respondent to accept a property bond for the release of Mr. Dumas.

7. Respondent then called Judge Holmes by telephone and suggested to her that the bail was too high.

8. Judge Holmes advised respondent that she had set bail at $5,000 cash or insurance company bond and would not change it.

9. Respondent was aware that Mr. Lawrence did not want to make an application to Judge Holmes because he felt that she would deny it and that by coming to respondent, Mr. Lawrence was trying to circumvent Judge Holmes.

10. Respondent also spoke by telephone with Sheriff's Deputy Robert V. Gravel, who informed him that it was the jail's policy not to accept property undertakings. Deputy Gravel indicated that he would need cash bail or a court order in order to release Mr. Dumas.

11. Respondent then witnessed the signatures of Mr. Dumas' parents on a property undertaking and signed a bail order. Respondent also signed an order discharging Mr. Dumas from custody because he did not know whether the property undertaking would be sufficient to obtain Mr. Dumas' release. Respondent turned the papers over to Mr. Lawrence.

12. Respondent is not a lawyer. He relied on Mr. Lawrence because of his knowledge and respect for the former judge. Respondent believed that Mr. Lawrence would not ask him to act in the matter if he was not authorized to do so.

13. When respondent signed the release orders, he did not have a copy of the felony complaint, a supporting deposition or the commitment order and did not know what the charge was against Mr. Dumas.

14. Respondent did not notify the district attorney's office of the application and did not offer the prosecution the opportunity to be heard, as required by Section 530.20(2)(b)(i) of the Criminal Procedure Law.

15. Respondent did not obtain a report of the defendant's criminal history, as required by Section 530.20(2)(b)(ii) of the Criminal Procedure Law.

16. Respondent knew when he signed the orders that the defendant was planning to leave the state.

17. Respondent did not retain the property undertaking and did not know of its whereabouts.

18. Mr. Dumas was released from custody on respondent's order later that evening.

19. After she learned of Mr. Dumas' release, Judge Holmes called respondent by telephone and asked him whether he had released the defendant. Respondent was not candid with Judge Holmes. He failed to inform her that he had ordered Mr. Dumas' release. Respondent told Judge Holmes only that he had acknowledged signatures on a property undertaking.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1) and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Without jurisdiction to do so, respondent released a defendant who had been jailed by another judge. He did so knowing that defense counsel was seeking this relief from respondent only because he could not get it from the arraigning judge. Respondent did not allow the prosecution the opportunity to be heard and failed to follow other steps the law requires of a judge in considering bail applications. By this extraordinary procedure, respondent engaged in serious misconduct. Matter of Lombardi, 1987 Annual Report 105 (Com. on Jud. Conduct, Jan. 2, 1986); Matter of Winick, unreported (Com. on Jud. Conduct, Jan. 29, 1987).

In considering sanction, we must examine several mitigating factors. It appears that respondent acted on the misguided advice of Mr. Lawrence, who, unlike respondent, was a lawyer with many years of service as a judge on a court with appellate authority over respondent's court. In addition, the misconduct involved but a single transaction in respondent's

long and unblemished career on the bench. See, Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153 (1986).

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

Mr. Bower, Judge Ciparick, Mr. Cleary, Judge Rubin, Judge Shea and Mr. Sheehy concur.

Mrs. Robb, Mrs. DelBello and Mr. Kovner dissent as to sanction only and vote that respondent be removed from office.

Mr. Bromberg and Judge Ostrowski were not present.

Dated: December 24, 1987

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

CLAIR A. REYOME,

a Justice of the Malone Town Court, Franklin County.

DISSENTING OPINION BY MR. KOVNER IN WHICH MRS. ROBB AND MRS. DEL BELLO JOIN

In my view, the determination fails to express the seriousness of the misconduct. Respondent's initial call to Judge Holmes, standing alone, constituted favoritism which would warrant, though not require, removal. Matter of Reedy v. State Commission on Judicial Conduct, 64 NY2d 299 (1985); Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153 (1986). The subsequent ultra vires execution of the bail order for the release of a defendant not within his jurisdiction was a blatant abuse of judicial authority. The mitigating factors noted in the determination do not alleviate the outrageousness of the action. While failure to contact the district attorney and to obtain a criminal history might be viewed as procedural errors by a lay justice, the fact that he knew that the defendant in the rape prosecution was planning to leave the state presents a context from which no person fit to serve as a justice could have been unaware of the impropriety involved. Lastly, the subsequent misleading of Judge Holmes confirms that the respondent was aware of his wrongdoing at the time.

Under these circumstances, I believe the appropriate sanction should be removal from office.

Dated: December 24, 1987

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

ELAINE M. RIDER,

a Justice of the Sangerfield Town Court and the Waterville Village Court, Oneida County.

Determination

APPEARANCES:

Gerald Stern (Stephen F. Downs and Cathleen S. Cenci, Of Counsel) for the Commission

Woodman and Getman (By William H. Getman) for Respondent

The respondent, Elaine M. Rider, a justice of the Sangerfield Town Court and Waterville Village Court, Oneida County, was served with a Formal Written Complaint dated December 4, 1985, alleging ex parte contacts with the prosecutor in a criminal case. Respondent filed an answer dated January 15, 1986.

By order dated February 10, 1986, the Commission designated Samuel B. Vavonese, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 12, 1986, and the referee filed his report with the Commission on September 11, 1986.

By motion dated November 10, 1986, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings and conclusions and for a determination that respondent be removed from office. Respondent opposed the motion by cross motion on November 28, 1986.

On December 12, 1986, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Waterville Village Court and has been since 1982. She is also a justice of the Sangerfield Town Court and has been since 1985.

2. Respondent is not an attorney. She has attended training courses for non-lawyer judges required by the Office of Court Administration and has attended magistrates' association seminars on the law.

3. On December 4, 1984, an omnibus motion was filed in the Waterville Village Court by Armond J. Festine, defense counsel in People v. Charles G. Frennier. The motion asked respondent to suppress certain oral statements made by the defendant to a police officer, to direct that a bill of particulars be provided the defendant and to suppress the results of a breathalyzer test adminstered to the defendant.

4. On December 18, 1984, an answering affidavit opposing the motion was filed by Michael E. Daley, an assistant district attorney in Oneida County.

5. Upon receiving the papers, respondent called Mr. Daley and asked him how she should proceed. Mr. Daley advised her to set a date for a hearing on the motion.

6. Respondent scheduled a hearing in February 1985. At Mr. Festine's request, the matter was adjourned to March 14, 1985.

7. The hearing was held before respondent on March 14, 1985. At one point, during legal arguments between counsel, respondent stated:

> You know you are both putting me on a spot and you both know that I am sitting here for the very first time hearing a matter such as this and not really knowing exactly what the points of law are.

8. At the conclusion of the hearing, respondent reserved decision. After the transcript arrived, she examined it and concluded that there was probable cause for the charge and that the case should proceed to trial.

9. Respondent again called Mr. Daley and asked him how she should proceed. Mr. Daley advised her to put her decision in writing.

10. Respondent asked Mr. Daley whether there was a particular form for her decision.

11. Mr. Daley asked for the substance of the decision. Respondent testified as to her response:

> I told him I found, because of the testimony of the witnesses and the police officer and everyone involved, that I felt that it was a just ticket. I felt that the gentleman in question was, in fact, in reasonable cause for having a DWI ticket written and that I thought it should proceed from there. Either Mr. Festine could bring his client in to plead guilty or either we would go to trial.

12. Mr. Daley then volunteered to have prepared a written decision for respondent's signature. Respondent concurred, saying that she did not "really have the time to puzzle this out."

13. Mr. Daley prepared and sent to respondent a three-page decision, setting forth the facts of the incident, denying Mr. Festine's motion and concluding:

> I find the defendant's testimony not to be credible while that of the Officer and of McNamara in regard to the time he left the Colonial Inn to be credible and believable.

The above language was not language used by respondent in the telephone conversation with Mr. Daley.

14. Respondent signed the decision and sent it with a handwritten cover memorandum to the parties. Respondent scheduled the matter for May 21, 1985. Mr. Festine was not informed as to how the decision had been prepared nor of respondent's conversation with Mr. Daley.

15. Mr. Festine requested an adjournment of the matter. On June 4, 1985, he informed respondent by letter that the defendant wished to proceed to trial and asked for a pretrial conference.

16. By letter of June 10, 1985, Mr. Festine requested that respondent disqualify herself and transfer the Frennier case to another court on the grounds that her decision as to his motion appeared to have been authored by the prosecutor.

17. Respondent scheduled the matter for June 18, 1985.

18. Mr. Festine failed to appear on June 18, 1985. He called respondent by telephone, informed her that he was unable to appear and asked for a reply to his request that she disqualify herself.

19. On July 17, 1985, Mr. Festine moved in the Oneida County Court for respondent's disqualification. Respondent was not sent a copy of the motion and accompanying affidavit.

20. In July 1985, respondent called the district attorney's office and asked a secretary to prepare an order transferring the Frennier case to the Marshall Town Court. A document labeled "affidavit" was typed, and respondent signed it on July 25, 1985.

21. By order dated August 13, 1985, the case was transferred to the Clinton Village Court by John L. Murad, a judge of the Oneida County Court.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1) and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained insofar as it is consistent with the findings above, and respondent's misconduct is established. Respondent's cross motion is denied.

This matter illustrates a problem of the Justice Court system in this state. While we sympathize with respondent's need for assistance, we cannot condone the method by which she sought it. Despite her lack of training and experience, she should have known that it was improper to rely on the prosecutor and to discuss with him the merits of the case in the absence of defense counsel. Matter of Wilkins, 1986 Annual Report 173 (Com. on Jud. Conduct, Dec. 24, 1985); Matter of Martin B. Klein, 1985 Annual Report 167 (Com. on Jud. Conduct, Aug. 30, 1984). The critical consideration is that a fair trial be afforded to both parties and, thus, high ethical standards must be observed by lawyer and lay judges alike. Matter of Fabrizio v. State Commission on Judicial Conduct, 65 NY2d 275 (1985). Ignorance of the rules is not a defense. Matter of Paul McGee, 1984 Annual Report 124 (Com. on Jud. Conduct, Jan. 21, 1983), affd., 59 NY2d 870 (1983).

Respondent exacerbated her misconduct by continuing to have orders prepared by the prosecutor after Mr. Festine questioned the practice. Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349 (1984).

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

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

Mr. Bromberg dissents as to sanction only and votes that respondent be removed from office.

Judge Rubin was not present.

Dated: January 30, 1987

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

ROY E. SMITH,

a Justice of the Davenport Town Court, Delaware County.

APPEARANCES:

Gerald Stern (Stephen F. Downs, Of Counsel) for the Commission

The respondent, Roy E. Smith, a justice of the Davenport Town Court, Delaware County, was served with a Formal Written Complaint dated August 4, 1987, alleging certain financial reporting, remitting and depositing deficiencies and alleging that he failed to perform his administrative and adjudicative responsibilities in numerous cases. Respondent did not answer the Formal Written Complaint.

By motion dated September 25, 1987, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be deemed established. Respondent did not oppose the motion or file any papers in response thereto. By determination and order dated October 22, 1987, the Commission granted the administrator's motion and found respondent's misconduct established.

The administrator submitted a memorandum as to sanction. Respondent neither submitted a memorandum nor requested oral argument.

On November 13, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent is a justice of the Davenport Town Court and has been since January 1970.

2. Between February 1984 and August 1986, respondent failed to remit funds and report cases to the Department of Audit and Control in a timely manner, as set forth in the appendix hereto, in violation of Sections 2020 and 2021(1) of the Uniform Justice Court Act, Section 1803 of the Vehicle and Traffic Law and Section 27(1) of the Town Law. Respondent's reports for the period were late in 28 of the 31 months. They were from 1 to 151 days late, or an average of 42 days late.

As to Charge II of the Formal Written Complaint:

3. Between December 7, 1983, and June 24, 1987, respondent failed to deposit court funds in his official court account in a timely manner, as set forth in Schedule B of the Formal Written Complaint, in violation of Section 30.7(a) of the Uniform Justice Court Rules in effect until January 6, 1986, and thereafter in violation of Section 214.9(a) of the Uniform Civil Rules for the Justice Courts.

4. Respondent kept undeposited court funds in a cash box at his home.

5. A Commission investigator reviewing respondent's court records also found $210 in cash in a shoe box containing court records.

6. As a result of respondent's failure to make timely deposits, his court account was deficient consistently throughout the period by as much as $1,734.86.

7. Respondent testified before a member of the Commission on May 5, 1987, that at one point he discovered a $250 shortage in his accounts and had concluded that he inadvertently threw $250 in cash bail in the trash.

As to Charge III of the Formal Written Complaint:

8. Since July 1983, respondent has failed to dispose of cases in a timely manner with the result that, as of July 9, 1987, 58 cases were pending in his court for more than nine months, as set forth in Schedule C of the Formal Written Complaint.

9. Respondent failed to maintain a cashbook from June 1983 to December 1986, in violation of Section 105.1 of the Recordkeeping Requirements for Town and Village Courts in effect until January 6, 1986, Section 30.9 of the Uniform Justice Court Rules in effect until January 6, 1986, and thereafter in violation of Section 214.11(a)(3) of the Uniform Civil Rules for the Justice Courts.

10. Respondent failed to maintain case files and indices of cases, in violation of Sections 107, 2019 and 2019-a of the Uniform Justice Court Act, Section 105.1 of the Recordkeeping Requirements for Town and Village Courts in effect until January 6, 1986, Section 30.9 of the Uniform Justice Court Rules in effect until January 6, 1986, and thereafter in violation of

Sections 214.11(a)(1) and 214.11(a)(2) of the Uniform Civil Rules for the Justice Courts.

11. As of July 9, 1987, respondent had failed to open seven items of mail from six defendants, as set forth in Schedule D of the Formal Written Complaint.

12. Respondent failed to notify law enforcement agencies and the Department of Motor Vehicles of the disposition of cases in his court, in violation of Section 91.12 of the Regulations of the Commissioner of the Department of Motor Vehicles.

13. Respondent failed to report to the Department of Audit and Control the disposition of 19 criminal cases, as set forth in Schedule E of the Formal Written Complaint, in violation of Sections 2020 and 2021(1) of the Uniform Justice Court Act, Section 27(1) of the Town Law and Section 1803 of the Vehicle and Traffic Law.

14. Respondent failed to maintain complete and adequate dockets of the 19 cases listed on Schedule E of the Formal Written Complaint, in violation of Sections 107, 2019 and 2019-a of the Uniform Justice Court Act and Section 105.3 of the Recordkeeping Requirements for Town and Village Courts in effect until January 6, 1986.

15. Respondent handles fewer than 25 cases a month. He has no excuse or explanation for his failures other than that he "got behind" and the work "overwhelmed" him.

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(a)(1), 100.3(a)(5) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(1), 3A(5) and 3B(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 has neglected nearly every aspect of his adjudicative and administrative duties. He has failed to dispose of cases pending in his court for years. He has mishandled public moneys by keeping them in his personal possession instead of promptly depositing them in his official account and turning them over to the state. By his own admission, respondent was so careless that on one occasion he threw $250 cash in the trash. He also failed to keep proper court records, as required by law.

By his disdain for the responsibilities of a judge, respondent has demonstrated that he is not fit to hold judicial office. Matter of Vincent v. State Commission on Judicial Conduct, 70 NY2d 208 (1987); Matter of Petrie v. State Commission on Judicial Conduct, 54 NY2d 807 (1981); Bartlett v. Flynn, 50 AD2d 401 (4th Dept. 1976).

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

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

Mr. Bromberg and Judge Ostrowski were not present.

Dated: December 21, 1987

APPENDIX

Month and Year of Report	Date Received by Audit and Control	Number of Days Late
2/84	3/23/84	13
3/84	4/10/84	0
4/84	5/21/84	11
5/84	8/21/84	71
6/84	8/21/84	42
7/84	8/21/84	11
8/84	9/20/84	10
9/84	10/18/84	8
10/84	11/07/84	0
11/84	2/27/85	79
12/84	2/27/85	48
1/85	2/27/85	16
2/85	3/11/85	1
3/85	6/11/85	62
4/85	6/11/85	32
5/85	6/11/85	1
6/85	11/13/85	126
7/85	11/13/85	95
8/85	11/13/85	64
9/85	11/13/85	34
10/85	11/13/85	3
11/85	1/15/86	36
12/85	1/16/86	6
1/86	4/09/86	58
2/86	4/09/86	30
3/86	4/09/86	0
4/86	10/08/86	151
5/86	10/08/86	120
6/86	10/08/86	90
7/86	10/08/86	59
8/86	10/08/86	28

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

BENNO G. SPIEHS,

Determination

a Justice of the Willet Town Court, Cortland County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Morris and Morris (By James E. Morris) for Respondent

The respondent, Benno G. Spiehs, a justice of the Willet Town Court, Cortland County, was served with a Formal Written Complaint dated September 8, 1986, alleging that he failed to properly perform his judicial duties in connection with a civil case in his court. Respondent filed an answer dated November 13, 1986.

On July 3, 1987, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for by Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on July 20, 1987.

The administrator and respondent submitted memoranda as to sanction. Oral argument was waived.

On August 28, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Willet Town Court and has been since January 1980.

2. On July 18, 1984, Catherine Lee Cobb met with respondent to discuss filing a claim against her parents, Jack and Camilla Cobb. Catherine Cobb alleged that her parents had failed to honor a verbal agreement made in 1973 to repay her student loan on the promise that she attend a particular school not of her own choosing.

3. Respondent advised Catherine Cobb to commence a small claims action in his court, notwithstanding that the amount she alleged was owed her, $2,500, exceeded the $1,500 monetary limitation for small claims cases, as defined by Section 1801 of the Uniform Justice Court Act.

4. Catherine Cobb commenced the action on August 10, 1984, by sending a small claims filing fee to respondent.

5. On October 1, 1984, respondent sent by first-class mail a "Summons With Notice" to Jack and Camilla Cobb. Respondent did not send notice of the action by certified mail with return receipt requested, as required by Section 1803 of the Uniform Justice Court Act.

6. On October 13, 1984, Jack and Camilla Cobb appeared at respondent's home, advised him that they intended to retain an attorney and were granted an adjournment.

7. Respondent told the defendants that he had "proof" that they had co-signed their daughter's student loan application and showed them a copy of the application.

8. On October 28, 1984, Camilla Cobb wrote to respondent and requested that he provide her and her attorney, Russell E. Ruthig, with copies of the student loan application. Respondent subsequently sent two copies to Camilla Cobb.

9. On November 13, 1984, Camilla Cobb contacted respondent and obtained an adjournment of the matter to November 21, 1984, and asked that future correspondence be addressed to Mr. Ruthig. Respondent notified Catherine Cobb of the adjournment.

10. On November 20, 1984, Mr. Ruthig wrote to respondent and requested that he be served with a copy of the complaint. Respondent did not receive the letter until after the scheduled court date, November 21, 1984.

11. On November 21, 1984, Catherine Cobb appeared in respondent's court. Neither the defendants nor their attorney were present. Respondent granted Catherine Cobb a default judgment of $2,500 plus interest. Respondent told Ms. Cobb that he would issue a transcript of judgment when he obtained the proper form.

12. Respondent received Mr. Ruthig's letter after the hearing date but did not respond and did not notify him of the default judgment.

13. Between November 1984 and April 1985, Ms. Cobb made approximately ten requests of respondent for a transcript of judgment. He did not provide one, as required by Section 1502(a) of the Uniform Justice Court Act.

14. On April 10, 1985, respondent issued a transcript of judgment to Catherine Cobb, postdated to November 24, 1984, listing no judgment creditor and indicating that the total amount of judgment was "total amount due of education loan."

15. On April 11, 1985, the Cortland County Clerk's Office returned the transcript of judgment to respondent and advised him that it was not acceptable for filing.

16. On June 1, 1985, Catherine Cobb learned that the county clerk's office had no record of a judgment in the case. She notified respondent.

17. On June 14, 1985, respondent revised the transcript of judgment, naming Marine Midland Bank of Buffalo as judgment creditor and listing the amount of judgment as $5,264.33.

18. On July 10, 1985, Mr. Ruthig wrote to respondent, questioning the revised judgment filed against his clients and asking that it be vacated. Mr. Ruthig advised respondent that his clients had never been notified of any action by Marine Midland Bank and had never been properly served with a summons.

19. On September 20, 1985, Mr. Ruthig again wrote to respondent.

20. On September 25, 1985, respondent signed an order vacating the judgment and sent it to Mr. Ruthig. Catherine Cobb was not notified of Mr. Ruthig's request to vacate the judgment, was not given an opportunity to be heard and was not advised that the judgment had been vacated.

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(a)(1), 100.3(a)(4), 100.3(a)(5) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(1), 3A(4), 3A(5) and 3B(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained insofar as it is consistent with the findings enumerated herein, and respondent's misconduct is established.

In a single case, respondent committed a series of legal and administrative errors which were prejudicial to the parties and the proper administration of justice. Collectively, the record reflects substantial disregard of the law and neglect of official duties, in violation of Sections 100.3(a)(1), 100.3(a)(5) and 100.3(b)(1) of the Rules Governing Judicial Conduct.

Although isolated errors or delays are matters for appellate review or administrative action, the pattern of mistakes and procrastination evident in

the handling of the Cobb case indicates respondent's inattention to proper procedure and neglect of duty and, thus, constitutes misconduct. Matter of Dougherty, 1985 Annual Report 123 (Com. on Jud. Conduct, Apr. 16, 1984).

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

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

Mr. Bromberg and Mr. Cleary were not present.

Dated: October 28, 1987

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

JAMES R. STRAITE,

Determination

a Justice of the New Berlin Village Court, Chenango County.

APPEARANCES:

Gerald Stern (Stephen F. Downs, Of Counsel) for the Commission

Petrone & Petrone, P.C. (By Louis S. Petrone) for Respondent

The respondent, James R. Straite, a justice of the New Berlin Village Court, Chenango County, was served with a Formal Written Complaint dated December 23, 1986, alleging, inter alia, that he used his judicial position to influence police to investigate a complaint made by his son and that he engaged in conduct that denied defendants certain basic rights and conveyed the impression of bias. Respondent did not answer the Formal Written Complaint.

By motion dated February 19, 1987, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be found established. Respondent did not oppose the motion or submit any papers in response thereto. By determination and order dated March 20, 1987, the Commission granted the administrator's motion and found respondent's misconduct established.

The administrator filed a memorandum as to sanction. Respondent neither submitted any papers nor appeared for oral argument.

On April 14, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent was a justice of the New Berlin Village Court from April 1, 1984, to December 22, 1986, when he submitted his resignation to the Chief Administrator of the Courts.

2. On June 24, 1984, respondent called by telephone the State Police barracks at Norwich. Respondent identified himself as a judge to Sergeant Kevin Molinari and shouted at Sergeant Molinari concerning the failure of the State Police to make any arrests with respect to a complaint made by respondent's son, William Straite, against his neighbors.

3. Respondent told Sergeant Molinari that he wanted his son's complaint investigated, "or I want a good explanation why it can't be done."

4. Respondent then spoke to Zone Sergeant Donald Ellis and indicated that he was dissatisfied with the way the State Police had handled his son's complaint. Respondent told Sergeant Ellis that he would "go all the way to Albany to find out why you cannot do what your job is...."

5. Respondent acknowledged in testimony before a member of the Commission that "I wanted [the police] to know I had a title, and I was a concerned citizen, and I was going to find out something about this affair...."

6. Trooper Elizabeth Reid Wonka was sent to William Straite's home to investigate the complaint made by respondent to Sergeant Ellis. When Trooper Wonka arrived at Mr. Straite's home, she was met by respondent, who directed her to accept Mr. Straite's complaints against his neighbors and to file them in the Pittsfield Town Court.

7. Thereafter, the State Police accepted complaints from Mr. Straite and arrested his neighbors.

As to Charge II of the Formal Written Complaint:

8. On September 10, 1985, respondent arraigned David Lee Harshbarger on a charge of Criminal Sale of Marijuana, Fourth Degree, and committed him to jail in lieu of $500 bail, notwithstanding that respondent's son, William Straite, had been involved in the undercover investigation that resulted in Mr. Harshbarger's arrest. Respondent learned of his son's involvement in the case immediately before the arraignment.

9. Mr. Harshbarger was subsequently re-arraigned in another court on the same charge and released on bail.

10. On September 23, 1985, respondent issued a bench warrant for the rearrest of Mr. Harshbarger on the same charge, notwithstanding that his son was a material witness in the case and that the matter was then pending in another court.

As to Charge III of the Formal Written Complaint:

11. On October 19, 1984, Brian L. Decker appeared before respondent on charges of Driving While Intoxicated; Driving With .10 Percent or More Blood Alcohol Content; Criminal Mischief, Fourth Degree, and Open Container. Respondent committed Mr. Decker to jail in lieu of bail.

12. Mr. Decker reappeared in court on October 22, 1984, with his parents. Mr. Decker's father, Harry P. Decker, III, informed respondent that the defendant was represented by counsel.

13. Respondent said that he "was not going to wait around all evening for the damned attorney," and indicated to the defendant's parents that respondent would be "lenient" if their son pleaded guilty.

14. The elder Mr. Decker then advised his son to plead guilty, and the defendant did so in the absence of counsel.

15. Respondent then sentenced Brian Decker to $460 in fines, surcharges and restitution and ordered his driver's license immediately and indefinitely revoked.

16. Mr. Decker's attorney, Colin E. Ingham, arrived in court as the Deckers were leaving. After Mr. Ingham learned that the case had been disposed of, he approached respondent and appealed to him to grant Mr. Decker a conditional license. Respondent replied that the case was over and that there was "no way" he would issue a conditional license.

As to Charge IV of the Formal Written Complaint:

17. On March 9, 1985, Paul F. Carey was charged with Driving While Intoxicated and Failure to Keep Right and was given a summons to appear before respondent on March 19, 1985.

18. Mr. Carey retained Peter J. McBride to represent him. Before Mr. Carey's scheduled appearance before respondent, Mr. McBride's son was killed in an accident, and Mr. McBride's law office was closed. Respondent was notified of the tragedy.

19. On March 19, 1985, after Mr. Carey and Mr. McBride failed to appear in court, respondent issued a warrant for Mr. Carey's arrest.

20. Thereafter, Mr. McBride called respondent several times and offered to produce his client, but respondent refused to give him an appearance date. Respondent was angry and belligerent and told Mr. McBride that he could not tell respondent how to run his court. Respondent shouted at Mr. McBride and, on at least one occasion, hung up the telephone on him.

21. After Mr. Carey was arrested on respondent's warrant, Mr. McBride called respondent and again attempted to obtain a time for arraignment. Respondent again refused to schedule a time and hung up the telephone.

22. Mr. McBride went immediately to respondent's court. Respondent told Mr. McBride that he was a "fucking ball-breaker" and loudly and belligerently told him that it was a "grave mistake" that Mr. McBride had once eliminated respondent from the jury in a case in another court in which Mr. McBride was representing one of the parties.

As to Charge V of the Formal Written Complaint:

23. On December 4, 1984, respondent arraigned a 17-year-old defendant, Theodore D. Canfield, on a charge of Grand Larceny, Third Degree, and committed him to jail without bail.

24. Thereafter, Mr. Canfield's mother, Carol A. Rogers, called respondent. Respondent loudly told Ms. Rogers that her son would be in jail for the next four days and that she could not visit him. Ms. Rogers consulted with an attorney and then called respondent again. Respondent again told Ms. Rogers loudly that she could not see her son and that he had broken the law and was going to pay for it.

25. On December 31, 1984, after Mr. Canfield had been released in his mother's custody, respondent saw the defendant at a local store. On January 1, 1985, respondent called Ms. Rogers and shouted at her. He told her that she was incompetent to care for her son and that respondent was going to have the boy's father, Ms. Rogers' former husband, come and take custody of Mr. Canfield. Ms. Rogers attempted to persuade respondent to leave Mr. Canfield in her care; respondent hung up the telephone.

26. On January 2, 1985, respondent called Mr. Canfield's attorney, Nelson W. Stiles, and ordered him to arrange for the defendant's father to take his son from Ms. Rogers' home. Respondent told Mr. Stiles that Mr. Canfield would either go to live with his father or go to jail.

As to Charge VI of the Formal Written Complaint:

27. On March 13, 1985, respondent arraigned William W. Trimble, Jr., on charges of Loud Exhaust, No Tail Lights and Altered Operator's License.

28. Before the arraignment, respondent asked Mr. Trimble why he had altered his license.

29. On July 10, 1985, Mr. Trimble reappeared before respondent. Mr. Trimble was wearing a three-piece suit. Respondent told Mr. Trimble that respondent was not impressed with "the monkey suit."

30. Respondent loudly and abusively accused Mr. Trimble several times of lying about his reasons for failing to appear on an earlier court date and threatened him with jail if he did not tell the truth.

As to Charge VII of the Formal Written Complaint:

31. On June 23, 1985, respondent, as a member of the New Berlin Emergency Medical Services Unit, accompanied Rick Dye, a hit-and-run accident victim, to the hospital and personally treated Mr. Dye.

32. On July 8, 1985, respondent presided over a preliminary hearing in the case of George H. Garrow, Jr., on a charge of Leaving the Scene of An Accident. The case involved the accident in which Mr. Dye had been injured, and one of the issues at the hearing was the seriousness of Mr. Dye's injury, which would determine whether the charge against Mr. Garrow was to be a felony or a misdemeanor.

33. Respondent presided notwithstanding that he had personal knowledge as to the seriousness of Mr. Dye's injury in that respondent had treated him on the night of the accident.

34. Respondent found against Mr. Garrow and did not inform his attorney of respondent's personal knowledge concerning the facts of the case until the hearing had been concluded.

As to Charge VIII of the Formal Written Complaint:

35. The charge is not sustained and is, therefore, dismissed.

As to Charge IX of the Formal Written Complaint:

36. On June 3, 1985, respondent arraigned Raymond Lund, Dennison R. Hoxie, Zeland Boice and Donald Stringham on charges of Harassment.

37. Respondent did not advise the defendants that they had the right to assigned counsel if they could not afford an attorney, as required by Section 170.10 of the Criminal Procedure Law.

38. When Mr. Lund pleaded not guilty, respondent told him, "Now, unplug your ears, boy."

39. Without determining how the other defendants pled, respondent excoriated them in a loud, angry voice and announced that they would be given a conditional discharge.

40. Respondent ordered them to stay off the village streets after 6:00 P.M. for 90 days. Respondent immediately called the village police chief before him and directed the chief to arrest and commit the defendants to jail without going before a judge if he saw them on a village street after 6:00 P.M. in the next 90 days. Respondent told the police chief that he would sign commitment papers after their incarceration.

41. Respondent concluded the proceeding by saying, "All right now, the three of you, get out of here."

As to Charge X of the Formal Written Complaint:

42. On May 19, 1986, Brooke Backus appeared before respondent on a charge of Unleashed Dog.

43. Respondent did not advise Mr. Backus of his rights and did not conduct a trial.

44. Respondent interrogated Mr. Backus concerning the offense and found him guilty of the charge.

45. Respondent suggested that Mr. Backus had no "brains" and warned him that if he were to be brought into court again on such a charge, respondent could order his dogs killed.

As to Charge XI of the Formal Written Complaint:

46. The charge is not sustained and is, therefore, dismissed.

As to Charge XII of the Formal Written Complaint:

47. On January 7, 1985, Nina H. Pawelko was charged with Speeding. The ticket was returnable in respondent's court.

48. On January 9, 1985, respondent received a letter from Ms. Pawelko in which she said that she was not guilty and stated that the arresting officer had "treated me like a criminal" and was "rude." Respondent replied by setting a trial date.

49. Ms. Pawelko then called respondent and asked whether it was necessary for her to make a six-hour trip from her home for trial. Respondent excoriated her for criticizing the arresting officer, told her that he was going to teach her respect for the law and insisted that she appear in court in person.

50. Respondent acknowledged in testimony before a member of the Commission that he felt that Ms. Pawelko's statements about the arresting officer were "untrue" because respondent knew him to be "a nice boy." Respondent said that he felt that Ms. Pawelko "needed perhaps a little chiding and a little humility...."

51. Ms. Pawelko was "terrified" by her conversation with respondent and decided to mail a guilty plea and a fine to the court.

52. Respondent refused to accept the plea by mail and ordered Ms. Pawelko to appear in person.

53. Ms. Pawelko retained an attorney to represent her. The attorney contacted respondent, and respondent said that he intended to "punish" Ms. Pawelko by forcing her to appear in court.

54. On her attorney's advice, Ms. Pawelko drove to respondent's court, pled guilty and was fined $40.

As to Charge XIII of the Formal Written Complaint:

55. Since taking office as a judge on April 1, 1984, respondent has also served as a peace officer with the New Berlin Fire Police, an emergency unit that assists local police in crowd and traffic control.

56. For two days each year during this period, respondent directed traffic at a congested crossroads, wearing a uniform and badge. Respondent also directs traffic out of uniform at least once every ten days.

As to Charge XIV of the Formal Written Complaint:

57. Respondent, a part-time judge, is also a claims manager, attorney-in-fact and vice president of an insurance company. His principal duties are to negotiate claims with attorneys.

58. Some of the attorneys with whom respondent deals in his insurance business also appear in his court on occasion.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(a)(3), 100.3(a)(4), 100.3(c)(1), 100.5(c)(1) and 100.5(h) of the Rules

Governing Judicial Conduct; Canons 1, 2, 3A(1), 3A(3), 3A(4), 3C(1) and 5C(1) of the Code of Judicial Conduct, and Section 105(c) of the Uniform Justice Court Act. Charges I through VII, IX and X and XII through XIV of the Formal Written Complaint are sustained, and respondent's misconduct is established. Charges VIII and XI are dismissed.

In a brief judicial career, respondent exhibited, on and off the bench, a thorough disregard of his ethical obligations. He demonstrated by a persistent and varied pattern of misconduct that he is not fit to be a judge and should be barred from holding judicial office in the future.

The evidence establishes that respondent is a rude and biased partisan who has flagrantly abused his judicial authority and violated the law in order to achieve results that conform to his personal prejudices. Respondent repeatedly aligned himself with the prosecution and suggested before trial that defendants were guilty of the offenses charged. He failed to advise defendants of basic constitutional rights as required by law. He elicited incriminating statements from them before trial. He coerced a guilty plea in one case in the absence of counsel. He summarily convicted defendants without trial.

In other cases, respondent threatened to jail defendants without court hearings. He failed to disqualify himself in a case in which his son was a material witness and in a case in which he had personal knowledge of disputed facts. See Section 100.3(c)(1) of the Rules Governing Judicial Conduct.

Respondent engaged in business dealings with attorneys likely to come before him in his judicial capacity, in violation of Section 100.5(c)(1) of the Rules Governing Judicial Conduct. He served as a peace officer, contrary to Section 100.5(h) of the Rules.

On one occasion, respondent invoked the prestige of his judicial office to advance the interests of his son in a private dispute.

In all these dealings, respondent was impatient, undignified and discourteous to lawyers and litigants.

Such egregious misconduct shocks the conscience and indicates that respondent poses a threat to the proper administration of justice. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286 (1983); Matter of McGee v. State Commission on Judicial Conduct, 59 NY2d 870 (1983); Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105 (1984); Matter of Fabrizio v. State Commission on Judicial Conduct, 65 NY2d 275 (1985). No judge is above the law he is sworn to uphold. The legal system cannot accommodate a jurist who disregards the law in such a manner. Matter of Ellis, 1983 Annual Report 107 (Com. on Jud. Conduct, July 14, 1982).

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 was not present.

This determination is rendered pursuant to Section 47 of the Judiciary Law in view of respondent's resignation from the bench.

Dated: April 16, 1987

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

JOHN G. TURNER,

a Judge of the County Court, Albany County.

APPEARANCES:

Gerald Stern (Stephen F. Downs, Of Counsel) for the Commission

Honorable John G. Turner, pro se

The respondent, John G. Turner, a judge of the County Court, Albany County, was served with a Formal Written Complaint dated October 31, 1986, alleging that he participated in fund-raising activities. Respondent filed an answer dated November 25, 1986.

By motion dated December 29, 1986, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be found established. Respondent did not oppose the motion or file any papers in response thereto. By determination and order dated January 29, 1987, the Commission granted the administrator's motion and found respondent's misconduct established.

The administrator filed a memorandum as to sanction. Respondent did not file any papers and waived oral argument.

On February 19, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a judge of the Albany County Court and has been since May 1984. Previously, he was a judge of the Albany City Court for six years.

2. In 1985 and 1986, respondent agreed to participate in the American Heart Association's "Jail Bail for Heart" fund-raising events.

3. Respondent knew that his name would be used to publicize the events.

4. In 1985, respondent cleared his court calendar for two hours and, as part of the fund-raising event, conducted mock arraignments in his courtroom of donors to the heart association. Respondent set mock bail for donors at the amount they had agreed to contribute to the heart association.

5. The money was collected outside of the courtroom by representatives of the heart association.

6. In 1986, respondent also cleared his calendar for two hours on a day when he would otherwise have held court for the purpose of the heart association "arraignments," but no "cases" came before him.

7. Respondent permitted his photograph to be taken for publicity purposes in connection with the event, but he believes that it was not published.

8. Respondent was aware that judges are not permitted to engage in fund-raising activities and acknowledges that his participation in the mock arraignments constituted a violation of the prohibition.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.5(b)(2) of the Rules Governing Judicial Conduct and Canons 1, 2 and 5B(2) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

No judge may solicit funds for charitable organizations or use or permit the use of the prestige of the office for that purpose. Section 100.5(b)(2) of the Rules Governing Judicial Conduct; Matter of Kaplan, 1984 Annual Report 112 (Com. on Jud. Conduct, May 17, 1983). Respondent violated this rule by permitting his name to be used to publicize a fund-raising event for the heart association. The purpose of the mock arraignments was to generate publicity that would induce contributions. By agreeing to participate, respondent lent the prestige of his office to this fund-raising effort.

Respondent futher deviated from the high standards of conduct expected of every judge by mocking a court proceeding and by taking court time to help raise funds for a private organization.

Respondent's misconduct is mitigated by the fact that he has readily acknowledged that what he did was wrong. Matter of Doolittle, 1986 Annual Report 87 (Com. on Jud. Conduct, June 13, 1985).

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

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

Mr. Cleary and Judge Rubin were not present.

Dated: March 23, 1987

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

ALLAN L. WINICK,

a Judge of the County Court, Nassau County.

Determination

APPEARANCES:

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

Jaspan, Ginsberg, Ehrlich, Reich & Levin (By A. Thomas Levin; Joseph Jaspan, Of Counsel) for Respondent

The respondent, Allan L. Winick, a judge of the County Court, Nassau County, was served with a Formal Written Complaint dated October 10, 1985. Respondent filed an answer dated October 21, 1985.

By order dated November 6, 1985, the Commission designated Gerald Harris, Esq., as referee to hear and report proposed findings of fact and conclusions of law.

On December 17, 1985, respondent was served with an Amended Formal Written Complaint, superceding the Formal Written Complaint of October 10, 1985. Respondent answered the Amended Formal Written Complaint on December 23, 1985.

A hearing was held on January 21 and 22, 1986, and the referee filed his report with the Commission on June 2, 1986.

By motion dated August 28, 1986, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings and conclusions and for a determination that respondent be censured. Respondent opposed the motion by cross motion on September 15, 1986.

On November 14, 1986, 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 a judge of the Nassau County Court and has been consistently since January 1, 1984. He also served two interim terms in 1982 and 1983.

2. On Sunday, May 5, 1985, Walter Cook was arrested in Queens by Investigator Gregory Gentile of the State Police and Investigator Steven G. Hill of the Attorney General's Office.

3. Investigator Gentile was executing a felony arrest warrant issued pursuant to a sealed indictment in Monroe County. Investigator Hill was executing an order and warrant of commitment for contempt of court arising out of a civil proceeding in Cayuga County.

4. After his arrest, Mr. Cook called Marshall A. Bernstein, an attorney who had previously represented him in civil matters, and asked him to find a judge who would arraign him. Mr. Bernstein was not told of the nature of the charges or that the arrest was pursuant to an indictment.

5. Mr. Bernstein attempted without success to find a judge to arraign Mr. Cook. He then called his law partner, Richard S. Gershman, at the Woodmere Country Club.

6. Mr. Bernstein asked Mr. Gershman to locate respondent and ask him to arraign Mr. Cook.

7. Respondent and Mr. Gershman are members of the club. Mr. Bernstein was a member until 1982. Although respondent was acquainted with the two lawyers as members of the club, he had no social or business dealings with them at or outside of the club.

8. Mr. Gershman found respondent in the locker room of the club and asked him whether he would arraign someone who had been arrested in Queens.

9. Respondent said that he had no jurisdiction in Queens. Mr. Gershman asked whether respondent could handle the arraignment if the defendant were brought to Nassau County.

10. Respondent agreed to arraign the defendant at his home before 5:00 P.M.

11. At the time, there was a procedure in Nassau County by which defendants arrested at night or on weekends could be arraigned by a District Court judge on call for such matters. Respondent was aware of the procedure but did not suggest that it be employed with respect to Mr. Gershman's client. Although a District Court judge would not have had jurisdiction to

arraign a defendant pursuant to a sealed indictment, respondent did not know at the time that Mr. Gershman's client had been arrested pursuant to a sealed indictment.

12. Mr. Cook was booked at State Police barracks and taken to respondent's home. Respondent, Mr. Cook, Mr. Gershman, Investigator Gentile, Investigator Hill, Mr. Cook's father and a man named Louis Morell were present for the proceeding.

13. Respondent refused to entertain the commitment order on the basis that he had no jurisdiction over an order issued by the Supreme Court.

14. Respondent conducted a proceeding on the arrest warrant which had some of the elements of an arraignment and which several of the participants, including respondent, have referred to at various times as an arraignment. Respondent now contends, however, that it was not an arraignment but a bail application hearing.

15. Respondent read Mr. Cook the charges listed on the warrant of arrest. He did not have a copy of the indictment and indicated on the back of the arrest warrant that the defendant had waived the reading of the indictment.

16. Respondent advised Mr. Cook of his right to counsel and that a predicate felon was subject to mandatory imprisonment.

17. Respondent then asked for a report on Mr. Cook's criminal history and said that he must have the views of an assistant district attorney as to bail.

18. Investigator Gentile gave respondent a criminal history which indicated a number of arrests dating to 1967 but no reported convictions.

19. Mr. Gershman reached a Nassau County assistant district attorney, Edward W. McCarty, III (now a District Court judge), and respondent spoke to him by telephone.

20. Mr. McCarty suggested that Mr. Cook be detained at the Nassau County Jail until he could be transported to Monroe County "where the judge who knows more of the facts could set the appropriate bail." Respondent said that he would consider it.

21. Mr. McCarty told respondent that the Monroe County authorities considered the matter serious, that Mr. Cook had "no definitive roots" in Nassau County, that he had been a fugitive for a long period and that he had a record of arrests.

22. Mr. McCarty recommended bail of $50,000.

23. Respondent said that he would consider Mr. McCarty's position and ended the conversation.

24. Respondent then heard Mr. Gershman, who argued that Mr. Cook was a businessman who had lived in Nassau County for 15 years.

25. Respondent set bail at $5,000 bond or $500 cash and ordered Mr. Cook to appear in Monroe County on May 8, 1985.

26. Respondent then called a Supreme Court justice and asked her to handle the commitment order, and the parties left his home.

27. Respondent had never before conducted an arraignment or a bail hearing at his home.

28. On May 8, 1985, respondent called Mr. McCarty to his chambers. Respondent asked whether Mr. McCarty had heard what happened with the case in Monroe County. Respondent indicated that he hoped that Mr. Cook had appeared as scheduled because respondent had extended "a favor to a friend" at his club.

29. Mr. Cook did not appear in Monroe County on May 8, 1985, and remained at large until November 1985.

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 Amended Formal Written Complaint is sustained, and respondent's misconduct is established. Respondent's cross motion is denied.

A judge must be sensitive to the appearance of impropriety that may be conveyed by his or her conduct, as well as to the commission of actual improprieties. Section 100.2 of the Rules Governing Judicial Conduct. The appearance of favoritism is no less to be condemned than actual favoritism. Matter of Spector v. State Commission on Judicial Conduct, 47 NY2d 465, 466 (1979).

Taken as a whole, respondent's handling of the Cook matter conveyed the appearance of favoritism.

Respondent, a county court judge with limited geographic jurisdiction, agreed to conduct a bail hearing for a defendant wanted in another county and arrested in a third. The request to do so came outside of court from a lawyer respondent knew only as a country club acquaintance. Respondent ignored standard procedures for off-hours proceedings and conducted the hearing not in a courtroom or a police station but at his home on a Sunday afternoon.

This unusual hearing raised serious procedural questions. Mr. Cook's arrest was pursuant to a warrant that demanded his appearance before the Monroe County Court, not respondent's court, and pursuant to a statute

that calls for a defendant's "arraignment." Section 210.15 of the Criminal Procedure Law. Respondent contends that he did not conduct an arraignment but a bail application hearing. This he had no power to do since the statute allows for bail or release only "[u]pon the arraignment...." CPL §210.15(6). Having assumed to hold a "bail application hearing," respondent set a low bail considering the defendant's fugitive status, the felony nature of the charges and the prosecutor's recommendation of a considerably higher bail.

It is not our function to review bail decisions or erroneous assumptions of jurisdiction. These are legal issues subject only to a judge's discretion and appellate review. We examine these factors as part of a picture that, with the other circumstances of the case, depicts the appearance of favoritism. Matter of Mullen, 1987 Annual Report 129 (Com. on Jud. Conduct, May 22, 1986); Matter of Latremore, 1987 Annual Report 97 (Com. on Jud. Conduct, May 30, 1986). Respondent further contributed to the appearance of impropriety by describing his handling of the matter as a "favor to a friend."

> The appearance from which favored treatment can be deduced, even without real foundation, can be very harmful to the administration of justice. Likewise is providing the opportunity from which an implication of impropriety could be drawn. No matter how innocent respondent's conduct may have been, it unnecessarily and unwisely put a burden of explanation and justification not only on himself but on the judiciary of which he is an officer.
>
> Matter of Suglia, 36 AD2d 326, 327-28 (1st Dept. 1971).

Because respondent's actions in this matter conveyed an appearance of favoritism, public sanction is appropriate, not to punish him but to maintain public confidence in the judiciary. Matter of Waltemade, 36 NY2d (a), (nn), (111)(Ct. on the Judiciary 1975).

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

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

Judge Ciparick and Mr. Cleary dissent and vote that the Formal Written Complaint be dismissed.

Mr. Bromberg did not participate.

Judge Rubin was not present.

Dated: January 29, 1987

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

PENNY M. WOLFGANG,

Determination

a Justice of the Supreme Court,
Eighth Judicial District, Erie County.

APPEARANCES:

Gerald Stern (Henry S. Stewart, Of Counsel) for the Commission

Goldstein Goldman Kessler & Underberg (Harry D. Goldman, Of Counsel) for Respondent

The respondent, Penny M. Wolfgang, a justice of the Supreme Court, 8th Judicial District, was served with a Formal Written Complaint dated October 24, 1986, alleging that she lent the prestige of her judicial office to advance certain business interests and charitable activities. Respondent filed an answer dated November 26, 1986.

On August 18, 1987, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for in Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on August 28, 1987.

The administrator and respondent submitted memoranda as to sanction. Oral argument was waived.

On October 22, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent is a justice of the Supreme Court and has been since January 1, 1986. She was a judge of the Erie County Court from January 1, 1979, to December 31, 1985.

2. In May 1983, respondent allowed herself to be featured in a commercial broadcast on radio station WJYE-FM, in which she identified herself as a judge and solicited support for the Buffalo Stallions, a professional soccer team doing business for profit.

3. In the commercial, respondent stated:

> Hi, I'm Judge Penny Wolfgang, Erie County Court Judge. I'd like to think I'm also a judge of what's good for the community. Like you, I'm a big fan of the Buffalo Stallions, and I know what they mean to Western New York. Right now the Stallions need our help. Support them. It's good for Buffalo.

4. Immediately after respondent's statement, an announcer stated, "Order Stallion season tickets now. Call 845-6200. Let's keep our Stallions...", whereupon singers continued, "...live and kicking at the Aud."

5. Respondent had no financial interest in the Buffalo Stallions and received no remuneration of any kind for the announcement.

6. As a result of a Commission investigation of her participation in the radio commercial, respondent was issued and received a letter of dismissal and caution dated January 18, 1984, advising her not to solicit funds for charitable or civic organizations or permit the use of the prestige of her office for that purpose and not to promote the private business interests of others.

As to Charge II of the Formal Written Complaint:

7. From 1984 to at least April 1986, respondent served as a member of the Board of Directors of the Western New York Chapter of the Cystic Fibrosis Foundation.

8. In November 1985, respondent participated in a fund-raising event of the Cystic Fibrosis Foundation by serving on a panel that chose the winner of "Buffalo's Sexiest Baldy Contest," sponsored by the organization.

9. The event was publicized in advance by poster advertisements and newspaper announcements, which noted that it was a fund-raiser and described judges of the contest as "celebrities" and "celebrity judges" but did not name respondent or any of the other members of the panel.

10. Prior to the contest, notices of the event were sent to members of the board of directors, noting that it was a fund-raiser and describing the contest judges as "celebrity judges." Prior to attending the event, respondent knew that it was to be a fund-raiser.

11. The event was held on November 14, 1985, at a restaurant in Williamsville. The panel of judges included respondent, a local television news anchor, an executive of a local newspaper, a town supervisor, an announcer for a local professional sports franchise and an administrator of a local college.

12. Respondent allowed herself to be photographed for publicity about the event by posing as she kissed the bald head of the winner of the contest.

13. The event raised approximately $1,000 for the Cystic Fibrosis Foundation.

14. Prior to her participation in the event, respondent had received from the Commission a letter of dismissal and caution dated January 18, 1984, advising her not to solicit funds for charitable or civic organizations or permit the use of the prestige of her office for that purpose.

As to Charge III of the Formal Written Complaint:

15. In March 1986, respondent permitted her name, judicial title and photographic likeness to be used in the "Buffalo Home and Garden Show '86" in an exhibit entitled the "Judge Penny Wolfgang Interior Design Room."

16. The home and garden show was sponsored by the Niagara Frontier Builders' Association, the Western New York Nurserymen's Association and the Niagara Frontier Chapter of the National Spa and Pool Institute, three organizations promoting commercial interests. The show was held from March 15 to March 23, 1986, at the Buffalo Convention Center.

17. Respondent received no remuneration for her participation. She had no financial or social connections with the sponsors of the show.

18. In February 1986, respondent, her husband and their daughter met with the owner and operator of Creative Interiors, an interior design firm which was to design the "celebrity room." They discussed their decorating tastes and provided various personal items for display in the room, including respondent's sneakers, photographs of respondent and her family, a photograph of respondent in her judicial robe, law books belonging to respondent's husband and a gavel.

19. A week before the opening of the home and garden show respondent taped a segment of a weekly television show known as "Dimension," which she hosted on a local public television station. Respondent interviewed the owner and operator of Creative Interiors about home decorating and the creation of the "celebrity room." The show was aired on the day the home and garden show opened. A videotape of the segment was also played as part of the exhibit.

20. The "celebrity room" adjoined an exhibit of Creative Interiors at the home and garden show. A representative of Creative Interiors was present to provide visitors with a brochure about the business.

21. The "celebrity room" was labeled, "Judge Penny Wolfgang Interior Design Room. Designed and Decorated by Lorna Czarnota of Creative Interiors, Buffalo, New York." A placard listed each of the commercial exhibitors that had provided furnishings for the room.

22. In addition to their personal items, the room included life-size photographic posters of respondent, her husband, their daughter and their dog.

23. The official guide of the home and garden show highlighted the location of the "Judge Penny Wolfgang Interior Design Room" and indicated that the room was designed to respondent's tastes and that of her family by Creative Interiors.

24. The home and garden show was publicized in several newspaper advertisements that included references to "Penny Wolfgang's Family Room by Creative Interiors."

25. Respondent visited the exhibit three or four times before and during the show.

26. Prior to her participation, respondent had received from the Commission a letter of dismissal and caution dated January 18, 1984, advising her not to promote private business interests.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.5(a), 100.5(b)(2) and 100.5(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 5A, 5B(2) and 5C(1) of the Code of Judicial Conduct. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

By her radio commercial and her participation in the home and garden show, respondent lent the prestige of her judicial office to advance private business interests. This is prohibited by three sections of the Rules Governing Judicial Conduct. Section 100.2(c) provides, "No judge shall lend the prestige of his or her office to advance the private interests of others...." Section 100.5(a) permits a judge to engage only in avocational activities that "do not detract from the dignity of the office...." Section 100.5(c)(1) compels a judge to "refrain from financial and business dealings that tend to ... exploit judicial position...."

Respondent's participation in "Buffalo's Sexiest Baldy Contest" also detracted from the dignity of her office and violated Section 100.5(b)(2) of the Rules which prohibits the use of the prestige of judicial office for charitable fund-raising. See also, Matter of Kaplan, 1984 Annual Report 112 (Com. on Jud.

Conduct, May 17, 1983); Matter of Turner, unreported (Com. on Jud. Conduct, Mar. 23, 1987).

A judge is permitted to engage in civic and charitable activities, such as respondent's leadership in the Cystic Fibrosis Foundation. The Code of Judicial Conduct encourages participation in community affairs: "Complete separation of a judge from extra-judicial activities is neither possible nor wise; he [or she] should not become isolated from the society in which he [or she] lives." Commentary to Canon 5, ABA Code of Judicial Conduct.

However, a judge may not participate in charitable fund-raising. Nor may a judge trade on judicial office to aid commercial ventures, whether or not she has a personal or financial stake in them.

Respondent's misconduct is exacerbated by the fact that her participation in two of these events occurred after she was explicitly advised by the Commission not to exploit her position for such purposes. See, Matter of Quinn v. State Commission on Judicial Conduct, 54 NY2d 386, 392 (1981).

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

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

Mr. Bower, Mr. Bromberg and Mr. Sheehy dissent as to sanction only and vote that respondent be censured.

Judge Rubin was not present.

Dated: November 19, 1987

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

PENNY M. WOLFGANG,

DISSENTING OPINION BY MR. BOWER

a Justice of the Supreme Court, Eighth Judicial District, Erie County.

I dissent from the sanction of admonition which is the mildest form of public discipline.

Respondent seems to suffer from incurable eczema of publicity seeking. It is not an excuse that judges should participate in charitable events. Generally, philanthropists perform their good deeds in anonymity. Respondent, however, in spite of having been previously cautioned, basks in the limelight of the media. From popularity to notoriety is but one short step. This is even more so where the conduct advances business interests.

Since admonition is but a reminder to do the right thing, it accomplishes little more than the previous caution, which was blithely disregarded. Accordingly, I vote for censure to show my deep sense of disapproval.

Dated: November 19, 1987

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

MERRILL R. ZAPF, SR.,

a Justice of the Clayton Village Court and the Clayton Town Court, Jefferson County.

Determination

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Swartz, Evans, Dickinson & Parmeter, P.C. (By Daniel S. Dickinson, III) for Respondent

The respondent, Merrill R. Zapf, Sr., a justice of the Clayton Town Court and acting justice of the Clayton Village Court, Jefferson County, was served with a Formal Written Complaint dated October 2, 1986, alleging that he engaged in certain improper practices with respect to small claims cases. Respondent filed an answer dated October 24, 1986.

On May 5, 1987, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for in Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on May 21, 1987.

The administrator and respondent submitted memoranda as to sanction. Oral argument was waived. On June 18, 1987, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Clayton Town Court and has been since January 1982. He is also acting justice of the Clayton Village Court and has been since April 1983.

2. Respondent, a retired State Police sergeant, is not a lawyer. He has successfully completed all courses for non-lawyer judges required by the Office of Court Administration since becoming a judge.

3. On June 5, 1986, respondent testified before a member of the Commission that in more than four years as a town justice he had not read the Uniform Justice Court Act and did not have available a copy of the law governing procedures in his court.

4. Between January 1, 1982, and May 20, 1985, it was respondent's practice in civil and small claims cases to send to the alleged debtor, before issuing a summons and initiating a proceeding, a letter on court stationery that attempted to coerce payment of the debt alleged without the necessity of a court hearing. The letters stated:

> I am writing relative a bill that _____ allege that you owe them since _____.
>
> I received this complaint today, but before issuing a summons to settle the matter in Small Claims Court, I wanted to give you an opportunity to either pay the bill or make some arrangements to do so, if in fact, you do owe it. This would save you the added expense of a civil suit, which would be added to your bill in the event there was a judgement rendered against you.
>
> If the bill is incorrect, payment has been made, or any other discrepancies, and it can not be straightened out prior to _____, I shall issue a summons for your appearance in Small Claims Court to argue the matter and render a decision.

5. Between March 18, 1982, and June 18, 1985, Cerow Agency, Inc., a corporation doing business as a general insurance agency, commenced 20 small claims cases in respondent's court, as denominated in Exhibit 5 of the agreed statement of facts, in violation of Section 1809 of the Uniform Justice Court Act. Each of the 20 cases resulted in a settlement or judgment in favor of the corporation.

6. The president of Cerow Agency, Inc., is Gordon E. Cerow, Jr., who is also the Clayton town supervisor and has been since 1960. Mr. Cerow

is a member of the same political party as respondent and encouraged respondent to seek judicial office.

7. Between February 1982 and October 1985, respondent accepted for filing and directed service of 133 additional small claims brought by 16 other corporations, as denominated in Exhibit 5 of the agreed statement of facts,* in violation of Section 1809 of the Uniform Justice Court Act. Each of the claims resulted in a settlement or judgment in favor of the corporation.

8. Between May 1983 and March 1984, respondent accepted for filing and directed service of 38 small claims summonses outside the geographic jurisdiction of his court, as denominated in Exhibit 187 of the agreed statement of facts, in violation of Section 1801 of the Uniform Justice Court Act.

9. Between October 1982 and April 1985, respondent granted default judgments against defendants in 16 small claims cases, as denominated in Exhibit 189 of the agreed statement of facts, despite having been presented with proof that the defendants had not been properly served with a summons to appear in court, in violation of Section 1803 of the Uniform Justice Court Act.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1) and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent has engaged in a series of legal errors in the filing and disposition of small claims cases that collectively convey the

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*Exhibit 5 and the agreed statement of facts indicate that there were 137 claims brought by the other corporations. However, the court records appended to the agreed statement of facts do not substantiate that figure. Three of the claims were brought in the names of individuals who are principals in the corporations [Ed Corbett v. Hubbell (Ex. 43), Charles Wingerath v. Fitchette (Ex. 144), and Charles Wingerath v. Schneider (Ex. 148)], and the record does not establish that the plaintiffs were suing on behalf of their corporations rather than individually. A fourth claim listed in Exhibit 5 was brought not in the name of the corporation listed but in the name of another business, Phinney's Service Station, (Ex. 131), which is run by a principal in the corporation listed. The record indicates that Phinney's Service Station is not a corporation (Ex. 186, p. 13) and, thus, is not precluded from bringing a small claims action by Section 1809 of Uniform Justice Court Act.

impression of favoritism toward business interests and prejudice against alleged debtors. Such an appearance of partiality is contrary to the role of a judge. Sections 100.2 and 100.3(a)(1) of the Rules Governing Judicial Conduct.

Contrary to law, respondent sent letters attempting to coerce the payment of debts outside of any legal proceedings, allowed corporations to bring small claims in his court, handled claims against defendants who were outside his jurisdiction and granted default judgments against defendants who had not been properly served with notice of the proceeding. Such a series of fundamental procedural errors--all to the benefit of business-plaintiffs and to the detriment of debtor-defendants--creates the appearance of favoritism. Such appearance is no less to be condemned than the impropriety itself. Matter of Spector v. State Commission on Judicial Conduct, 47 NY2d 462, 466 (1979).

In mitigation of this misconduct, we note that respondent ceased these practices upon notice of the Commission's investigation and has at all times been candid and cooperative in the investigation. Matter of Kelso v. State Commission on Judicial Conduct, 61 NY2d 82, 87 (1984); Matter of Sandburg, 1986 Annual Report 157, 161 (Com. on Jud. Conduct, June 6, 1985).

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

Mrs. Robb, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Judge Ostrowski and Mr. Sheehy concur.

Mr. Kovner and Judge Shea dissent as to sanction only and vote that respondent be censured.

Mr. Bromberg and Judge Rubin were not present.

Dated: July 24, 1987

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

MERRILL R. ZAPF, SR.,

a Justice of the Clayton Village Court and the Clayton Town Court, Jefferson County.

DISSENTING OPINION BY MR. KOVNER IN WHICH JUDGE SHEA JOINS

The use of a coercive letter on judicial stationery, standing alone, constitutes misconduct (Matter of Adams, 1979 Annual Report 73, 74 [Com. on Jud. Conduct, Nov. 29, 1978]), and, in my opinion, would warrant admonition. When combined with the ultra vires acts of assertion of jurisdiction over claims outside the geographic jurisdiction of the court and other serious misconduct, more severe discipline is warranted. I believe censure to be the appropriate sanction.

Dated: July 24, 1987

1987 MATTERS, ACCORDING TO COURT (See Tables on Pages 5-9)

1987 DISPOSITIONS	Town & Village Court -- Lawyer / Non-Lawyer	City Court -- Part-Time / Full-Time	County Court	Family Court	District Court	Court of Claims	Surrogate Court	Supreme Court	Court of Appeals; App. Div.
COMPLAINTS RECEIVED	99 / 212	34 / 117	72	94	12	2	36	216	12
COMPLAINTS INVESTIGATED	34 / 83	7 / 20	3	10	3	0	5	23	2
NUMBER OF JUDGES CAUTIONED AFTER INVESTIGATION	4 / 24	2 / 1	3	1	0	0	0	4	1
NUMBER OF FORMAL WRITTEN COMPLAINTS AUTHORIZED	0 / 23	4 / 1	0	2	1	0	3	5	0
NUMBER OF JUDGES CAUTIONED AFTER FORMAL WRITTEN COMPLAINT	0 / 0	0 / 0	0	0	0	0	0	2	0
NUMBER OF JUDGES PUBLICLY DISCIPLINED	3 / 10	2 / 1	2	0	0	0	1	3	0
NUMBER OF FORMAL WRITTEN COMPLAINTS DISMISSED OR CLOSED	1 / 8	0 / 0	0	0	1	0	0	2	0

NOTE: All town & village justices serve part-time and may be lawyers. All city court judges are lawyers and serve either part-time or full-time. All other judges are lawyers and serve full-time.

TABLE OF CASES PENDING AS OF DECEMBER 31, 1986.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	TOTALS
Incorrect Ruling								
Non-Judges								
Demeanor		6	6	6		4	5	27
Delays		2	3	2		5	1	13
Confl./Interest		7	7	4	1	2	3	24
Bias		2	14	2	6	8	1	33
Corruption		5	6		2	1		14
Intoxication		1						1
Disable/Qualif.			1					1
Political Activ.		3	5	1		1		10
Finances, Records, Training		1	4	3		2	2	12
Ticket-Fixing			1			2	2	5
Assertion of Influence		3	4	2			8	17
Miscellaneous		10	13	11	1	7	4	46
TOTALS		40	64	31	10	32	26	203

* Investigations closed upon vacancy of office other than by resignation.
** Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions

TABLE OF NEW CASES CONSIDERED BY THE COMMISSION IN 1987.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	TOTALS
Incorrect Ruling	411							411
Non-Judges	97							97
Demeanor	52	11	22	4		3		92
Delays	40	5	1	1				47
Confl./Interest	13	8	4	2				27
Bias	80	6	19	1	1			107
Corruption	6	1	2					9
Intoxication		1						1
Disable/Qualif.	1							1
Political Activ.	2	9		2				13
Finances, Records, Training	4	4	4	1			1	14
Ticket-Fixing			1					1
Assertion of Influence	7	11	5	4	1			28
Miscellaneous	100	37	17	1				155
TOTALS	813	93	75	16	2	3	1	1003

* Investigations closed upon vacancy of office other than by resignation.

** Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.

ALL CASES CONSIDERED BY THE COMMISSION IN 1987: 1003 NEW COMPLAINTS AND 203 PENDING FROM 1986.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	TOTALS
Incorrect Ruling	411							411
Non-Judges	97							97
Demeanor	52	17	28	10		7	5	119
Delays	40	7	4	3		5	1	60
Confl./Interest	13	15	11	6	1	2	3	51
Bias	80	8	33	3	7	8	1	140
Corruption	6	6	8		2	1		23
Intoxication		2						2
Disable/Qualif.	1		1					2
Political Activ.	2	12	5	3		1		23
Finances, Records, Training	4	5	8	4		2	3	26
Ticket-Fixing			2			2	2	6
Assertion of Influence	7	14	9	6	1		8	45
Miscellaneous	100	47	30	12	1	7	4	201
TOTALS	813	133	139	47	12	35	27	1206

* Investigations closed upon vacancy of office other than by resignation.

** Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions