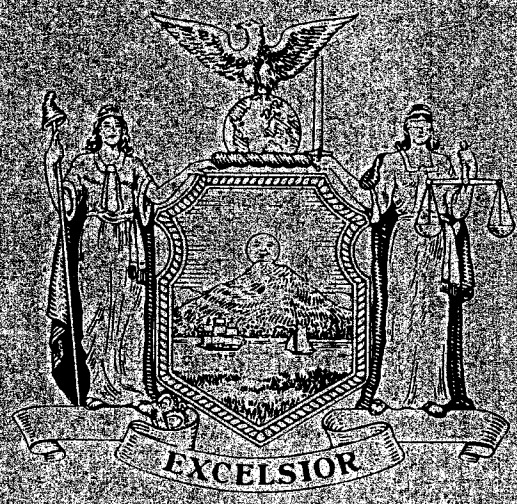
ANNUAL REPORT
1990

New York State
Commission on Judicial Conduct



1990 ANNUAL REPORT

OF THE

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

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HONORABLE WILLIAM J. OSTROWSKI
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(Served to October 19, 1989)

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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, 1989, through December 31, 1989.

Respectfully submitted,

John J. Bower, Chairman
On Behalf of the Commission

March 1, 1990
New York, New York

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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, 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 1990 Annual Report covers the Commission's activities during calendar year 1989.

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 1989

In 1989, 1171 new complaints were received, compared with 1109 the year before. Of these, 976 (83%) were dismissed upon initial review, and 195 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 were 34 initiated by the Commission on its own motion.

On January 1, 1989, 161 investigations and proceedings on formal charges were pending from the prior year.

Many 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). Some were from litigants who complained about the merits of a particular ruling or decision made by a judge. 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, 1989, through December 31, 1989. Detailed statistical analysis of the matters considered by the Commission is appended in chart form.

ACTION TAKEN IN 1989

Of the combined total of 356 investigations and proceedings on formal charges conducted by the Commission in 1989 (161 carried over from 1988 and 195 authorized in 1989), the Commission made the following dispositions in 233 cases:

-- 112 matters were dismissed outright.

-- 56 matters involving 55 different judges were dismissed with letters of dismissal and caution.

-- 25 matters involving 13 different judges were closed upon resignation of the judge from office.

-- 12 matters involving 10 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.

-- 28 matters involving 20 different judges resulted in formal discipline (admonition, censure or removal from office).

One hundred twenty-three matters were pending at the end of 1989.

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 1989 Matters" figure indicates the percentage of 1989 results involving judges of a particular court against the total number of Commission actions in the same category in 1989.

Table 1: Town and Village Justices (2400; 68.5%)

1989 Dispositions	Lawyers	Non-Lawyers	Total	Percent of 1989 Matters
Complaints Received	72	278	350	30%
Complaints Investigated	20	121	141	72.5%
Number of Judges Cautioned After Investigation	5	32	37	74%
Number of Formal Written Complaints Authorized	2	13	15	75%
Number of Judges Cautioned After Formal Complaint	1	0	1	20%
Number of Judges Publicly Disciplined	2	11	13	65%
Number of Formal Complaints Dismissed or Closed	1	4	5	72%

Table 2: City Court Judges (372; 11%)

1989 Dispositions	All Lawyers; Part-Time	All Lawyers; Full-Time	Total	Percent of 1989 Matters
Complaints Received	40	143	183	16%
Complaints Investigated	10	18	28	14.5%
Number of Judges Cautioned After Investigation	2	2	4	8%
Number of Formal Written Complaints Authorized	2	1	3	15%
Number of Judges Cautioned After Formal Complaint	0	2	2	40%
Number of Judges Publicly Disciplined	0	3	3	15%
Number of Formal Complaints Dismissed or Closed	0	0	0	0%

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

1989 Dispositions	All Lawyers; All Full-Time	Percent of 1989 Matters
Complaints Received	92	8%
Complaints Investigated	0	0%
Number of Judges Cautioned After Investigation	1	2%
Number of Formal Written Complaints Authorized	0	0%
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 4: Family Court Judges (114; 3%)

1989 Dispositions	All Lawyers; All Full-Time	Percent of 1989 Matters
Complaints Received	115	10%
Complaints Investigated	8	4%
Number of Judges Cautioned After Investigation	3	6%
Number of Formal Written Complaints Authorized	1	5%
Number of Judges Cautioned After Formal Complaint	1	20%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	0	0%

* Included in this figure are six judges who serve concurrently as County Court and Family Court judges. In addition, there are eleven judges who serve concurrently as County Court and Surrogate's Court judges, and 32 who serve concurrently as County Court, Surrogate's Court and Family Court judges.

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

1989 Dispositions	All Lawyers; All Full-Time	Percent of 1989 Matters
Complaints Received	26	2%
Complaints Investigated	2	1%
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	1	5%
Number of Formal Complaints Dismissed or Closed	0	0%

Table 6: Court of Claims Judges (54; 1.5%)*

1989 Dispositions	All Lawyers; All Full-Time	Percent of 1989 Matters
Complaints Received	5	.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%)*

1989 Dispositions	All Lawyers; All Full-Time	Percent of 1989 Matters
Complaints Received	51	4%
Complaints Investigated	5	2.5%
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	1	14%

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

1989 Dispositions	All Lawyers; All Full-Time	Percent of 1989 Matters
Complaints Received	220	19%
Complaints Investigated	10	5%
Number of Judges Cautioned After Investigation	4	8%
Number of Formal Written Complaints Authorized	1	5%
Number of Judges Cautioned After Formal Complaint	1	20%
Number of Judges Publicly Disciplined	2	10%
Number of Formal Complaints Dismissed or Closed	1	14%

* Included in this total are eleven Surrogates who serve concurrently as County Court judges and 32 who serve concurrently as Family Court and County Court judges.

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

1989 Dispositions	All Lawyers; All Full-Time	Percent of 1989 Matters
Complaints Received	19	1.5%
Complaints Investigated	1	.5%
Number of Judges Cautioned After Investigation	1	2%
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

1989 Dispositions	Number	Percent of 1989 Matters
Complaints Received	110	9%

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 1989 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 1989 in which it determined that the judge involved be removed from office.

Matter of Irving W. Levine

The Commission determined that Irving W. Levine, a Judge of the Civil Court of the City of New York, Kings County, be removed from office for promising a former political leader

that he would adjourn a pending case at the leader's request and for lying to FBI agents about the meeting with the political leader.

In its determination of January 23, 1989, the Commission found that Judge Levine met with Meade Esposito, former chairman of the Executive Committee of the Kings County Democratic Party, and told Mr. Esposito that he would adjourn a commercial holdover proceeding pending before him. Thereafter, Judge Levine granted requests by both parties to adjourn the matter. When questioned by the FBI about the meeting with Mr. Esposito, Judge Levine falsely stated that he did not discuss the case.

The Commission found that by making the promise to Mr. Esposito, Judge Levine conveyed the appearance that his decisions thereafter to grant adjournments were influenced by the request. The Commission concluded that a judge who conveys such an appearance and gives false information to government agents is not fit for judicial office.

Judge Levine requested review of the Commission's determination by the Court of Appeals, which ordered his removal on October 13, 1989. Matter of Levine, 74 NY2d 294 (1989).

Matter of Donald G. Masner

The Commission determined that Donald G. Masner, a Justice of the Westmoreland Town Court, Oneida County, be removed from office for failing to perform his judicial duties in a

dignified and impartial manner, engaging in a course of conduct prejudicial to the administration of justice, failing to advise defendants charged with criminal conduct of basic due process rights and failing to perform the administrative and adjudicative duties of his office. (Judge Masner is not a lawyer.)

In its determination of January 25, 1989, the Commission found that Judge Masner engaged in a pattern of conduct during arraignment and other pretrial proceedings in criminal cases which evidenced a predisposition not only against the particular defendant before him but against defendants generally. The Commission found that Judge Masner improperly conducted routine "pretrial hearings" in which he required defendants, but not representatives of the prosecution, to appear. In these sessions, Judge Masner asked defendants to give statements as to their defense, and he then determined whether the defense warranted a trial.

The Commission concluded that Judge Masner's conduct "offended virtually every minimum standard of appropriate judicial conduct, including material ex parte communications, offensive and insulting demeanor, coercive tactics and failure to keep adequate records of cases in his court."

Judge Masner did not request review of the Commission's determination, and the Court of Appeals ordered his removal on March 7, 1989.

Matter of Edward J. Kiley

The Commission determined that Edward J. Kiley, a Judge of the District Court, Suffolk County, be removed from office for interceding on behalf of defendants in two cases and giving testimony that was lacking in candor.

In its determination of April 3, 1989, the Commission found that Judge Kiley spoke to the prosecutor and the presiding judge and offered information which was designed to influence their decisions as to bail of a defendant whose family members were friends and former clients. The Commission also found that Judge Kiley's testimony was evasive and less than forthcoming in that he denied that his purpose in speaking to the prosecutor and the other judge was to influence their bail decisions on the defendant's behalf.

In connection with a second case, the Commission found that Judge Kiley failed to disqualify himself and asked the prosecutors ex parte for a favorable disposition in a case after a friend had spoken to him about the case.

Judge Kiley requested review of the Commission's determination by the Court of Appeals, which modified the sanction to censure on October 24, 1989. Matter of Kiley, 74 NY2d 364 (1989).

Matter of Josephine D. Tyler

The Commission determined that Josephine D. Tyler, a Justice of the Caneadea Town Court, Allegany County, be removed

from office for presiding over a case in which her husband was the complaining witness, striking a youth in the face with a telephone book, exceeding her authority by ordering child support and using the prestige of her office in connection with a personal dispute. (Judge Tyler is not a lawyer.)

In its determination of May 1, 1989, the Commission found that Judge Tyler should have had no part in the case in which her husband was the complaining witness and should not have relied on extra-judicial information in setting bail for the defendant. It also held that she knew or should have known that a town justice does not have the authority to impose child support on the defendant in a family offense matter.

Judge Tyler requested review of the Commission's determination by the Court of Appeals, where the matter is pending. On June 30, 1989, the Court suspended Judge Tyler pending disposition of her request for review, and she resigned her judicial office on September 25, 1989.

Matter of Stephen A. More

The Commission determined that Stephen A. More, a Justice of the Springfield Town Court, Otsego County, be removed from office for failing to deposit court funds promptly in his official account and failing to remit funds promptly to the state comptroller as required by law. (Judge More is not a lawyer.)

In its determination of August 25, 1989, the Commission found that over a period of four years Judge More failed to deposit and remit court funds promptly.

The mishandling of court funds by a judge raises questions about the interim use of the money and diminishes public confidence in the individual judge and in the judiciary as a whole, the Commission held.

Judge More did not request review of the Commission's determination, and the Court of Appeals ordered his removal on October 6, 1989.

Matter of Walter Andela

The Commission determined that Walter Andela, a Justice of the Exeter Town Court, Otsego County, be removed from office for failing to deposit and remit court funds promptly and for neglecting his adjudicative and administrative responsibilities. (Judge Andela is not a lawyer.)

In its determination of December 6, 1989, the Commission found that Judge Andela had failed to deposit court funds promptly during a three-year period, keeping undeposited money in a desk at his home. It also found that over a four-year period, Judge Andela had failed to remit court funds promptly to the state comptroller as required by law. Judge Andela also neglected 22 cases, failed to keep adequate court records and failed to cooperate in the Commission's investigation.

The Commission determined that Judge Andela neglected nearly every aspect of his judicial duties, and that his disregard for recordkeeping and his carelessness in handling public money breached the public's trust.

Judge Andela did not request review of the Commission's determination, and the Court of Appeals ordered his removal on January 17, 1990.

Matter of James W. Burrell

The Commission determined that James W. Burrell, a Justice of the Franklinville Town Court, Cattaraugus County, be removed from office for converting $610 in court funds to his own use and for failing to deposit court funds promptly in his official account for more than a year. (Judge Burrell is not a lawyer.)

In its determination of December 21, 1989, the Commission found that Judge Burrell had cashed three checks or money orders paid as fines and did not deposit the money in his court account. He also failed to keep any records of the cases and did not report their disposition to the arresting officers or the Department of Motor Vehicles as required by law.

The Commission concluded that the conversion of public funds by Judge Burrell "shocks the conscience," and that his failure to make records of the cases or report their disposition indicates that he was attempting to conceal receipt of the money.

Judge Burrell did not request review of the Commission's determination, and the Court of Appeals ordered his removal on February 6, 1990.

Determinations of Censure

The Commission completed eight disciplinary proceedings in 1989 in which it determined that the judges involved be censured.

Matter of William E. Abbott

The Commission determined that William E. Abbott, a Justice of the Palmyra Town Court, Wayne County, be censured for soliciting an affidavit from a witness in a case pending in another court as a favor to the defendant's attorney, who is a friend of the judge. (Judge Abbott is not a lawyer.)

In its determination of April 5, 1989, the Commission found that Judge Abbott asked the 17-year-old victim of a robbery to come to his home and sign an affidavit that the judge understood would be used by the defendant's attorney to try to avoid a state prison sentence for his client. In doing so, he argued strenuously for the lawyer's cause and made a racist remark concerning the makeup of the prison population.

The Commission concluded that Judge Abbott used the prestige of his judicial office to try to obtain a favor for his friend (the defendant's attorney).

Judge Abbott did not request review by the Court of Appeals.

Matter of Christopher H. D'Amanda

The Commission determined that Christopher H. D'Amanda, a Justice of the Penfield Town Court, Monroe County, be censured for abusing the authority of his office in three traffic incidents. (Judge D'Amanda is a lawyer.)

In its determination of April 26, 1989, the Commission found that Judge D'Amanda had used the prestige of his office on three occasions to avoid receiving traffic tickets.

The Commission's determination concluded that a judge may not by his own conduct flout the laws he is sworn to uphold and expect to sustain the confidence and trust of the people in whose name he administers justice, and that the mention of judicial office for the purpose of obtaining special treatment is unethical.

Judge D'Amanda did not request review by the Court of Appeals.

Matter of William R. Crosbie

The Commission determined that William R. Crosbie, a Justice of the Tarrytown Village Court, Westchester County, be censured for making three improper telephone calls to police in connection with the arrest of a family and political associate. (Judge Crosbie is a lawyer.)

In its determination of September 8, 1989, the Commission found that Judge Crosbie was motivated by personal and political interests in making the calls and that he repeatedly invoked the prestige of his judicial office and threatened to impede the administration of justice by refusing to hear arraignments in the neighboring community where a candidate of the judge's party had been arrested.

The Commission concluded that Judge Crosbie was "clearly attempting to use the power and prestige of judicial office for personal and political ends."

Judge Crosbie did not request review by the Court of Appeals.

Matter of Edward J. Greenfield

The Commission determined that Edward J. Greenfield, a Justice of the Supreme Court, New York County, be censured for long delays in disposing of pending matters.

In its determination of September 28, 1989, the Commission found that Judge Greenfield had delayed rendering decisions or deciding motions in eight cases for as long as nine years.

The Commission found the delays to be "unreasonable," "inexcusable" and "unconscionable."

Judge Greenfield requested review of the Commission's determination by the Court of Appeals, where the matter is pending.

Matter of E. Wendell Ross

The Commission determined that E. Wendell Ross, a Justice of the Chester Town Court, Warren County, be censured for improperly failing to disqualify himself in several cases. (Judge Ross is not a lawyer.)

In its determination of September 29, 1989, the Commission found that Judge Ross heard three cases in which the defendants were related within the sixth degree of relationship, four cases in which the defendants were clients of his private business, one case in which he was the complaining witness, one case in which his personal attorney represented a party and one case in which he had a financial relationship with a party.

The Commission determined that Judge Ross violated clear prohibitions and precedents which require a judge to disqualify himself in matters in which his impartiality might reasonably be questioned.

Judge Ross did not request review by the Court of Appeals.

Matter of Eugene M. Hanofee

The Commission determined that Eugene M. Hanofee, a Judge of the County Court and Surrogate's Court, Sullivan County, be censured for refusing to permit a lawyer to practice in his court after the lawyer objected to the judge's remarks in a criminal case, requesting favorable treatment for a lawyer from

another judge and attempting to interfere with the Commission's investigation of a complaint.

In its determination of October 27, 1989, the Commission found that Judge Hanofee had refused to permit a lawyer to appear before the judge for 88 days after the lawyer objected to the judge's remarks about the ethnicity of certain defendants. Judge Hanofee acted arbitrarily, without commencing any formal proceeding in which the attorney might be heard.

The Commission also found that Judge Hanofee had engaged in misconduct by calling another judge and asking him to "be nice" to a lawyer that was appearing before the other judge that day. It also held that in telling a lawyer who was to be a Commission witness in an investigation of the judge, "Don't hurt me," the judge attempted to interfere with the Commission's discharge of its lawful mandate.

Judge Hanofee requested review of the Commission's determination by the Court of Appeals, but his request was dismissed because of the judge's failure to file a record and brief.

Matter of James T. Phillips, Jr.

The Commission determined that James T. Phillips, Jr., a Justice of the Morristown Town Court, St. Lawrence County, be censured for allowing his personal attorney to appear in his court and to draft several documents in a case without the

knowledge of the prosecutor, and for neglecting another case. (Judge Phillips is not a lawyer.)

In its determination of November 3, 1989, the Commission found that Judge Phillips allowed a lawyer to appear in a criminal matter notwithstanding that the lawyer had represented him and his wife on several occasions. Judge Phillips also allowed the lawyer to draft his written decision dismissing the case, an amended order and his return on appeal, all without notice to the prosecutor.

The Commission held that Judge Phillips should have disclosed his relationship with the defendant's attorney and offered to disqualify himself. The Commission concluded that, by communicating with the lawyer ex parte, discussing the case and permitting him to draft decisions and other court papers, Judge Phillips exacerbated the appearance of impropriety. The Commission also found that the judge had neglected a second case for 15 months, then improperly issued a warrant for the defendant's arrest even though he had never been ordered to appear in court.

Judge Phillips did not request review by the Court of Appeals.

Matter of Henry Goebel, Jr.

The Commission determined that Henry Goebel, Jr., a Justice of the Nassau Town Court and the Nassau Village Court, Rensselaer County, be censured for failing to remit court funds

promptly to the state comptroller over an eleven-year period. (Judge Goebel is not a lawyer.)

In its determination of December 26, 1989, the Commission found that Judge Goebel had not remitted court funds promptly to the comptroller as required by law from January 1978 to March 1989, notwithstanding a cautionary warning by the Commission in 1979 that he do so and 96 letters from the comptroller requesting the reports.

The Commission determination noted that the mishandling of public funds constitutes misconduct, even when not done for a judge's personal profit, and that the judge's failure to heed the warning by the Commission exacerbated his misconduct.

Judge Goebel did not request review by the Court of Appeals.

Determinations of Admonition

The Commission completed five disciplinary proceedings in 1989 in which it determined that the judges involved be admonished.

Matter of Edward A. Rath

The Commission determined that Edward A. Rath, a Justice of the Supreme Court, Erie County, be admonished for attending four political functions when he was not a candidate.

In its determination of February 21, 1989, the Commission found that Judge Rath had attended two fund-raisers in

support of his wife's political candidacy and had accompanied his wife at two other political events.

The Commission concluded that judges must hold themselves aloof from political activity and may not accompany their spouses to political events or participate in their spouses' political campaigns.

Judge Rath did not request review by the Court of Appeals.

Matter of Wayde F. Earl

The Commission determined that Wayde F. Earl, a Justice of the Lake George Village Court, Warren County, be admonished for failing to advise numerous criminal defendants of their right to counsel and for discouraging defendants in some cases from exercising their right to counsel. (Judge Earl is not a lawyer.)

In its determination of March 31, 1989, the Commission found that Judge Earl had also disregarded the fact that defendants were too intoxicated to understand the proceedings and had failed to rearraign them. He also accepted waivers of arraignment and the right to counsel in some cases.

The Commission noted that Judge Earl disregarded the law notwithstanding that he had been on the bench for more than eleven years and was familiar with the Criminal Procedure Law.

Judge Earl did not request review by the Court of Appeals.

Matter of Carmelo J. Tavormina

The Commission determined that Carmelo J. Tavormina, a Judge of the Civil Court of the City of New York, Kings County, be admonished for four instances of discourteous conduct. In its determination of May 3, 1989, the Commission found that Judge Tavormina exhibited undignified, intemperate and discourteous conduct toward attorneys in his courtroom. In one instance, the judge loudly accused a lawyer of being a liar, partly in retaliation for the fact that she and others had filed a complaint with the Commission.

The Commission concluded that Judge Tavormina failed to exhibit the dignity and courtesy expected of every judge, and that his act of retaliation alone constituted misconduct.

Judge Tavormina did not request review by the Court of Appeals.

Matter of Kenneth VanBuskirk

The Commission determined that Kenneth VanBuskirk, a Justice of the Whitehall Town Court and the Whitehall Village Court, Washington County, be admonished for his improper handling of two cases. (Judge VanBuskirk is not a lawyer.)

In its determination of May 23, 1989, the Commission found that Judge VanBuskirk heard a complaint and issued a criminal summons to a defendant notwithstanding his personal relationship with the family of the complaining witness. Judge

VanBuskirk also intervened on behalf of the same man in order to effect the withdrawal of a warrant issued by another judge.

The Commission determined that, by attempting to find solutions to difficult community problems involving contentious parties, Judge VanBuskirk abandoned his proper role as a neutral and detached magistrate, and that his informality and lack of attention to proper legal procedure conveyed the appearance of partiality.

Judge VanBuskirk did not request review by the Court of Appeals.

Matter of Joseph Slavin

The Commission determined that Joseph Slavin, a Judge of the Civil Court of the City of New York and an Acting Justice of the Supreme Court, Kings County, be admonished for improperly jailing a criminal defendant because his lawyer had failed to appear in court.

In its determination of August 7, 1989, the Commission found that because defense counsel was not present in court, Judge Slavin revoked the bail of a defendant who had previously appeared on 26 of 27 occasions and remanded the defendant to jail, notwithstanding that the lawyer had advised court personnel that he was actually engaged in another court.

The Commission noted that Judge Slavin's only legitimate concern with regard to bail should have been to insure the defendant's future appearance, and that he knew or should

have known that it was improper to deny a defendant his liberty because of the actions of another person over whom the defendant had no control.

Judge Slavin did not request review by the Court of Appeals.

Dismissed Formal Written Complaints

The Commission disposed of 12 Formal Written Complaints in 1989 without rendering public discipline.

In five 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 a confidential letter of dismissal and caution.

In one case, the Commission determined that the judge's misconduct had been established but closed the matter in view of the fact that the judge had retired from judicial office. The Commission closed two other matters without making any findings as to misconduct, because the judges had resigned.

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

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 1989, 55 letters of dismissal and caution were issued by the Commission, five of which were issued after formal charges had been sustained and a determination made that the judges had engaged in misconduct. (Thirty-eight town or village justices were cautioned; two part-time city court judges were cautioned; fifteen other full-time judges were cautioned.)

The caution letters addressed various types of conduct. For example, thirteen judges were cautioned for inordinate delay in disposing of cases and reporting them to the State Comptroller.

Nine judges were cautioned for engaging in improper ex parte communications, including visiting the site of property which was the subject of a dispute, visiting the home of a defendant, interviewing witnesses outside the court, and revising a decision after discussing the matter by telephone with the defendant.

Six judges, some full-time, others part-time, were cautioned for engaging in impermissible political activity, which included: two judges confronting supporters of their political opponents about their displays of political signs; referring to an opponent in disparaging and insulting terms; contacting individuals who had served as jurors in the judge's court to ask their support in the judge's re-election campaign; attending a political fund-raiser at a time when the judge was not a candidate for judicial office; and notarizing a political party designating petition that contained false information.

A part-time judge was cautioned for serving as a director of public safety. Another part-time judge was cautioned for representing defendants in other courts after the defendants' cases were transferred from the judge's court. One full-time judge was cautioned for making inappropriate and insensitive public remarks about the victim of a serious crime. Another full-time judge was cautioned for ordering funds under the jurisdiction of his court into a financial institution from which he had received a loan less than two weeks before. Another full-time judge was cautioned for retroactively releasing a defendant

who had been mistakenly released from custody; the subsequent order was intended to assist non-judicial personnel who had permitted the defendant to leave without posting bail under the original order.

Judges were also cautioned, inter alia, for: using judicial stationery in a private dispute; refusing to permit an attorney to represent a defendant in a small claims case; summoning a defendant to court and questioning him in the absence of the defendant's attorney; and telling a defendant that he would "throw [her] butt in jail" if she violated an order of protection.

Since April 1, 1978, the Commission has issued 441 letters of dismissal and caution, 36 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

Thirteen judges resigned in 1989 while under investigation or under formal charges by the Commission.

Since 1975, 181 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 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 1989, the Commission referred 29 matters, involving complaints against housing court judges, court employees or administrative issues, to either the Office of Court Administration or an administrative judge. Six complaints against lawyers were referred to the appropriate disciplinary committee. One complaint, which was closed as a result of the judge's retirement from office, was referred to the District Attorney for appropriate action.

SUMMARY OF COMPLAINTS CONSIDERED
SINCE THE COMMISSION'S INCEPTION

Since January 1975, when the temporary Commission commenced operations, 11,851 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 8591 (72%) were dismissed upon initial review and 3260 investigations were authorized. Of the 3260 investigations authorized, the following dispositions have been made through December 31, 1989:

-- 1524 were dismissed without action after investigation;

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

-- 239 were closed upon resignation of the judge;

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

-- 525 resulted in disciplinary action.

-- 123 are pending.

Of the 525 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission:[3]

-- 92 judges were removed from office;

-- 1 additional removal determination and 1 censure determination are pending review in the Court of Appeals;

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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.

-- 3 judges were suspended without pay for six months (under previous law);

-- 2 judges were suspended without pay for four months (under previous law);

-- 169 judges were censured publicly;

-- 92 judges were admonished publicly; and

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

In addition, 181 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 46 Commission determinations, 37 of which were for removal, seven for censure and two for admonition. The Court accepted the sanction determined by the Commission in 36 cases, 31 of which were removals. In two cases, the Court increased the sanction from censure to removal. In eight cases, the Court reduced the sanction that had been determined by the Commission, reducing six removals to censure, and two censures 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 1989, the Court had before it seven requests for review, two of which had been filed in 1988 and five of which were filed in 1989. Of these seven matters, the Court decided four; one was dismissed because the judge failed to file a record and brief; two are pending.

Matter of William H. Intemann, Jr.

On October 25, 1988, the Commission determined that William H. Intemann, Jr., a Judge of the County Court, Family Court and Surrogate's Court, Hamilton County, be removed from office for engaging in business activity and practicing law while sitting as a full-time judge, and failing to disqualify himself in certain matters. Judge Intemann requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated June 6, 1989, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Intemann, 73 NY2d 580 (1989).

The Court concluded that the judge had improperly participated in business activity, practiced law while sitting as a judge, and failed to disqualify himself in numerous matters brought by an attorney who was his close friend, business associate and personal attorney. In concluding that the sanction of removal was appropriate, the Court noted the seriousness of the judge's improper conduct, including the deception practiced on several of his clients, and the judge's lack of candor, both during the investigation and at the hearing.

Matter of Jerome D. Cohen

On October 28, 1988, the Commission determined that Jerome D. Cohen, a Justice of the Supreme Court, Kings County, be removed from office for receiving personal loans without interest and ordering infants' funds deposited in the same institution.

Judge Cohen requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated June 30, 1989, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Cohen, 74 NY2d 272 (1989).

Upholding the Commission's findings and conclusions, the Court stated that the judge's conduct in obtaining loans from HYFIN Credit Union at favorable rates not available to others, and paying no interest on the loans over a period of five years, at a time when the judge was directing that nearly $250,000 in infants' funds be deposited into HYFIN, created the impression that the judge "was exploiting his judicial office for personal benefit" and that his judicial decisions "were influenced by personal profit motives" (Id. at 277). Accordingly, the Court concluded, the sanction of removal was appropriate.

Matter of Irving W. Levine

On January 23, 1989, the Commission determined that Irving W. Levine, a Judge of the Civil Court of the City of New York, Kings County, be removed from office for promising a former political leader that he would adjourn a pending case at the leader's request, and for lying to the Federal Bureau of Investigation when questioned about the matter. Judge Levine requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated October 13, 1989, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Levine, 74 NY2d 294 (1989).

Accepting the Commission's findings and conclusions, the Court found that by his conduct the judge "conveyed the impression in an ex parte communication that his rulings would not be based on merit but on his allegiance and loyalty to the former political leader" (Id. at 297). Such conduct, the Court concluded, "jeopardizes the public confidence in the integrity and impartiality of the judiciary, indispensable to the administration of justice in our society, and warrants removal from office" (Id.).

Matter of Edward J. Kiley

On April 3, 1989, the Commission determined that Edward J. Kiley, a Judge of the District Court, Suffolk County, be removed from office for interceding on behalf of defendants in two cases. Judge Kiley requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated October 24, 1989, the Court rejected the sanction determined by the Commission and imposed the sanction of censure. Matter of Kiley, 74 NY2d 364 (1989).

While agreeing that the judge's intercession in the two cases was improper, the Court specifically rejected the Commission's finding that the judge's testimony regarding his

motivations in one case lacked candor. The Court stated that reliance by the Commission on lack of candor as an aggravating circumstance "should be approached cautiously" so as not to unfairly deprive a judge "of the opportunity to advance a legitimate defense" (Id. at 371, 370).

As to the underlying conduct, the Court found that by interceding on behalf of defendants in two cases the judge "lent and appeared to lend the prestige of his office to advance the respective defendant's private interests," and thereby engaged in misconduct warranting the sanction of censure (Id.).

SPECIFIC PROBLEM AREAS IDENTIFIED BY THE COMMISSION

In the course of its inquiries and other duties, the Commission has identified certain issues and patterns of conduct that require comment and discussion in a forum other than a disciplinary determination in an individual case, 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.

Violation Of Rights

In numerous cases over the last six years, the Commission has disciplined judges for having deprived defendants and litigants of certain fundamental rights.[4] In several such cases, the Court of Appeals has held that a pattern of denying parties their fundamental rights constitutes misconduct for which discipline is warranted.

In Matter of Reeves, 63 NY2d 105 (1984), a Family Court judge was removed from office for, inter alia, routinely failing to advise litigants of various rights. In 64 cases over a two-year period, the judge was found to have failed to advise parties before him of their right to counsel, the right to remain silent,

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[4]Prior to this year, complaints alleging violations of rights were recorded as "miscellaneous" in the statistical charts appended to the Commission's annual reports. The number of such matters has now increased to such a point as to justify a separate category in those charts and in the Commission's record keeping.

the right to an adjournment to confer with counsel and the right to a blood grouping test in paternity cases, as well as failed to require sworn financial disclosure statements in matrimonial and maintenance cases, all as required by law.

In Matter of Sardino, 58 NY2d 286 (1983), a City Court judge was removed for, inter alia, deliberately failing to read defendants' rights at arraignment and using bail in a punitive fashion. The Court stated:

> The ability to be impartial is an indispensable requirement for a judicial officer. Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property....
>
> 58 NY2d at 290-91

In Matter of McGee, 59 NY2d 870 (1983), a town justice was removed from office for, inter alia, engaging in a course of conduct prejudicial to the administration of justice over two years by failing to advise defendants in criminal cases of their rights, including: the right to counsel, to communicate by phone or letter for the purpose of obtaining counsel, to have counsel assigned, to have pre-trial hearings in felony cases, and to trial by jury. The judge also routinely failed to give defendants copies of the accusatory instruments and used bail coercively to obtain guilty pleas.

In Matter of Cook, reported in the Commission's 1987 Annual Report, a town justice was removed from office for, inter alia, failing to advise defendants in criminal cases of their rights, including the right to counsel, to court-appointed counsel if the defendant could not afford it, or an adjournment for the purpose of obtaining counsel, all as required by law.

In Matter of Straite, reported in the Commission's 1988 Annual Report, a village justice was removed from office for, inter alia, failing to advise defendants of the right to assigned counsel, and excoriating defendants for their alleged misbehavior even before they entered pleas.

In Matter of Jutkofsky, reported in the Commission's 1986 Annual Report, a town justice was removed from office for, inter alia, denying scores of defendants their rights by inducing guilty pleas, sentencing unrepresented defendants to jail for periods of time in excess of the maximum allowed by law and issuing arrest warrants in matters over which he did not have jurisdiction.

In Matter of Masner, reported in this Annual Report, a town justice was removed from office for, inter alia, failing to advise defendants in criminal cases of their rights and conducting so-called "pre-trial" hearings in which only the defendants would appear, to be interrogated by the judge without benefit of counsel or even the presence of a prosecuting attorney.

Seventeen complaints alleging violation of rights are presently being investigated by the Commission, including at least one which has proceeded to a Formal Written Complaint.

Numerous judges have argued that such violations of rights constitute appealable errors of law, or misinterpretation of laws, and do not constitute misconduct. The Court of Appeals specifically rejected that argument in Reeves, supra:

> Petitioner contends that the failure to notify [parties] of their rights and purported violations of statutory procedures are "mistakes and errors of law" which can be corrected on appeal and which fall short of judicial misconduct. A repeated pattern of failing to advise litigants of their constitutional and statutory rights, however, is serious misconduct....
>
> 63 NY2d at 109

The continued incidence of repeated failures to accord litigants their rights is especially troubling in the face of numerous Court of Appeals cases disciplining judges for the practice. Judges should take great care to abide by the law and avoid abusing their broad discretionary powers in making decisions regarding detention. The Commission does not act as an appellate court and does not involve itself in questions of judicial discretion or errors of law. Only flagrant violations of law, which demonstrate willful or reckless disregard of law, incompetence or bias, will become the subject of Commission inquiry and, where appropriate, discipline.

Improper Ex Parte Communications With Defense Attorneys

In last year's annual report, the Commission commented on the problem of judges who improperly discuss the merits of particular cases on an ex parte basis with prosecutors and other law enforcement representatives, and who otherwise rely improperly on prosecutors in what should be the impartial discharge of judicial duties.

In this report, the Commission addresses the reverse side of the same issue: judges who rely improperly upon or consult improperly with defense attorneys and then take action in a case, without affording the prosecution an appropriate opportunity to be heard.

For example, in Matter of Phillips (reported in this annual report), the Commission found that a town justice improperly communicated ex parte with the defense attorney in a criminal case, then permitted the defense attorney to draft three important documents -- including the judge's decision to dismiss the criminal charges -- all without notice to the prosecutor.

In Matter of Conti, 70 NY2d 416 (1987), a town justice was removed from office for, inter alia, communicating ex parte with the defendant (who happened also to be his personal attorney) in a speeding case, and thereafter dismissing the matter without notifying the prosecutor or affording the prosecutor an opportunity to be heard.

Ex parte practices in which judges rely improperly on either the prosecution or defense undermine a fundamental

judicial obligation to hear both sides in a dispute fairly in order to render judgment impartially. It distorts the judicial process for the trial judge to discuss the merits of a case with one side in private, then act without even notifying the other side or otherwise affording an appropriate opportunity to be heard. 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.

Coercion Of Pleas In Traffic Cases

The Commission disciplined a town justice (see Matter of Masner in this report) and confidentially cautioned a second town justice in 1989 for an improper practice that appears not to be isolated -- requiring traffic defendants who plead "not guilty" to appear ex parte prior to trial for the apparent purpose of obtaining guilty pleas.

Section 1806 of the Vehicle and Traffic Law requires that "upon receipt" of a not guilty plea by mail to a traffic violation, a judge "shall advise the [defendant] of the trial date by first class mail...."

In the 1989 case resulting in caution, the judge acknowledged a practice of requiring traffic defendants who plead not guilty to appear in court, presumably for the purpose of setting a trial date. The judge said that this practice was designed to allow "the defendant an additional opportunity to

enter a more informed plea." The prosecution was not notified or required to appear.

Such a policy -- mandating, in effect, an involuntary appearance by the defendant -- is contrary to Section 1806 of the Vehicle and Traffic Law. It places an unnecessary burden upon those who exercise their right to plead not guilty and request a supporting deposition from the ticket-issuing officer. It is also coercive, in that it implies that a plea of not guilty is not an "informed plea," and that the only way for the defendant to avoid more than one appearance in court is to change the plea to guilty. Indeed, in some areas of the state, defendants who plead not guilty are routinely scheduled to appear for what is called a "Not Guilty Hearing," at which they may either change their plea or be scheduled for trial at a later date. There is no basis in law for a so-called "Not Guilty Hearing."

In public forums, some town and village justices have vehemently defended this practice as necessary to encourage plea bargains, avoid time-consuming trials and expedite dispositions. Other justices have sharply criticized the practice as being contrary to law and inconsistent with the fair and proper administration of justice.

The Commission recommends that the Office of Court Administration address this subject in its training programs for judges, advising judges (as we do here and in our cautions) to avoid this coercive and burdensome practice.

Criticism Of Jurors

Section 100.3(a)(3) of the Rules Governing Judicial Conduct requires a judge to be patient, dignified and courteous to jurors and others who appear before them.

Over the years, the Commission has become aware of instances in which some judges have criticized jurors for their verdicts, particularly in criminal cases in which the defendants were acquitted. The Commission has confidentially cautioned some judges for such conduct.

The American Bar Association Standards (Section 5.13, The Function of the Trial Judge) state that a judge may thank jurors for their service but should neither praise nor criticize their verdict.

Even if done in a temperate manner, criticism of jurors who perform their lawful function in good faith is improper and can undermine public confidence in an essential element of the legal process -- participation by average citizens in the justice system. Jurors who leave jury service, having been told by the judge that they acquitted a guilty person, are apt to remember the experience when they again are called for jury service.

Attendance At Political Events

In previous annual reports, the Commission has discussed various aspects of the prohibition on political activity by judges. The Rules Governing Judicial Conduct were

amended in 1986 to make the limitations on such activity even more specific.

Section 100.7 of the Rules permits political activity by a judge only in furtherance of his or her own campaign for elective judicial office, subject to strict parameters, such as the following rules on attendance at political events.

1. 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 permits attendance at such events up to six months after the general election.

2. 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.

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.

Despite the clarity of these and other provisions of the Rules, the Commission has found that problems persist with respect to attendance by judges at political events. In 1989, for example, the Commission admonished a Supreme Court Justice for attending four political functions at a time when he was not a candidate. (See Matter of Rath in this report.) The judge had attended two fund-raisers on behalf of his wife's candidacy for political office, and on two other occasions he accompanied his wife to political events.

A second judge was cautioned in 1989 for having attended a single political fund-raiser at a time when the judge was not a candidate for judicial office.

All judges, including those who serve part-time or as "acting" judges, must avoid political activity except for the specific activity permitted by Section 100.7 of the Rules.

Use Of A Judge's Name On Charitable Fund-Raising Solicitations

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 to the extent such conduct does not interfere with

the performance of judicial duties or detract from the dignity of judicial office.

A judge may also participate in civic and charitable activities, with several specific limitations. Among them is the prohibition on a judge's soliciting funds for the charitable organization (Section 100.5[b][2] of the Rules). However worthy the cause, a judge cannot promote a charity's fund-raising event. Nor may the judge's name otherwise be used for fund-raising, such as on a printed solicitation or invitation to a fund-raising event. Indeed, pursuant to a specific amendment in 1982 in the Rules, a judge's name may not even be listed on a charity's stationery which is used for fund-raising purposes. This applies even if the judge's title is not included on the letterhead.

Notwithstanding these prohibitions, the Commission's attention is called several times a year, as it was in 1989, to charitable fund-raising solicitations that bear the names of judges. Over the years, the Commission has cautioned several judges in this regard.

Many civic and charitable organizations take appropriate measures to guard against the improper use of a judge's name in fund-raising matters. Others are unaware of the restrictive rules.

Judges who serve as board members or are otherwise active in charitable organizations should advise those organizations of the restrictions in the Rules, thereby avoiding the problems and improper appearances that arise with the use of their names for fund-raising purposes.

STATE COMPTROLLER'S REPORT ON COMMISSION FINANCES

In 1989, the Office of the State Comptroller conducted a financial audit of the Commission's operations. A team of auditors spent approximately 135 person-days reviewing financial records and procedures in the Commission's three offices. Their study included extensive interviews of staff and examination of the records underlying various disbursements. For example, the auditors correlated the public records in certain cases (e.g. transcripts, motion papers and referee reports) with the financial disbursements made in those cases.

In a public report issued at the conclusion of the audit, the Comptroller's office noted that the Commission's finances were in order and that its financial expenditures, records and policies were consistent with state policy and rules.

The Comptroller made no recommendations for change in the Commission's financial practices.

The only dispute between the Commission and the Comptroller's office was over a non-financial matter. In seeking to expand the scope of their review beyond the area of financial accountability into an assessment of the merits of the Commission's decisions in particular cases, the auditors sought access to investigatory material and other records which, by statute, are confidential. They sought, for example, to see files of dismissed complaints and to observe Commission staff in the course of conducting ongoing investigations.

The Commission, citing the strict mandate of confidentiality set forth in Section 45 of the Judiciary Law, declined to reveal statutorily confidential material or to permit the presence of auditors in ongoing inquiries. The Comptroller's report criticized the Commission for this decision, but the auditors never sought through formal means, such as a court order, to contest the Commission's statutory obligation to deny access to confidential files.

Indeed, in the only recommendation contained in his final report, the Comptroller recommended that the Commission urge the Legislature to amend Section 45 of the Judiciary Law and loosen the confidentiality constraints. The Commission has declined to do so.

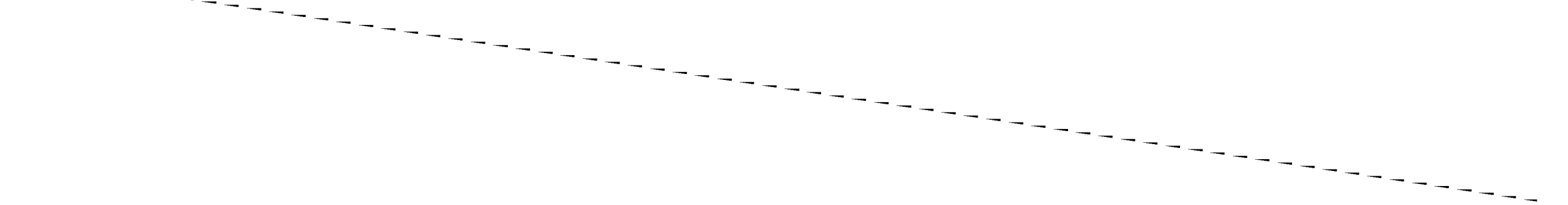
In a response to the Comptroller's report, the Commission advised the Governor, Comptroller and leaders of the Legislature that it has "serious doubts" about the wisdom of the Comptroller's recommendation to amend Section 45. The Commission also raised "serious questions whether the Comptroller should determine from an 'audit' whether the Commission is exercising its discretion wisely" as to individual complaints and determinations. Thus, the Commission was constrained to reject the Comptroller's recommendation, suggesting that any legislative change desired by the Comptroller be proposed directly by the Comptroller to the Governor and Legislature.

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,

John J. Bower, Chairman
Myriam J. Altman
Henry T. Berger
Carmen Beauchamp Ciparick
E. Garrett Cleary
Dolores DelBello
Isaac Rubin
Eugene W. Salisbury
John J. Sheehy



APPENDIX A

BIOGRAPHIES OF COMMISSION MEMBERS

HONORABLE MYRIAM J. ALTMAN is a graduate of Barnard College and the New York University School of Law. She was elected a Justice of the Supreme Court for the First Judicial District in 1987. Prior thereto, from 1978 to 1987, she served a ten-year term as a Judge of the Civil Court of the City of New York, eight and one half of those years as an Acting Justice of the Supreme Court. Justice Altman is a member of the Committee on State Courts of Superior Jurisdiction and the Committee on Women in the Profession of the Association of the Bar of the City of New York and co-chair of the Committee on Continuing Education for the Newly Admitted Lawyer of the New York County Lawyers' Association. She is a member of the Office of Court Administration's Committee on Civil Law and Procedure and a vice president of the New York State Association of Women Judges. She and her husband are the parents of three children.

HENRY T. BERGER, ESQ. is a graduate of Lehigh University and New York University School of Law. He is a partner in the firm of Berger, Poppe, Janiec and Mackasek in New York City. He is chair of the Committee on State Legislation of the Association of the Bar of the City of New York. Mr. Berger served as a member of the Council of the City of New York in 1977.

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.

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 of the Puerto Rican Bar Association. Judge Ciparick is a member of 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 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 DelBello Associates in Armonk, New York. Mrs. DelBello is a member of Alpha Delta Kappa, the international honorary society for women educators; the National Association of Female Executives; the Westchester Public Relations Association; the Founders Club of the Yonkers YWCA; National Association of Negro Women; the Board of Directors for Greyston Inn and President of the Board of Directors of the the Northern Westchester Center for the Arts. She was formerly a member of the League of Women Voters; The Hudson River Museum Board of Directors; Lehman College Performing Arts Center; Westchester Women in Communications; Naylor Dana Institute for Disease Prevention, American Health Foundation.

VICTOR A. KOVNER, ESQ., is a graduate of Yale College and the Columbia Law School. He was a partner in the firm of Lankenau Kovner & Bickford, which is now known as Lankenau & Bickford. Mr. Kovner served as a member of the Mayor's Committee on the Judiciary from 1969 through 1985. Mr. Kovner was 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. For many years, Mr. Kovner served on the board of directors of the Committee for Modern Courts. He was Chair of the Legal Affairs Committee of the Magazine Publishers of America and he served 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 was acting chair of the Board of Trustees of the American Place Theater. In 1988, Mr. Kovner was awarded a Citation of Merit from the American Judicature Society. Mr. Kovner resigned from the Commission upon his appointment as Corporation Counsel of the City of New York in January 1990.

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 a former member of the National Advisory Council of the Salvation Army and is now an Honorary Member of the Albany Salvation Army Board. In 1988 the Salvation Army of Albany gave Mrs. Robb the Award for Outstanding Community Service. 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 a former member of the Executive Committee of the Board of the American Judicature Society and a former member of its Board. She serves on the Visiting Committee for Fellowships and Internships of the Nelson A. Rockefeller Institute of Government. Mrs. Robb was given an award in 1976 by the Albany Area Chamber of Commerce for outstanding contributions on behalf of the Civic and Community Development of the Albany area and its surrounding Communities. In 1982 she received an honorary degree of Doctor of Law from Siena College in Loudonville. In 1984 Mrs. Robb was awarded the Regents' Medal of Excellence for her community service to New York State. In 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 in New York State. The University of Nebraska gave to Mrs. Robb their Alumni Achievement Award. Mrs. Robb had been a member of the Commission since its inception until her resignation in 1989. She is the mother of four children and grandmother of eleven.

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. (He is presently serving by certification.) 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.

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 the Chairman 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.

HONORABLE EUGENE W. SALISBURY is a graduate of the University of Buffalo and the University of Buffalo Law School. He is Senior Partner in the law firm of Lipsitz, Green, Fahringer, Roll, Schuller & James of Buffalo and New York City. He has also been the Village Justice of Blasdell since 1961. Since 1963, Judge Salisbury has served as a lecturer on New York State Civil and Criminal Procedure, Evidence and Substantive Criminal Law for the State Office of Court Administration. He has served as President of the State Magistrates Association and in various other capacities with the Association, as Village Attorney of Blasdell and as an Instructor in Law at SUNY Buffalo. Judge Salisbury has authored published volumes on forms and procedures for various New York courts, and he is Program Director of the Buffalo Area Magistrates Training Course. He serves or has served on various committees of the American Bar Association, the New York State Bar Association and the Erie County Bar Association, as well as the Erie County Trial Lawyers Association and the World Association of Judges. Judge Salisbury served as a U.S. Army Captain during the Korean Conflict and received numerous Army citations for distinguished and valorous service. Judge Salisbury and his wife reside in Blasdell, New York.

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, and has served on its Committees on Professional Discipline and Professional and Judicial Ethics.

CLERK OF THE COMMISSION

ALBERT B. LAWRENCE, ESQ., holds a B.S. in journalism from Empire State College, an M.A. in criminal justice from Rockefeller College and a J.D. from Antioch University. He joined the Commission staff in 1980 and has been Clerk of the Commission since 1983. He also teaches law, criminal justice and journalism at Empire State College, State University of New York. A former newspaper reporter, Mr. Lawrence was awarded the New York State Bar Association Certificate of Merit "for constructive journalistic contributions to the administration of justice." He is vice president of the Capital Region Committee, New York Civil Liberties Union.

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. Mr. Postel is a member of the Monroe County Bar Association's Committee on Professional Performance and Public Education.

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 those who were designated as referees in Commission cases 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.

Biographies of the Commission members are set forth in Appendix A. A list of Commission staff members is also appended.

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 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.

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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.

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 1989

REFEREE	CITY	COUNTY
Patrick J. Berrigan, Esq.	Niagara Falls	Niagara
William R. Brennan, Esq.	Buffalo	Erie
Bruno Colapietro, Esq.	Binghamton	Broome
J. Kenneth Campbell, Esq.	Mineola	Nassau
Daniel G. Collins, Esq.	New York	New York
Mary C. Daly, Esq.	New York	New York
C. Benn Forsyth, Esq.	Rochester	Monroe
Bernard H. Goldstein, Esq.	New York	New York
Hon. Matthew J. Jasen	Buffalo	Erie
John F. Luchsinger, Jr., Esq.	Syracuse	Onondaga
Hon. John S. Marsh	Niagara Falls	Niagara
Carroll J. Mealey, Esq.	Albany	Albany
Edward S. Spector, Esq.	Buffalo	Erie
Michael Whiteman, Esq.	Albany	Albany

State of New York
Commission on Judicial Conduct

APPENDIX D

Determinations
Rendered in 1989

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

WILLIAM E. ABBOTT,

a Justice of the Palmyra Town Court, Wayne County.

Determination

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

David Lee Foster for Respondent

The respondent, William E. Abbott, a justice of the Palmyra Town Court, Wayne County, was served with a Formal Written Complaint dated April 28, 1988, alleging that he solicited an affidavit from a witness in a case pending in another court on behalf of the defendant's counsel, who is a friend of respondent. Respondent filed an answer dated May 16, 1988.

By order dated May 25, 1988, the Commission designated Jacob D. Hyman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 8, 1988, and the referee filed his report with the Commission on October 29, 1988.

By motion dated November 18, 1988, 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 censured. Respondent opposed the motion on December 14, 1988. The administrator filed a reply on January 9, 1989.

On January 19, 1989, 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 has been a justice of the Palmyra Town Court for approximately ten years. Previously, he was a justice of the Palmyra Village Court for approximately seven years. Respondent is not a lawyer.

2. Respondent has known Ronald C. Valentine, the Wayne County public defender, as an attorney and friend for approximately 20 years.

3. In July 1987, Mr. Valentine approached respondent after court and asked him to sign an affidavit on behalf of Gerald M. Van Hout, a client of Mr. Valentine who had been charged before another court with the armed robbery of a grocery store. Mr. Valentine hoped to use the affidavit in support of a motion to dismiss the indictment against Mr. Van Hout.

4. Respondent refused to sign an affidavit because of his judicial position.

5. Mr. Valentine then asked respondent whether he knew Tammi L. Tice, the grocery store cashier who was allegedly robbed at gunpoint by Mr. Van Hout. Respondent replied that his daughter, Terri, and her friend, Carl Sergeant, knew Ms. Tice. Mr. Valentine appealed to respondent to have his daughter contact Ms. Tice and ask her to sign an affidavit.

6. Respondent asked Mr. Valentine whether it would be proper for him, as a judge, to do so. Mr. Valentine assured him that it would.

7. Mr. Valentine subsequently made two telephone calls to respondent to determine whether Ms. Tice had been contacted.

8. Respondent understood that the affidavit would be used by Mr. Valentine in an effort to avoid a state prison sentence for his client. Mr. Valentine told respondent that Mr. Van Hout had psychological problems and delivered psychological reports on Mr. Van Hout to respondent's home. He also delivered affidavits signed by others in support of the motion, including Ms. Tice's boss at the grocery store. Respondent reviewed the documents.

9. Respondent asked Mr. Sergeant to speak with Ms. Tice about the affidavit. She told Mr. Sergeant that she would be willing to speak to respondent about the matter.

10. On August 2, 1987, Mr. Sergeant called Ms. Tice by telephone and told her that respondent would call her later that evening.

11. At about 10:00 P.M., respondent called Ms. Tice and asked her to come to his home. Ms. Tice, who was then 17 years old, stated that she wished to bring her mother, Donna Rae Powers.

12. Ms. Tice and Ms. Powers arrived at respondent's home about five minutes later. Respondent initially introduced himself as Mr. Abbott or Bill Abbott. He then either referred to himself as a judge or acknowledged that he was a judge in response to a remark by Ms. Powers. At the time, both Ms. Tice and Ms. Powers knew that respondent was a judge.

13. Respondent indicated that he was doing a "favor" for his friend, Mr. Valentine, who was seeking to avoid a mandatory prison sentence

for Mr. Van Hout. Respondent said that Mr. Van Hout "didn't mean" to rob the store and was sorry for what he had done. He indicated that Mr. Van Hout was a "nice guy" who had emotional problems. Respondent showed Ms. Tice the affidavit signed by her employer.

14. Respondent told Ms. Tice that Mr. Van Hout would be "worse off" if he were sentenced to Attica, which respondent described as "90 percent black, 5 percent Puerto Rican and 5 percent white."

15. Ms. Tice refused to sign the affidavit. Respondent did not discuss the matter further. The women then left his home.

16. On August 4, 1987, Mr. Valentine submitted an omnibus motion in the case, asking, among other things, that the indictment against Mr. Van Hout be dismissed in the interest of justice.

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

Respondent used the prestige of his judicial office to try to obtain a favor for his friend, Mr. Valentine. In doing so, he conveyed the impression to Ms. Tice and her mother that Mr. Valentine was in a special position to influence him.

That he did so outside of court and only mentioned in passing that he was a judge does not diminish the wrong. A judge "...although off the bench remain[s] cloaked figuratively with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others." Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465, 469 (1980).

Respondent argued strenuously for Mr. Valentine's cause, repeating several arguments that the lawyer had given him in favor of his client. Ms. Tice was only 17 years old at the time and knew that respondent was a local judge. "...[A]ny communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office." Matter of Lonschein v. State Commission on Judicial Conduct, 50 NY2d 569, 572 (1980).

In addition, respondent's comment concerning the racial makeup of the prison population was racist. See Matter of Evens, 1986 Annual Report 103 (Com. on Jud. Conduct, Sept. 18, 1985).

There are several mitigating factors which convince us that respondent's removal is not warranted. He has had a long and heretofore

unblemished record on the bench. See Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153, 155 (1986). Although it in no way excuses his misconduct, we take into account in considering sanction that respondent, a layman, was acting under the advice, albeit misguided, of Mr. Valentine, a trusted friend and a member of the bar. See Matter of Reyome, 1988 Annual Report 207, 209 (Com. on Jud. Conduct, Dec. 24, 1987). We also note that once Ms. Tice indicated that she would not sign the affidavit, respondent did not discuss the subject further.

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

Judge Altman, Mr. Berger, Judge Ciparick, Mrs. Del Bello, Mr. Kovner and Judge Ostrowski concur.

Mrs. Robb, Mr. Bower and Judge Rubin dissent as to sanction only and vote that respondent be removed from office.

Mr. Cleary and Mr. Sheehy were not present.

Dated: April 5, 1989

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

WILLIAM E. ABBOTT,

a Justice of the Palmyra Town Court, Wayne County.

DISSENTING OPINION BY MR. BOWER

I dissent from the sanction of censure and vote that respondent be removed from office. There are virtually no factual disputes concerning the underlying events. It is thus established that while Tammi Tice, age 17, was working as a cashier at a supermarket in Palmyra, one Gerald Van Hout entered, pointed a gun at her and demanded the money from her register. During this robbery attempt, one shot was fired. Luckily, it missed Ms. Tice. Shortly after the robbery, Ms. Tice testified before the Grand Jury, which then indicted Gerald Van Hout on two counts of Robbery, First Degree, Criminal Use of A Firearm, First Degree, both felony offenses, Criminal Possession Of A Weapon, Third Degree and Grand Larceny, Fourth Degree. His defense was then assumed by one Ronald Valentine, the Wayne County Public Defender and a long-time friend of respondent.

Two of the charges pending against Van Hout, Robbery, First Degree and Criminal Use Of A Weapon, Third Degree, were violent felony offenses and if convicted, a state prison sentence would have been mandatory. Concerned about his client, Mr. Valentine prepared a motion to dismiss these two violent felony charges and contacted numerous members of the community, including the victims of the attempted robbery, to support such motion.

In his attempts to garner support for the motion, Mr. Valentine asked respondent to sign an affidavit on behalf of Van Hout. Respondent, a judge for over 15 years, properly refused, but he did agree to intercede with the victim, Tammi Tice, who had attended school with respondent's daughter, to persuade her to sign such an affidavit.

Respondent knew, or should have known, that Ms. Tice testified under oath before the Grand Jury and that if the motion to dismiss were denied, she would be one of the main witnesses at the trial against Van Hout. Nonetheless, he asked Ms. Tice to sign an affidavit which recited that Van Hout "attempted to steal money" from the store and that "at no time while he was in the store, was there an attempt on his part to physically harm anyone and no one was hurt." Respondent knew or should have known that if Ms. Tice signed such an affidavit, her value as a prosecution witness

would be severely undermined; not to mention the fact that respondent knew that Van Hout had a gun, pointed it at Ms. Tice and demanded the money in her cash register. Undeterred by such knowledge, he attempted to get her to sign the affidavit, knowing that the facts were otherwise. He told Ms. Tice that Van Hout (whom he called Gerry) had not meant to rob the supermarket, that the robbery was not Van Hout's fault and that Van Hout was sorry that it happened. He also told her that according to psychological reports, Van Hout would be better off in the local jail than if he were sent to Attica where the population was "90 percent black, 5 percent Puerto Rican and 5 percent white." There is no question but that respondent's knowledge of Van Hout, his motives and feelings were based solely on what his friend, the defense counsel, told him, and that his mentioning of the racial makeup at Attica was an obvious attempt to play on presumed prejudices that Ms. Tice might have.

Ms. Tice refused to sign the affidavit, showing a greater sense of responsibility and civic pride than respondent.

It is not an overstatement to say that respondent's attempt to help his friend's client in a case not yet tried, would have compromised Ms. Tice's credibility, would have hindered the prosecution of the case and would have deprived the victim of exercising her right to be heard about the offense in the victim-impact statement (Section 390.30[3][b] of the Criminal Procedure Law). His attempts to describe Van Hout's state of mind, his concern with Van Hout's punishment and his description of Attica (a place respondent had never visited), clearly are contrary to his sworn duty to uphold the law, to be truthful and honest. Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 554 (1986).

Keeping in mind that judicial sanction is not punishment but is tailored to an assessment of whether respondent's retention on the bench is in the public interest (Matter of Vonder Heide v. State Commission on Judicial Conduct, 72 NY2d 658 [1988]; Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105, 111 [1984]), it is hard to see how public confidence in respondent's integrity can exist. He effectively destroyed any semblance of his integrity by these acts.

It is irrelevant under these egregious circumstances that respondent relied on Mr. Valentine's legal advice, or that he was not motivated by venality.

This saga is not of bad judgment or even very bad judgment. It is a tale of irresponsibility and intellectual dishonesty. Respondent's retention on the bench is a luxury that we cannot afford.

Dated: April 5, 1989

State of New York
Commission on Judicial Conduct

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

Determination

WALTER ANDELA,

a Justice of the Exeter Town Court, Otsego County.

— — — — — — — — — — — — — — — — — —

APPEARANCES:

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

Duncan S. MacAffer for Respondent

The respondent, Walter Andela, a justice of the Exeter Town Court, Otsego County, was served with a Formal Written Complaint dated June 8, 1988, alleging that he failed to deposit and remit court funds and that he neglected certain other adjudicative and administrative responsibilities. Respondent filed an answer dated August 9, 1988.

By order dated July 18, 1988, the Commission designated Eugene E. Napierski, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 31 and November 1, 1988, and the referee filed his report with the Commission on August 24, 1989.

By motion dated September 22, 1989, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on October 5, 1989. Oral argument was waived.

On October 19, 1989, 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 has been a justice of the Exeter Town Court since 1979.

2. Between May 1984 and March 1988, respondent failed to remit court funds to the state comptroller by the tenth day of the month following collection, as required by 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, and as denominated in Schedule A appended hereto.

As to Charge II of the Formal Written Complaint:

3. From February 1985 to January 1988, respondent failed to deposit court funds in his court account in a timely manner, as required by Section 30.7(a) of the Uniform Justice Court Rules in effect before January 6, 1986, and Section 214.9(a) of the Uniform Civil Rules for the Justice Courts in effect since January 6, 1986, and amended on March 25, 1987. Funds received and deposited by respondent are denominated in Schedule B appended hereto.

4. Respondent kept undeposited court funds in and on a desk at his home. A Commission investigator found $25 cash and 21 undeposited checks totalling $510 on top of respondent's desk during an examination of court records on April 24, 1987. On May 6, 1987, the investigator found a $50 check dated July 10, 1985, paid to the court as restitution. On April 8, 1988, the investigator found a total of $59 cash in various record books kept by respondent.

5. During this period, respondent's court account was deficient by as much as $809.50. Respondent made no deposits between June 20, 1986, and January 19, 1987, notwithstanding that he received $1,586.90 during that seven-month period.

6. Respondent was aware at all times that he was required to promptly deposit court funds. He has no excuse for not doing so.

As to Charge III of the Formal Written Complaint:

7. From October 1983 to the date of the Formal Written Complaint, respondent failed to dispose of 22 cases involving 14 defendants, as denominated in Schedule C appended hereto.

8. Respondent failed to remit a total of $705 in fines or fees to the state comptroller received in 32 cases involving 29 defendants, as required by law and as denominated in Appendix A to the administrator's motion.

9. Respondent failed to maintain adequate records of the receipt of court funds, as required by Section 31(1)(a) of the Town Law.

10. Respondent failed to maintain complete and adequate records and dockets, as required by Sections 107, 2019 and 2019-a of the Uniform Justice Court Act and Section 31(1)(a) of the Town Law.

11. Between September 1984 and April 1988, respondent failed to maintain a cashbook, as required by Section 105.1 of the Recordkeeping Requirements for Town and Village Courts and Section 30.9 of the Uniform Justice Court Rules in effect before January 6, 1986, and Section 214.11(a)(3) of the Uniform Civil Rules for the Justice Courts in effect since January 6, 1986.

12. Respondent failed to maintain case files and indices of cases, as required by Section 105.1 of the Recordkeeping Requirements for Town and Village Courts and Section 30.9 of the Uniform Justice Court Rules in effect before January 6, 1986; as required by Sections 214.11(a)(1) and 214.11(a)(2) of the Uniform Civil Rules for the Justice Courts in effect since January 6, 1986, and as required by Sections 107, 2019 and 2019-a of the Uniform Justice Court Act.

As to Charge IV of the Formal Written Complaint:

13. Respondent failed to cooperate with the Commission in that he failed to respond to requests by Commission staff that he explain the status of numerous cases pending in his court made in connection with a duly-authorized investigation at respondent's appearance before a member of the Commission on December 15, 1987, and by letters dated October 30, 1987, January 20, 1988, and February 5, 1988.

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 IV of the Formal Written Complaint are sustained, and respondent's misconduct is established. Respondent's motion that he be retired for physical or mental disability is denied.*

Respondent has neglected nearly every aspect of his adjudicative and administrative duties. He failed to promptly deposit court funds in his official account, leaving checks and cash in a desk at his home--in one instance for nearly two years. He failed to promptly remit court funds to

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*With his motion to the Commission, respondent included a letter concerning his health. Respondent had ample opportunity to present evidence concerning his physical and mental condition to the referee and failed to do so. Therefore, the letter appended to his motion is not properly before us and was not considered in rendering this determination.

the state comptroller as required by law. He neglected pending cases and did not keep adequate court records. Respondent also failed to cooperate with Commission staff's investigation of his conduct.

A judge's "disregard for statutory recordkeeping requirements and his carelessness in handling public moneys is a serious violation of his official responsibilities." "Such a breach of the public's trust warrants removal." Matter of Petrie v. State Commission on Judicial Conduct, 54 NY2d 807, 808 (1981). See also Matter of Cooley v. State Commission on Judicial Conduct, 53 NY2d 64 (1981); Matter of Hutzky, 1984 Annual Report 94 (Com. on Jud. Conduct, Nov. 4, 1983).

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

Mr. Kovner, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mrs. Del Bello, Mrs. Robb, Judge Rubin and Mr. Sheehy concur.

Mr. Cleary and Judge Salisbury were not present.

Dated: December 6, 1989

SCHEDULE A

Month and Year of Report	Date Received by Audit and Control	Number of Days Late
5/84	9/4/84	86
6/84	9/4/84	56
7/84	9/4/84	25
8/84	9/4/84	0
9/84	10/9/84	0
10/84	11/19/84	9
11/84	1/28/85	49
12/84	1/28/85	18
1/85	4/23/85	72
2/85	4/23/85	44
3/85	4/23/85	13
4/85	6/26/85	47
5/85	6/26/85	16
6/85	7/16/85	6
7/85	10/31/85	82
8/85	10/31/85	51
9/85	10/31/85	21
10/85	3/14/86	123
11/85	3/14/86	94
12/85	3/14/86	63
1/86	3/14/86	32
2/86	3/14/86	4
3/86	6/25/86	76
4/86	6/23/86	44
5/86	6/23/86	13
6/86	12/15/86	158
7/86	12/15/86	127
8/86	12/15/86	96
9/86	12/15/86	66
10/86	12/15/86	35
11/86	12/15/86	5
12/86	5/14/87	124
1/87	5/14/87	93
2/87	5/14/87	65
3/87	5/14/87	34
4/87	5/14/87	4
5/87	9/14/87	96
6/87	9/14/87	66
7/87	9/14/87	35
8/87	9/14/87	4
9/87	1/20/88	102
10/87	1/20/88	71
11/87	1/20/88	41
12/87	1/21/88	11
1/88	2/18/88	8
2/88	3/16/88	6
2/88 (supplemental)	5/16/88	67
3/88	5/16/88	36

SCHEDULE B

Dates Received	Amount Received	Date of Deposit	Amount of Deposit	Deficiency or Surplus	Cumulative Deficiency or Surplus
2/12-4/11/85	$ 427.88	4/12/85	$ 327.88	$ -100.00	$ -100.00
4/12-6/5/85	1,250.00	6/6/85	1,340.00	90.00	- 10.00
6/6-7/11/85	617.50	7/12/85	592.50	- 25.00	- 35.00
7/12-8/21/85	805.00	8/22/85	715.00	- 90.00	-125.00
8/22-10/14/85	847.00	10/15/85	737.00	-110.00	-235.00
10/15/85-4/10/86	647.00	4/11/86	732.00	85.00	-150.00
4/11-6/19/86	4,188.00	6/20/86	4,148.50	- 39.50	-189.50
6/20/86-1/19/87	1,586.90	1/20/87	1,261.90	-325.00	-514.50
1/20-3/11/87	880.00	3/12/87	585.00	-295.00	-809.50
3/12-4/22/87	145.00	4/23/87	145.00	0	-809.50
4/23-4/30/87	45.00	5/1/87	555.00	510.00	-299.50
5/1-9/9/87	1,740.50	9/10/87	1,825.50	85.00	-214.50
9/10/87-1/14/88	4,075.00	1/15/88	3,740.00	-335.00	-549.50

SCHEDULE C

Defendant	Charge	Date of Arrest
Dennis Brooker	Harassment	6/30/86
Steven Bunn	Criminal Contempt	9/3/84
Sheila Chenel	Uninspected Motor Vehicle	5/10/86
Theodore Fox	Imprudent Speed	5/4/86
Theodore Fox	Leaving The Scene Of An Accident	5/4/86
Theodore Fox	Failure To Keep Right	5/4/86
Alexander Hawkins	Speeding	7/29/85
Patricia Herman	Unregistered Motor Vehicle	8/21/84
William Marquisee	Consumption Of Alcohol In A Motor Vehicle	10/15/83
Russell Schermerhorn	Aggravated Unlicensed Operator	2/25/87
Russell Schermerhorn	Failure To Keep Right	2/25/87
Russell Schermerhorn	Unrestrained Child	2/25/87
Linda Schwartz	Uninspected Motor Vehicle	1/6/87
Tammy Sharlow	Speeding	8/13/87
Peter Wannamaker	Driving While Intoxicated	6/28/86
Peter Wannamaker	Failure To Keep Right	6/28/86
Peter Wannamaker	Criminal Impersonation	6/28/86
Marsha Watson	Uninspected Motor Vehicle	11/1/84
James Wilson	Driving While License Revoked	11/28/85
James Wilson	Driving While Intoxicated	11/28/85
James Wilson	Failure To Keep Right	11/28/85
James Wiltse	Inadequate Headlights	12/20/85

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

JAMES W. BURRELL,

a Justice of the Franklinville Town Court, Cattaraugus County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Honorable James W. Burrell, pro se

The respondent, James W. Burrell, a justice of the Franklinville Town Court, Cattaraugus County, was served with a Formal Written Complaint dated April 12, 1989, alleging that he cashed and retained a total of $610 in court funds and that he failed to deposit court funds promptly for more than a year. Respondent submitted a letter dated April 28, 1989, in response to the complaint.

By order dated May 24, 1989, the Commission designated Patrick J. Berrigan, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 11 and 12, 1989. Respondent did not appear at the hearing. The referee filed his report with the Commission on October 2, 1989.

By motion dated October 16, 1989, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent did not file any papers in response thereto and did not request oral argument.

On November 17, 1989, 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 has been a justice of the Franklinville Town Court during the time herein noted.

2. On November 12, 1987, F.W. Johnston Transport, Inc., was charged with Overwidth Vehicle and Overlength Vehicle. The charges were returnable before respondent.

3. The defendant pled guilty by mail to both charges, and respondent fined the defendant a total of $410.

4. The defendant sent to respondent two money orders for $200 and $210 in payment of the fines. The money orders were made payable to "James Burrell, T.J., Town of Franklinville."

5. On January 15, 1988, respondent cashed the money orders at the Cattaraugus County Bank, where he has a personal checking account. When questioned by bank personnel, respondent falsely stated that he had dismissed the cases and needed the cash to return to a truck driver who was waiting at his home.

6. Respondent did not deposit the money in his official court account.

7. Respondent did not enter the Johnston cases in his docket until November 28, 1988, after he was asked to testify before a member of the Commission. He did not issue a receipt for the fines and kept no case file or cashbook record of the cases. Respondent did not advise the arresting officer of the disposition of the cases and did not report the disposition to the Department of Motor Vehicles, as required by Section 91.19 of the Regulations of the Commissioner of Motor Vehicles. Respondent did not remit the $410 to the state comptroller, as required by 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, until December 4, 1988, after he had been asked to testify before a member of the Commission concerning the cases.

8. On February 8, 1988, Transport Robert was charged with Overwidth Vehicle and Overlength Vehicle. The charges were returnable before respondent.

9. The defendant pled guilty by mail to both charges, and respondent fined the defendant a total of $410.

10. The defendant sent to respondent two checks for $200 and $210 in payment of the fines. The checks were made payable to "James Burrell, T.J."

11. On March 26, 1988, respondent cashed the $200 check at the Cattaraugus County Bank. He again falsely told a bank teller that he needed the cash to return to a truck driver.

12. Respondent did not deposit the $200 in his official court account. He deposited the $210 check on March 28, 1988.

13. Respondent did not enter the Overwidth Vehicle case involving Transport Robert in his docket until November 28, 1988, after being asked to testify before a member of the Commission concerning the matter. He did not issue a receipt for the fines and kept no cashbook record of the Transport Robert cases. Respondent did not advise the arresting officers of the disposition of the cases and did not report the dispositions to the Department of Motor Vehicles. Respondent did not remit the $200 fine to the state comptroller until December 4, 1988, after he was asked to testify before a member of the Commission concerning the matter.

As to Charge II of the Formal Written Complaint:

14. Between March 6, 1987, and June 8, 1988, respondent failed to deposit court funds promptly into his official account, as required by Section 214.9(a) of the Uniform Civil Rules for the Justice Courts, and as denominated in Exhibit 3 of the evidence admitted at the hearing. By the end of the period, respondent's court account was deficient by more than $4,000.

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

The preponderance of the evidence establishes that respondent converted a total of $610 in court funds to his own use by cashing three checks and money orders and did not deposit the money in his court account. The conversion of public funds by a judge entrusted with their care shocks the conscience and warrants removal from office. Matter of Montaneli, 1987 Annual Report 121, 126 (Com. on Jud. Conduct, Nov. 17, 1986); Matter of Moore, 1984 Annual Report 131, 133 (Com. on Jud. Conduct, Nov. 10, 1983).

Respondent exacerbated this gross misconduct by attempting to conceal his receipt of the money. He issued no receipts and made no records of the cases until after Commission staff inquired about them.

Respondent also failed to deposit promptly other funds received during a 15-month period, raising questions about the interim use of the money. See Matter of Rater, 1987 Annual Report 135, 137 (Com. on Jud. Conduct, July 25, 1986), accepted, 69 NY2d 208 (1987).

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

Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Judge Rubin, Judge Salisbury and Mr. Sheehy concur.

Mr. Kovner was not present.

Dated: December 21, 1989

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

WILLIAM R. CROSBIE,

a Justice of the Tarrytown Village Court, Westchester County.

APPEARANCES:

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

John G. Bonomi (Sheldon Amster, Of Counsel) for Respondent

The respondent, William R. Crosbie, a justice of the Tarrytown Village Court, Westchester County, was served with a Formal Written Complaint dated June 6, 1988, alleging that he made three improper telephone calls to police in connection with the arrest of a family and political associate and that he engaged in ex parte communications and was discourteous in a small claims case. Respondent filed an answer dated July 14, 1988.

On July 18, 1988, the Commission designated Robert M. Kaufman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 3, 4 and 5 and November 4 and 15, 1988, and the referee filed his report with the Commission on March 21, 1989.

By motion dated April 17, 1989, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion by cross motion on May 5, 1989. The administrator filed a reply on May 16, 1989. Respondent replied on May 19, 1989.

On July 18, 1989, 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, a lawyer, has been a justice of the Tarrytown Village Court since April 1, 1987.

2. On March 11, 1988, at 12:07 A.M., Michael G. Croke was arrested in the Village of North Tarrytown and charged with Driving While Intoxicated, Driving With A Suspended License, Driving Without A License and other violations of the Vehicle and Traffic Law.

3. Mr. Croke's parents were long-time friends and political associates of respondent. His mother had served as respondent's campaign manager in North Tarrytown when respondent ran for Assembly in 1982. At the time of his arrest, Michael Croke was the Republican candidate for trustee in the Village of North Tarrytown.

4. A news story concerning Mr. Croke's arrest ran in the Tarrytown Daily News on March 11, 1988. Respondent read the story. He heard in street conversations that the police had released the story in order to "sink the Republicans" in the North Tarrytown elections scheduled for March 15, 1988.

5. On March 11, 1988, respondent called the North Tarrytown Police Department and asked to speak to Officer Jose Cotarelo, who had participated in the arrest of Mr. Croke. Respondent identified himself as "Judge Crosbie." He asked Officer Cotarelo whether he had called the press concerning Mr. Croke's arrest. The officer replied that he had not done so. Respondent said:

> Well, they made the telephone call and reported the D.W.I. 'cause Croke's a candidate, so this disturbs me very much. I try to cooperate with the North Tarrytown police, but they're not going to get my cooperation if they're going to report D.W.I.s on Republican candidates....
>
> ... I'm not going to if they're going to hit our candidates. I'm a Republican.

6. On March 12, 1988, respondent called the North Tarrytown Police Department and spoke to Sgt. Gabriel Hayes. Respondent said that he was going to subpoena the police department's tapes of telephone conversations for the day that Mr. Croke was arrested. Sergeant Hayes asked whether respondent was representing Mr. Croke as an attorney. Respondent replied, "No. I'm the judge. I'm the guy that does your arraignments up here, which I've ceased doing now until I find out what happened." Respondent told the sergeant that someone from the police station reported

the arrest to the newspaper, and he called it an "abuse of something up there." He repeated his threat to subpoena the tapes "right away."

7. On March 14, 1988, respondent called North Tarrytown Police Chief Richard J. Spota. Respondent reminded the chief that he had done "lots of arraignments up in your shop...." He told the chief that Mr. Croke's arrest had been reported from a telephone line in the police station and called it "a breach either of ethics or of integrity here...." Respondent threatened not to make himself available for arraignments in the adjoining village and again mentioned issuing a subpoena for the tapes. Chief Spota agreed to examine the tapes to determine whether a call to the newspaper had been made from the police station. He reported to respondent several days later that no such call had been recorded.

8. At no time was Mr. Croke's case before respondent or his court.

As to Charge II of the Formal Written Complaint:

9. The charge 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 and 100.7 of the Rules Governing Judicial Conduct and Canons 1, 2 and 7 of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established. Charge II is dismissed.

Motivated by personal and political interests, respondent made three telephone calls to attempt to confirm his suspicion that police had publicized the arrest of a candidate of his party four days before the election. In pursuit of this aim, respondent repeatedly invoked the prestige of his judicial office and threatened to impede the administration of justice. This is evident from his own words in the three calls.

Respondent said that he was disturbed that police had reported the arrest "'cause Croke's a candidate." He threatened not to cooperate with police in the neighboring community by refusing to conduct arraignments when the regular judge was unavailable "if they're going to report D.W.I.s on Republican candidates." This was repeated several times in a four-day period. Respondent also threatened to use his judicial power to subpoena police tapes of telephone calls made on the day of the candidate's arrest.

Whether he had such power or not, by making such threats, he was clearly attempting to use the power and prestige of judicial office for personal and political ends. This violates Sections 100.2(c) and 100.7 of the Rules Governing Judicial Conduct. The Commission does not accept

respondent's claim that he was merely defending a criminal defendant's fair-trial interests. Such an explanation is not borne out by his words.

A lawyer-judge should be especially sensitive to ethical standards. Matter of MacAffer, 2 Commission Determinations 347, 350-51 (Com. on Jud. Conduct, June 11, 1981); Matter of Darrigo, 2 Commission Determinations 353, 360 (Com. on Jud. Conduct, June 25, 1981). Although he acknowledged at oral argument before the Commission that the telephone calls created the appearance of impropriety, respondent insisted at the hearing eight months after the calls that his conduct was proper. This failure to recognize the impropriety of his actions exacerbates the misconduct. Matter of Shilling v. State Commission on Judicial Conduct, 51 NY2d 397, 404 (1980); 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 censure.

Mrs. Robb, Mr. Berger, Judge Ciparick, Mr. Cleary, Judge Rubin and Judge Salisbury concur.

Mrs. Del Bello and Mr. Kovner dissent as to sanction only and vote that respondent be removed from office.

Mr. Sheehy dissents as to sanction only and votes that respondent be admonished.

Judge Altman and Mr. Bower were not present.

Dated: September 8, 1989

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

WILLIAM R. CROSBIE,

a Justice of the Tarrytown Village Court, Westchester County.

DISSENTING OPINION BY MR. KOVNER

This record reveals not an isolated instance of egregious misconduct, but three separate and blatant abuses of public office occurring over a period of four days. Complaints made to law enforcement officers explicitly based upon respondent's political preference plainly affront the administration of justice. To pursue those partisan calls with threats not to cooperate in the performance of his official duties and to subpoena police tapes when no matter was before him was totally inexcusable.

Even though respondent belatedly came to recognize aspects of his misconduct, in my view his ability to provide the appearance of impartial justice in his community has been irreparably damaged. See Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290-91 (1983). I believe the appropriate sanction should be removal from office.

Dated: September 8, 1989

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

CHRISTOPHER H. D'AMANDA,

a Justice of the Penfield Town Court, Monroe County.

Determination

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel), for the Commission

Timothy K. Burgess for Respondent

The respondent, Christopher H. D'Amanda, a justice of the Penfield Town Court, Monroe County, was served with a Formal Written Complaint dated May 6, 1988, alleging that he abused the authority of his office in three traffic incidents. Respondent filed an answer dated May 31, 1988.

By order dated June 13, 1988, the Commission designated Peter J. Murrett, Jr., Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 26, 1988, and the referee filed his report with the Commission on November 21, 1988.

By motion dated January 27, 1989, 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 February 15, 1989. The administrator filed a reply on March 2, 1989. Oral argument was waived.

On March 30, 1989, 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 has been a justice of the Penfield Town Court since January 1, 1978.

2. On July 1, 1987, while driving on Route 104 in the Town of Williamson, respondent was stopped by State Trooper Michael J. Pray.

3. Respondent left his vehicle, met the trooper on the roadside and asked why he had been stopped.

4. Trooper Pray asked for respondent's license and registration and told him to return to his vehicle. Respondent was not carrying his license and registration.

5. Respondent replied that he did not have to return to his vehicle and asked again why he had been stopped. The trooper told him that he felt that respondent had been following too closely and again told him to return to his vehicle.

6. Respondent continued to protest that the trooper had had no reason to stop him. Trooper Pray told respondent a total of about five times to return to his vehicle and that he would radio for a computer check on respondent's license plates. The trooper ultimately threatened to arrest respondent for disorderly conduct if he did not return to his vehicle.

7. Respondent was upset, angry and argumentative.

8. He returned to his vehicle and drove away.

9. Trooper Pray pursued him and stopped him a second time. He approached respondent's vehicle and told him that he was going to be ticketed for Failure To Obey A Police Officer.

10. Trooper Pray then returned to his patrol car to run a check on respondent's car. Respondent then got out of his vehicle and walked to the passenger side of the patrol car. The trooper asked respondent whether he was C.H. D'Amanda, as his registration check had indicated. Respondent replied that he was Christopher D'Amanda. The trooper then began writing a ticket.

11. Respondent leaned into the patrol car, touched the trooper's hand and said, "Don't write that ticket." The trooper told respondent to get his hands and body out of the patrol car, and respondent complied.

12. Respondent apologized to the trooper and identified himself as a Penfield town justice. Respondent said that the ticket would "cause a lot of problems."

13. The trooper accepted the apology and told respondent that he would only issue a ticket for Failure To Obey A Police Officer.

14. Respondent was convicted of the charge on September 1, 1987, and was given a conditional discharge.

As to Charge II of the Formal Written Complaint:

15. On November 2, 1986, respondent was stopped for Speeding on Route 286 in the Town of Walworth by Trooper Steven T. White.

16. Respondent gave Trooper White his vehicle registration but was not carrying his driver's license. Trooper White returned to his patrol car and contacted the police station to obtain respondent's address and other information in order to issue him a ticket for Speeding.

17. Respondent left his vehicle, approached Trooper White and asked, "Are you going to write me a ticket?"

18. When the trooper responded in the affirmative, respondent said, "Well, I know all about these things. I am the Penfield town justice."

19. Trooper White responded, "Why didn't you tell me that in the first place?" He then located respondent's name on a roster of local judges and allowed respondent to leave without issuing a ticket.

As to Charge III of the Formal Written Complaint:

20. On a Sunday morning in the spring or summer of 1986, respondent was stopped for speeding on Route 286 in the Town of Walworth by Trooper John P. Del Gaudio.

21. Respondent told the trooper that he was not carrying his driver's license and added, "You are not going to believe this, but I am a town justice."

22. Trooper Del Gaudio asked for identification that respondent was a judge, but he could supply none. The trooper then contacted a fellow trooper by radio and verified that respondent was a town justice in Penfield.

23. The trooper then advised respondent to watch his speed, told him to have a nice day and allowed him to leave without issuing a ticket.

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. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

On three occasions, respondent used the prestige of his judicial office to avoid receiving traffic tickets, in violation of Section 100.2(c) of the Rules Governing Judicial Conduct. "A judge may not flout the laws he

is sworn to uphold when they are applied to him personally and expect to sustain the confidence and trust of the people in whose name he administers justice." Matter of Barr, 1981 Annual Report 139, 142 (Com. on Jud. Conduct, Oct. 3, 1980).

The mere mention of his judicial office in order to obtain treatment not generally afforded to others violates the canons of judicial ethics. "The absence of a specific request for favorable treatment or special consideration is irrelevant...." Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153, 155 (1986).

In addition, respondent's other conduct during the incident involving Trooper Pray failed to conform to the high standards of conduct expected of every judge, on or off the bench. See Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465, 469 (1980). It was improper for him to persistently and angrily argue with the trooper about why he was stopped, to fail to comply with repeated orders to return to his vehicle, to attempt to leave the scene when he knew that he was expected to wait and to touch the trooper's hand and say, "Don't write that ticket."

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

Mrs. Robb, Mr. Berger, Mr. Bower, Mr. Cleary, Mrs. DelBello, Mr. Kovner and Mr. Sheehy concur.

Judge Altman, Judge Ciparick and Judge Ostrowski dissent as to sanction only and vote that respondent be admonished.

Judge Rubin was not present.

Dated: April 26, 1989

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

WAYDE F. EARL,

a Justice of the Lake George Village Court, Warren County.

Determination

APPEARANCES:

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

Thomas J. McDonough for Respondent

The respondent, Wayde F. Earl, a justice of the Lake George Village Court, Warren County, was served with a Formal Written Complaint dated January 12, 1987, alleging misconduct with respect to 39 cases from 1984 to 1986. Respondent filed an answer dated February 2, 1987.

By order dated March 25, 1988, the Commission designated Peter Preiser, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on June 21, 22 and 23, 1988, and the referee filed his report with Commission on October 24, 1988.

By motion dated December 19, 1988, 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 on January 30, 1989.

On February 16, 1989, 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 has been a justice of the Lake George Village Court for approximately 15 years.

2. At all times relevant to the allegations in the complaint, respondent was familiar with the provisions of the Criminal Procedure Law relating to arraignment of the defendants.

3. During a period dating from May 1984 through September 1986, in the cases set forth in Schedule A annexed hereto, respondent violated the provisions of the Criminal Procedure Law governing the manner in which arraignments are to be conducted, and thus the rights of defendants arraigned before him by:

(a) Customarily disregarding the fact that defendants were too intoxicated to understand the proceedings and then failing in such cases to promptly rearraign those he committed to jail;

(b) using procedures that failed to include affirmative action reasonably calculated to assure that defendants had the aid of counsel at arraignment or to determine whether defendants were eligible for assigned counsel;

(c) using procedures that failed to include affirmative action reasonably calculated to assure that defendants would have the aid of counsel at subsequent stages of the proceedings;

(d) accepting waivers of arraignment and of the right to counsel from defendants whom he had failed to advise of the right to assigned counsel for indigents; and,

(e) actively discouraging defendants from electing to be represented by counsel.

4. For example, in People v. Mark Jarvis, when the defendant requested an adjournment to obtain an attorney, respondent told the defendant that he was in a lot of trouble, that an attorney would not do him any good, that he was going to be heavily fined and that he would lose his license. Respondent never informed the defendant, who was unemployed, of his right to assigned counsel or how to apply for assigned counsel. When the defendant appeared a week later without counsel, respondent accepted a guilty plea, imposed a fine and suspended the defendant's license.

5. In People v. Jarvis Griffin, although the unemployed defendant was intoxicated at arraignment, respondent committed the defendant to jail in lieu of bail and failed to schedule a rearraignment, leaving the defendant to return from jail unrepresented a week later. At the second appearance, the defendant asked for assigned counsel (though not alerted by respondent), and respondent informed the defendant that he would have to apply at the Municipal Center and return to court in a few weeks. Since defendant lived three hours away, he agreed to proceed without counsel, pled guilty to a misdemeanor and was ordered to pay restitution.

6. In People v. Randy Tubbs, an intoxicated 18-year-old defendant was arraigned by respondent and committed to jail in lieu of bail for two nights. Respondent had provided no application form for assigned counsel and had taken no steps to contact assigned counsel. When the defendant returned a week later, still unrepresented, and requested an attorney, respondent merely offered a plea bargain to which the defendant agreed.

7. In People v. Mark Beaudet, the unemployed defendant, intoxicated at arraignment, was committed to jail in lieu of bail, and respondent set a return date eleven days later. After the police chief intervened to persuade respondent to release the defendant after four days, the defendant appeared on the return date, still unrepresented. Respondent informed him that he had pled guilty, sentenced him to time served, but never conducted a rearraignment and never appointed counsel.

8. Respondent testified in this proceeding that he does not feel that in cases in which defendants are charged with violations the "cost to the taxpayers" of assigning counsel is warranted.

9. In addition, during a period from May 1985 to September 1986, respondent engaged in a cooperative venture with the police that circumvented the requirements of the Criminal Procedure Law for appearance and plea by defendants in person or by attorney in noncriminal violation cases. Under this procedure, respondent convicted defendants on the basis of a form signed at the police station and imposed a fine and surcharge equal to the amount of the prearraignment bail fixed by the police.

10. Except as set forth above, the allegations of Charge I are not sustained and are, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

11. The charge is not sustained and is, therefore, dismissed.

As to Charge III of the Formal Written Complaint:

12. The charge 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), 100.3(a)(1), 100.3(a)(3), 100.3(a)(4) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(1), 3A(4) and 3C(1) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established. Charges II and III are dismissed.

At the times in question, respondent had served as a judge for more than eleven years and was familiar with the provisions of the Criminal Procedure Law concerning arraignments. Nevertheless, respondent disregarded the requirements of law and followed his own procedures.

Respondent took no steps to promptly rearraign defendants he knew were too intoxicated to understand their rights when he committed them to jail. He deliberately distorted the clear statutory procedure for advising defendants of their right to counsel. Indeed, as is shown by his statement in the Mark Jarvis case, the misconduct appears to be part of a pattern to discourage defendants from electing to be represented by counsel. See Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105, 109-110 (1984); Matter of McGee v. State Commission on Judicial Conduct, 59 NY2d 870, 871 (1983). In addition, respondent's authorization of use of police station forms, requiring defendants to waive their rights, was a blatant disregard of the requirements of the Criminal Procedure Law. In effect, respondent permitted the police to adjudicate their own arrests.

The Commission notes that respondent has announced his retirement effective April 1, 1989, and that respondent was cooperative throughout this proceeding. See Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153, 155 (1986).

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

Judge Altman, Mr. Berger, Judge Ciparick, Mr. Cleary, Mr. Kovner and Judge Ostrowski concur.

Mrs. Robb dissents and votes that Charges I through III be sustained in toto and dissents as to sanction and votes that respondent be censured.

Mrs. Del Bello dissents as to sanction only and votes that respondent be censured.

Mr. Bower, Judge Rubin and Mr. Sheehy were not present.

Dated: March 31, 1989

Schedule A

Defendant	Charge	Date of Arrest
Abbott, Carl C.	Disorderly Conduct	8/31/86
Ammerman, Jennifer	Open Container	7/20/85
Andujar, Orlando	Open Container	8/05/86
Barscz, William	Reckless Driving	10/21/84
	Unlicensed Operator	10/21/84
	Failure To Comply	10/21/84
	Uninsured Motor Vehicle	10/21/84
	Switched Plates	10/21/84
	Unregistered Motorcycle	10/21/84
	Speeding	10/21/84
Beaudet, Mark	Disorderly Conduct	1/13/85
Bowler, Daniel K.	Possession of Fireworks	7/10/85
Brooks, Scott	Theft of Services	8/11/85
	Possession of Marijuana	8/11/85
Bubenheimer, Brian D.	Disorderly Conduct	8/09/86
Burkins, Keith	Driving While Intoxicated	7/16/84
	Possession of Marijuana	7/16/84
	Criminal Possession Of A Weapon, Fourth Degree	7/16/84
Burkins, Wayne	Resisting Arrest	7/16/84
	Criminal Possession Of A Weapon, Fourth Degree	7/16/84
Clough, David	Open Container	7/20/85
Donahue, Tricia E.	Open Container	7/19/85
Erickson, Carl B., Jr.	Disorderly Conduct	7/06/85
Ford, Brian M.	Harassment	9/01/86
Freemire, Douglas	Driving While Intoxicated	8/16/86
	Drove Left Of Pavement Markers	8/16/86
Gagne, Richard J.	Harassment	9/01/86

Defendant	Charge	Date of Arrest
Gallagher, Matthew	Disorderly Conduct	6/16/85
Gengo, Michael G.	Possession of Marijuana	8/04/86
Gordon, Timothy	Open Container	5/26/85
Goss, Kevin	Theft of Services	8/11/85
Granger, Thomas	Open Container	7/20/85
Griffin, Jarvis	Criminal Mischief, Fourth Degree	8/16/86
	Harassment	8/16/86
	Disorderly Conduct	8/16/86
Higgins, Mark	Disorderly Conduct	5/28/84
Hotte, Gary A.	Unlawful Possession of Marijuana	6/04/86
Jarvis, Mark	Driving While Intoxicated	8/01/86
Maddaloni, Michael D.	Open Container	7/07/85
Malmburg, Kevin A.	Disorderly Conduct	7/06/85
Newman, Linda M.	Open Container	9/01/86
Olander, Karen	Disorderly Conduct	5/28/84
Pazmino, Carlo R.	Disorderly Conduct	5/18/86
Place, Stephen L.	Possession of Marijuana	7/10/85
Pond, Samuel D.	Open Container	7/07/85
Potter, Kevin P.	Open Container	7/20/85
Toney, Jeffrey T.	Open Container	7/20/85
Tubbs, Randy	Resisting Arrest	7/08/85
	Disorderly Conduct	7/08/85
Yager, Mark A.	Possession of Marijuana	7/07/85
Yager, Michael	Possession of Marijuana	7/07/85
Zadok, Don	Open Container	9/01/86

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

HENRY GOEBEL, JR.,

a Justice of the Nassau Town Court and Acting Justice of the Nassau Village Court, Rensselaer County.

APPEARANCES:

Gerald Stern for the Commission

Zweig and Caldes (By Theodore G. Caldes) for Respondent

The respondent, Henry Goebel, Jr., a justice of the Nassau Town Court and the Nassau Village Court, Rensselaer County, was served with a Formal Written Complaint dated May 23, 1989, alleging that he failed to remit court funds to the state comptroller in a timely fashion over an eleven-year period. Respondent did not answer the Formal Written Complaint.

On October 3, 1989, 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, stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On October 19, 1989, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Nassau Town Court since 1968 and acting justice of the Nassau Village Court since 1976. During that time, respondent has been aware of the requirement that he remit court funds to the state comptroller by the tenth day of the month after he receives them. Respondent has never had a court clerk.

2. From January 1978 to December 1978, respondent failed to remit court funds to the state comptroller by the tenth day of the month following collection, as required by Sections 2020 and 2021(1) of the Uniform Justice Court Act, Section 1803 of the Vehicle and Traffic Law, Section 27(1) of the Town Law and Section 4-410(1)(b) of the Village Law, and as denominated in Schedules A and B appended to the Formal Written Complaint.

3. By letter dated February 1, 1979, respondent was cautioned by the Commission to remit to the comptroller as required by law.

4. From January 1979 to March 1989, respondent again failed to remit court funds to the state comptroller as required by law and as denominated in Schedules A and B appended to the Formal Written Complaint.

5. Between 1978 and May 1989, the comptroller's office sent 96 letters to respondent requesting that he file his reports. On six occasions, the comptroller returned respondent's checks to him because the checks were stale.

6. During these periods, respondent promptly deposited court funds in his official account.

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. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

While respondent promptly deposited his court funds, he did not remit them to the state comptroller in a timely fashion as required by law. He was consistently late in remitting money over an eleven-year period, in some cases by more than three years. Thus, he violated his ethical obligations to comply with the law and to diligently discharge his administrative responsibilities. See Sections 100.2(a) and 100.3(b)(1) of the Rules Governing Judicial Conduct.

The failure to heed a Commission warning that he comply with remitting requirements exacerbates the misconduct. Matter of Rater v. State Commission on Judicial Conduct, 69 NY2d 208, 209 (1987); Matter of Lenney v. State Commission on Judicial Conduct, 71 NY2d 456, 458-59 (1988).

The mishandling of public funds is misconduct, even when not done for a judge's personal profit. Bartlett v. Flynn, 50 AD2d 401 (4th Dept. 1976). Judges have been disciplined for failure to remit court funds without additional evidence of failure to deposit. Matter of Rogers v. State Commission on Judicial Conduct, 51 NY2d 224 (1980); Matter of Moulton, 1985 Annual Report 200 (Com. on Jud. Conduct, Apr. 13, 1984). The fact that respondent promptly deposited court funds and, thus, at all times was able

to account for money he collected makes a sanction less than removal appropriate in this case.

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

Mr. Kovner, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mrs. Robb, Judge Rubin and Mr. Sheehy concur.

Judge Salisbury was not present.

Dated: December 26, 1989

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 J. GREENFIELD,

a Justice of the Supreme Court,
New York County.

Determination

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission

Shea & Gould (By Milton S. Gould; Jonathan D. Kantor, Of Counsel) for Respondent

Jay D. Fischer for Respondent

The respondent, Edward J. Greenfield, a justice of the Supreme Court, 1st Judicial District, was served with a Formal Written Complaint dated August 9, 1988, alleging that he delayed disposing of pending matters in numerous cases. Respondent filed an answer dated February 28, 1989.

By order dated January 19, 1989, 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 March 8, 1989, and the referee filed his report with the Commission on May 18, 1989.

By motion dated June 6, 1989, 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 July 7, 1989. The administrator filed a reply on July 10, 1989.

On July 18, 1989, 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 has been a justice of the Supreme Court since January 1, 1969. He was a judge of the Civil Court of the City of New York from 1964 to 1968.

2. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Solow Building Corp. was tried before respondent in May and June 1979. Final submissions to respondent were in September 1979. Despite several communications to respondent and his law secretary from the plaintiff's counsel in 1981, 1984, 1985 and 1986, respondent did not decide the matter. The plaintiff subsequently commenced an Article 78 proceeding to compel a decision. Respondent decided the case on April 3, 1987.

3. In May 1982, the defendant in Murray Schwartz v. Arthur Tessler, M.D. moved to dismiss for failure to make a prima facie case after a trial in which the jury was deadlocked. Respondent granted the motion in July 1983. In February 1984, the plantiff moved for a new trial on the basis of newly-discovered evidence. Respondent denied the motion on June 30, 1986.

4. On October 2, 1984, the plaintiff in Scalamandre Silks, Inc. & Scalamandre Wallpaper v. Consolidated Edison of New York moved to vacate respondent's earlier dismissal of the action and to restore the matter to the trial calendar. The plaintiff's counsel communicated with respondent's chambers approximately 24 times, requesting a decision on the motion. On May 17, 1985, the plaintiff brought an Article 78 proceeding to compel a decision. Respondent granted the motion on May 28, 1985, while he was hospitalized as the result of a heart attack.

5. On November 2, 1981, the plantiffs in Silk & Bunks, P.C. v. Stanley Danzig brought a motion to impress a trust on funds alleged to have been wrongfully taken. Final submissions to respondent were on November 16, 1981. On November 16, 1981, from the bench, respondent ordered that other property be returned to the plaintiffs forthwith. On December 7, 1981, the plaintiffs brought a motion to hold the defendant in contempt for failure to comply with respondent's order. That issue was referred to a referee, and final submissions on the referee's report to respondent were in January 1983. The plaintiff's counsel communicated with respondent in July 1983 and January 1984. On April 11, 1984, the plaintiffs brought an Article 78 proceeding to compel a decision. On June 14, 1984, the Appellate Division, First Department, granted the Article 78 petition. The issues were resolved by the parties on June 19, 1984. Respondent testified in this proceeding that he deliberately withheld rendering a decision on the motions because of allegations made against the defendant, a former judge, and his wife, a sitting judge, that respondent felt would have "repercussions" on the "reputation and integrity of the court" were he to issue a public opinion.

6. The plaintiff in Prince Carpentry v. Cosmopolitan Mutual Insurance Co. et al. moved for summary judgment on November 25, 1981. Counsel made several requests of respondent for a decision through May 1983. On December 20, 1983, an Article 78 proceeding was brought to compel a decision. Respondent issued a decision on January 23, 1984.

7. In May 1979, a defendant in Michael De Candia v. Hudson Waterways, Inc. et al. moved to dismiss the complaint. Final submissions to

respondent were in August 1979. In December 1982, a third-party defendant moved to dismiss the complaint against him for lack of jurisdiction. A defendant cross-moved for leave to conduct discovery on the question of jurisdiction. On October 22, 1986, respondent granted the motion to dismiss the third-party complaint and denied the motion for discovery. On October 31, 1986, respondent denied the defendant's motion to dismiss.

8. The defendant in Starkaiser Matos Pires v. Frota Oceanica Brasileira S.A. et al. moved in February 1978 for an order to strike the plaintiff's notice to take a deposition. Final submissions to respondent were in the same month. Respondent did not decide the motion until May 26, 1987. The plaintiff moved in December 1978 for an order striking a defendant's answer for failure to produce witnesses for deposition. Final submissions to respondent on that motion were in the same month. Respondent denied the motion on May 26, 1987. In December 1982, the plaintiff moved for an order to take depositions of witnesses abroad. Final submissions to respondent on that motion were in the same month. Respondent denied the motion on June 2, 1987. In February 1983, a defendant moved for summary judgment. Final submissions to respondent were in March 1983. Respondent denied the motion on May 26, 1987.

9. The plaintiff in Public Administrator of the County of New York v. Frota Oceanica Brasileira S.A. et al. moved in November 1979 for a protective order and for an order modifying a demand for a bill of particulars. Final submissions to respondent were in January 1980. On May 14, 1987, respondent granted the motion for a protective order and granted in part and denied in part the motion to modify. In February 1981, the plaintiff moved to require the defendants to respond to a discovery demand. Final submissions to respondent were in March 1981. Respondent granted the motion on May 14, 1987. In February 1978, the plaintiff moved for an order requiring disclosure. On May 14, 1987, the motion was granted in part and denied in part.

10. Respondent did not unreasonably delay rendering a decision in Paul Conti and Julie Conti v. Herbert Citrin and Melohn Properties.

11. In 1985, respondent suffered a heart attack. At the end of 1986 and in early 1987, he was hospitalized for about ten days. He had heart bypass surgery later in 1987 and did not return to full-time activity for several months but did some work in the hospital and at home.

12. Respondent's administrative judges spoke to him six to twelve times concerning delays in rendering decisions. In 1987, about 25 cases were removed from respondent's calendar to give him more time to complete decisions in cases that had been delayed.

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)(5) of the Rules Governing Judicial Conduct and Canons 1, 2 and 3A(5) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is

sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

As numerous character witnesses attested in this proceeding, respondent has high standing in the legal community as a scholarly, conscientious, hard-working and productive judge who gives great attention to detail. Notwithstanding such praise, respondent's delays of up to nine years in deciding motions and disposing of matters before him were unconscionable. His repeated failure to dispose promptly of the business of his court, prompting Article 78 proceedings to compel decisions in four cases, constitutes misconduct and is cause for public discipline.

The Constitution gives the Commission the obligation to hear complaints as to the "performance of official duties of any judge or justice" and the authority to sanction a judge for "persistent failure to perform his duties...." Article VI, Section 22(a). The Rules Governing Judicial Conduct impose upon judges the ethical duty to "dispose promptly of the business of the court." Section 100.3(a)(5). Although they may also be the proper business of court administrators and the appellate courts, extensive delays in adjudication are clearly within the jurisdiction of the Commission. Judges have been disciplined for persistent delays in disposing of cases. Matter of Lenney v. State Commission on Judicial Conduct, 71 NY2d 456 (1988); Matter of Leonard, 1986 Annual Report 137 (Com. on Jud. Conduct, Oct. 24, 1985).

As found by the distinguished referee, respondent's delays were unreasonable and inexcusable. Neither his health problems, which began after most of the eight cases had already been on his calendar for years, nor his fear in the Silk & Bunks case that the allegations would undermine the court's reputation and integrity provide ample justification for his failure to dispose of the matters before him.

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

Mrs. Robb, Mr. Berger, Mrs. DelBello, Mr. Kovner, Judge Rubin and Mr. Sheehy concur, except that Mr. Berger, Mr. Kovner and Judge Rubin dissent as to the Silk & Bunks case only and find no misconduct.

Mr. Cleary and Judge Salisbury dissent as to sanction only and vote that respondent be admonished.

Judge Ciparick did not participate.

Judge Altman and Mr. Bower were not present.

Dated: September 28, 1989

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 J. GREENFIELD,

a Justice of the Supreme Court, New York County.

OPINION BY MR. KOVNER IN WHICH MR. BERGER AND JUDGE RUBIN JOIN, DISSENTING IN PART

I respectfully dissent from the finding that the delay in Silk & Bunks, P.C. v. Stanley Danzig constituted misconduct.

It is uncontroverted that a draft of respondent's decision was prepared promptly but was not released pending a resolution of the ongoing settlement discussions conducted at numerous conferences before respondent with all parties.

While many may differ with respondent's efforts to obtain a settlement, and especially with his discussion with the Administrative Judge regarding his stated concern about the impact of his decision on the reputation and integrity of the Court, the course of action adopted by respondent during the settlement discussions was a matter of judicial discretion. Moreover, respondent was charged solely with delay and not with impropriety in the procedures he chose to employ in his effort to bring about an overall resolution to prolix litigation.

Notwithstanding the uncontroverted record of respondent's distinguished service on the bench and at the bar and notwithstanding my view of Silk & Bunks, I must, with reluctance, join in the sanction imposed by the Commission.

Dated: September 28, 1989

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

EUGENE M. HANOFEE,

a Judge of the County Court, Sullivan County.

APPEARANCES:

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

Barton Denis Eaton for Respondent

The respondent, Eugene M. Hanofee, a judge of the County Court and Surrogate's Court, Sullivan County, was served with a Formal Written Complaint dated July 14, 1988, alleging that he made inappropriate remarks in five cases, that he refused to permit a lawyer to make a motion, that he did not permit another lawyer to practice in his court after the lawyer objected to respondent's remarks in a court proceeding, that he requested favoritism from another judge and that he attempted to interfere with the Commission staff's investigation of a complaint. Respondent filed an answer dated August 24, 1988.

By order dated September 9, 1988, the Commission designated the Honorable Catherine T. England as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 5, 6, 8, 9, 12, 13, 14, 15 and 21, 1988, and the referee filed her report with the Commission on May 26, 1989.

By motion dated June 13, 1989, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. On July 13, 1989, respondent cross moved to disaffirm the referee's report and to dismiss the complaint or, alternatively, for a new hearing before a different referee.

On August 18, 1989, 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. The charge is not sustained and is, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

2. The charge is not sustained and is, therefore, dismissed.

As to Charge III of the Formal Written Complaint:

3. Respondent has been the sole judge of the Sullivan County Court and Surrogate's Court since June 5, 1984. He was a judge of the Sullivan County Family Court from January 1, 1977, to June 5, 1984.

4. On February 11, 1988, Miguel Cuesta appeared before respondent in County Court for sentencing on a charge of Criminal Sale Of A Controlled Substance, Fourth Degree. The following exchange took place between respondent and Mr. Cuesta's attorney, John Ferrara of the Legal Aid Society:

> THE COURT:...Apparently Mr. Cuesta does feel he is suffering some injustice at the hand of our legal system. I am just wondering how he would be treated if he appeared in Cuba on the same charge.
>
> MR. FERRARA: He says he doesn't know because he came into this country 18 years ago.
>
> ****
>
> THE COURT: He is still an alien, though.... It's very upsetting to the Court when you read something like that in the probation report and it usually comes from--another one coming up here. Someone from Guatemala, Cuba, Colombia. All unhappy when they get caught and convicted of crime, you know. It really bothers this Court tremendously.
>
> MR. FERRARA: Judge, I hesitate to distinguish between my clients who are Hispanic and my clients who are not, and their views as to the legal system. Quite frankly, I think that's an improper approach for this Court or anybody else.
>
> THE COURT: It's what?

MR. FERRARA: To distinguish between the Hispanics and the Anglos and the Blacks, and I would ask the Court not to do that.

THE COURT: I am talking about individuals and talking about Mr. Cuesta as an individual. He is an alien here and unhappy with our justice system. I am saying, perhaps he should go back to where he came from. This is what the Court is saying. It's very inappropriate, and I take task with you by indicating that this Court is bias to anybody coming from any particular country, or area, or whatever. That's an outrageous statement if that's what you are saying. I think you should apologize to the Court.

5. Mr. Ferrara refused to apologize, and respondent adjourned the matter for a week and remanded Mr. Cuesta to jail. He ordered counsel to meet with him in chambers and said to Mr. Ferrara, "You can begin thinking about it, and I ask that you be relieved from appearing in this court on this matter."

6. Mr. Ferrara's supervisor, Carl J. Silverstein, executive director of the Legal Aid Society, heard about the incident and came to respondent's court. Respondent told Mr. Silverstein that Mr. Ferrara was "persona non grata" in respondent's court and that he would not hear any more of Mr. Ferrara's cases. Mr. Silverstein suggested that they let the matter "cool down" over the upcoming weekend.

7. Without further discussion, respondent issued a letter to Mr. Silverstein on February 16, 1988, stating, "I am disqualifying myself on all matters in which John Ferrara has appeared or will be appearing."

8. Mr. Ferrara had 25 cases pending before respondent at the time--approximately a quarter of the court's criminal caseload. The 25 cases included three in which the defendants had pled guilty and were awaiting sentence, one in which a pretrial hearing was in progress, four in which decisions on pretrial motions were pending, four in which pretrial hearings were to be scheduled and one in which respondent's decision after a pretrial hearing was pending. Twenty-one of the defendants were jailed.

9. Mr. Ferrara testified in this proceeding that his cases "lingered" after respondent refused to allow him to appear. Mr. Silverstein testified that he could not reassign the cases because it would have created an imbalance in the caseload of the five lawyers on his staff. The district attorney, Stephen F. Lungen, testified that Mr. Ferrara's cases were in "limbo" as the result of respondent's decision and that he was concerned that they might have to be dismissed for failure to provide a speedy trial.

10. On February 22 and 24, 1988, Mr. Ferrara wrote to Edward S. Conway, the administrative judge for the 3d Judicial District, and asked him to assign other judges to preside in the 25 cases.

11. Judge Conway replied that it would be "impossible" to re-assign all of the cases and urged Mr. Ferrara and respondent to resolve their differences promptly. By letter of March 8, 1988, Judge Conway said, "There is no way that the judicial system can tolerate the present circumstances of having the single court judge in a one-judge county disqualified in all criminal cases in which the chief trial counsel... is assigned or will be assigned in the future."

12. On March 9, 1988, respondent wrote to Mr. Silverstein "to clarify" his February 16 letter. Respondent said, "I have not and am not disqualifying myself from any Legal Aid cases. It is only John Ferrara that is disqualified from appearing before me."

13. On March 23, 1988, Judge Conway assigned Family Court Judge Anthony V. Kane to handle "the large number of cases on the Sullivan County Court criminal calendar" in which Mr. Ferrara was counsel. Judge Conway also directed respondent to sit in Family Court while Judge Kane was required to be in respondent's court.

14. Judge Conway told respondent that he felt that respondent had no authority to prevent Mr. Ferrara from appearing before him. Deputy Chief Administrative Judge Robert J. Sise also told respondent, "I do not think a judge can prevent a lawyer from practicing in his court."

15. Between February and May 1988, respondent met with Mr. Silverstein and several members of the board of directors of the Legal Aid Society to discuss the controversy.

16. Respondent and an attorney for Mr. Ferrara exchanged several drafts of a joint statement in which they proposed to resolve their differences, but no agreement was reached.

17. On May 10, 1988, respondent wrote to the chief clerk of the court and directed him to restore Mr. Ferrara's cases to his calendar. Respondent was scheduled to appear the following day to give testimony concerning this matter before a member of the Commission. His appearance was subsequently adjourned to May 25, 1988.

As to Charge IV of the Formal Written Complaint:

18. On March 5, 1987, respondent was visited in chambers by Joseph P. Famighetti, a Nassau County lawyer with whom respondent had worked while on assignment there.

19. Mr. Famighetti was scheduled to appear that day before Justice Perry E. Meltzer in the Thompson Town Court, about a mile from respondent's court.

20. During the visit, respondent called Judge Meltzer, whom he had known for years and who was scheduled to appear before respondent as a lawyer the same day.

21. Respondent told Judge Meltzer that Mr. Famighetti was a "nice" person and that Judge Meltzer "should be nice to him."

22. Judge Meltzer told respondent that he would treat Mr. Famighetti as he treats all lawyers appearing before him. He then disclosed the call to the assistant district attorney who was appearing in the case in which Mr. Famighetti was counsel and offered to recuse himself.

As to Charge V of the Formal Written Complaint:

23. Respondent was notified by letter dated May 13, 1988, that the Commission had authorized an investigation into a complaint that he had an ex parte communication with defense counsel in People v. Eskenazi in May 1985.

24. After he received the letter, respondent summoned defense counsel in the case, David Cohen, to his chambers.

25. Respondent told Mr. Cohen that Commission staff was investigating the case and that Mr. Cohen would be called as a witness.

26. Respondent and Mr. Cohen discussed the case in an effort to reconstruct what had occurred. At one point, respondent said, "You remember that we never had any ex parte conversation."

27. Mr. Cohen replied that he did not and that if he were asked to testify, he would tell the truth. Respondent said, "Don't hurt me." There was further conversation, and, as Mr. Cohen was leaving, respondent said, "I know you are not going to do anything to hurt me."

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a), 100.2(b), 100.2(c), 100.3(a)(4) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 2B, 3A(4) and 3B(1) of the Code of Judicial Conduct. Charges III, IV and V of the Formal Written Complaint are sustained, and respondent's misconduct is established. Charges I and II are dismissed. Respondent's cross motion to dismiss or for a new hearing is denied.

It was inappropriate, unreasonable and arbitrary for respondent to refuse to hear Mr. Ferrara's cases for 88 days after the lawyer had made remarks which offended him. Respondent had appropriate means for dealing with Mr. Ferrara's conduct if he thought that it was improper. He could have held him in contempt if he thought the remarks were contemptuous, or he could have complained to the grievance committee if he thought the lawyer's conduct violated the Code of Professional Responsibility.

Instead, respondent barred Mr. Ferrara from his courtroom in an obvious attempt to extract an apology or punish him for making the remarks. By doing so, he placed in jeopardy the expeditious administration of justice and failed to facilitate the performance of the administrative responsibilities of other judges and court officials. See Section 100.3(b)(1) of the Rules Governing Judicial Conduct.

While respondent must disqualify himself in any case in which his impartiality might reasonably be questioned (Section 100.3[c][1] of the Rules), he also has an obligation to try to put aside his personal feelings about a lawyer and act impartially toward the lawyer's clients. Sections 100.1 and 100.2 of the Rules.

Respondent's call to Judge Meltzer conveyed the clear impression that he was seeking favoritism for Mr. Famighetti or his client. "[A]ny communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office." Matter of Lonschein v. State Commission on Judicial Conduct, 50 NY2d 569, 572 (1980).

Respondent's conversation with Mr. Cohen, in which he stated, "You remember that we never had any ex parte conversation," and, "Don't hurt me," were clearly designed to influence any testimony by Mr. Cohen before the Commission and, thus, constituted an attempt to interfere with the Commission's discharge of its lawful mandate. See Matter of Fabrizio v. State Commission on Judicial Conduct, 65 NY2d 275 (1985); Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 553-54 (1986); Matter of White, 1987 Annual Report 153, 156 (Com. on Jud. Conduct, Aug. 8, 1986).

By reason of the foregoing, the Commission records the following votes:

Charge I is dismissed (Mr. Kovner, Judge Altman, Judge Ciparick and Mrs. Del Bello dissent and vote that the charge be sustained);

Charge II is dismissed (Mrs. Del Bello dissents and votes that the charge be sustained);

Charge III is sustained (Judge Altman dissents and votes that the charge be dismissed);

Charge IV is sustained;

Charge V is sustained (Judge Altman, Mr. Bower and Mr. Cleary dissent and vote that the charge be dismissed).

The Commission determines that the appropriate sanction is censure.

Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Robb, Judge Rubin and Judge Salisbury concur as to sanction.

Mr. Kovner and Mrs. Del Bello dissent as to sanction and vote that respondent be removed from office.

Mr. Sheehy was not present.

Dated: October 27, 1989

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

EUGENE M. HANOFEE,

OPINION BY JUDGE ALTMAN, DISSENTING IN PART

a Judge of the County Court, Sullivan County.

I concur in the dissent of Judge Ciparick and find misconduct on Charge I and dissent and vote to dismiss Charge III.

On February 16, 1988, respondent stated, "I am disqualifying myself on all matters in which John Ferrara has appeared or will be appearing." Thereafter, on March 9, 1988, respondent wrote, "I have not and am not disqualifying myself from any Legal Aid cases. It is only John Ferrara who is disqualified from appearing before me."

If respondent was so hurt by Mr. Ferrara's comments that he could not be fair in his cases, no one can challenge his right to disqualify himself. His subsequent statement that "It is only John Ferrara who is disqualified from appearing before me," can be read simply as clarification of the parameters and limitations of respondent's disqualification.

I am not convinced by a preponderance of the credible evidence that respondent's actions regarding Mr. Ferrara were for a patently improper purpose. While the opinions of the administrative judges should be given serious consideration, they were not legally binding on respondent, and he had every right to exercise his own independent judgment on the disqualification issue. To respondent's credit, he finally put his own feelings aside in order to facilitate the orderly administration of justice.

Dated: October 27, 1989

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

EUGENE M. HANOFEE,

a Judge of the County Court, Sullivan County.

OPINION BY JUDGE CIPARICK, IN WHICH MR. KOVNER AND JUDGE ALTMAN JOIN, DISSENTING IN PART

I dissent as to the dismissal of Charge I and concur as to sanction.

In its majority opinion, the Commission has dismissed charges against respondent which inter alia allege that "...respondent made ethnically derogatory, prejudicial and otherwise inappropriate remarks about Hispanic, Jamaican or South American people while presiding over sentencing proceedings..." in five different matters in 1987 and 1988. The referee in this matter, after a full hearing, found misconduct on this charge.

The Honorable Sol Wachtler, Chief Judge of the State of New York, in creating the New York State Judicial Commission on Minorities stated:

> We are concerned with a growing perception among lawyers, court employees and the public that minorities are not treated fairly in our courts... If a significant segment of society loses faith in the fairness of our system of justice, society will be in grave danger.

Thus, one of the chief mandates of the Commission on Minorities is to address the perception of racial and ethnic bias and to specifically study the issue of courtroom treatment of minorities. One would hope that the mistreatment of minority litigants is not widespread. However, even if it exists in one courtroom in this state, all efforts should be made to eliminate it.

Respondent's statements and demeanor during the sentencing of the five defendants in question certainly rise to the level of misconduct and cannot be tolerated. Not only were individual litigants subject to humiliation and scorn, but also the perception of racial and ethnic bias was such that it prompted witnesses, non-minority attorneys and court personnel

to come forward and testify at the hearing before the referee. It appeared to them that respondent displayed an anti-Hispanic bias.

It is unequivocal in New York law that expressions of racial or ethnic bias by judges will not be tolerated. Matter of Cerbone v. State Commission on Judicial Conduct, 61 NY2d 93 (1984); Matter of Aldrich v. State Commission on Judicial Conduct, 58 NY2d 279 (1983); Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465 (1980); Matter of Bloodgood, 1982 Annual Report 69 (Com. on Jud. Conduct, June 11, 1981); Matter of Sweetland, 1989 Annual Report 127 (Com. on Jud. Conduct, Nov. 21, 1988).

Respondent's behavior, not only evinced ethnically derogatory and otherwise improper conduct, it also undermined an essential part of his role as a judge; that is, to be and appear impartial. (Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286 [1983]).

Accordingly, I find misconduct as to Charge I. I have voted with the majority on Charges II, III, IV and V and concur in the determination insofar as it sustains the three latter charges and also concur in the determination insofar as it finds that the appropriate sanction is censure.

Dated: October 27, 1989

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

EUGENE M. HANOFEE,

DISSENTING OPINION
BY MRS. DEL BELLO

a Judge of the County Court,
Sullivan County.

I dissent as to the dismissal of Charge I and as to sanction.

The Commission's dismissal of Charge I suggests that it is perfectly proper for a judge to make ethnically derogatory statements about Hispanic, Jamaican or South American defendants.

When one defendant, who was about to be sentenced to prison, asked about the return of photos of his children, he was greeted by the insensitive, callous comment that he should not worry too much about the photos since he may be seeing his children soon in Colombia. The judge's explanation of his obviously snide comment was that he wanted to make the defendant feel good.

Four other Hispanic or South American defendants were told that they could go back where they came from. Remarkably, the precipitating factor for his hostile comments in some instances was their so-called criticism of the American system of justice. The respondent's explanation was that he did not direct the defendants to go back to their countries of origin; he only "suggested" that they do so.

In an age of continuing world-wide racial and ethnic strife, it is not too much to expect that judges will avoid giving the appearance of being prejudiced or unduly concerned with the ethnic backgrounds of defendants. If we do not have understanding and ethnic impartiality inside our courtrooms, then what can we expect outside of our courtrooms?

For the Commission to conclude that these comments by a judge in an American court of law do not rise to the level of misconduct is astounding.

One young, legal aid lawyer risked the judge's wrath by respectfully expressing his disagreement with the judge's comments to the lawyer's client. Although the Commission properly sustained Charge III relating to respondent's banishment of that lawyer from the judge's courtroom for several months, it has failed to find improper the very conduct that prompted the lawyer to speak out in

court. Dismissing Charge I is a terrible message to that lawyer and to all those who believe that the judge's ethnic comments were improper.

At the hearing, respondent was asked by his attorney about the chances that one of the defendants will lead a productive life. Respondent testified that the defendant "was not Hispanic looking;" his physical appearance was "American," and he was "clean-cut" and "good looking." The respondent's conclusion was that the defendant had "great potential."

That is disturbing testimony in a case such as this. When joined with his inappropriate comments about the defendants and their countries of origin, it appears that respondent has problems dealing with defendants from certain other countries.

I find it especially outrageous that he cloaks his remarks in patriotism and, in a most un-American manner, he maintains that criticism of the American court system by foreign-born defendants is an affront to him. Their "criticism" was nothing more than complaints about delays, pressure to plead guilty and, in one instance, about not receiving a medical examination in jail.

I would sustain Charge I and remove the judge from office. His conduct as to Charges I, III, IV and V show a lack of fitness for judicial office, and his expressed attitude in these proceedings did nothing to demonstrate otherwise.

Dated: October 27, 1989

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 J. KILEY,

a Judge of the District Court, Suffolk County.

Determination

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission

Nathan R. Sobel for Respondent

The respondent, Edward J. Kiley, a judge of the District Court, Suffolk County, was served with a Formal Written Complaint dated May 10, 1988, alleging that he interceded on behalf of defendants in two cases and that he gave testimony that was lacking in candor. Respondent filed an answer dated June 8, 1988.

By order dated June 17, 1988, the Commission designated J. Kenneth Campbell, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on September 14 and 16, 1988, and the referee filed his report with the Commission on December 5, 1988.

By motion dated December 23, 1988, 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 February 6, 1989. The administrator filed a reply on February 8, 1989.

On February 17, 1989, 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 has been a judge of the Suffolk County District Court since January 27, 1983.

2. Respondent has known John Hopkins, Sr., and members of his family personally and professionally for more than ten years. As a practicing lawyer before he took the bench, respondent had represented Mr. Hopkins and members of his family, including a son, John Hopkins, Jr.

3. At about 6:00 A.M. on October 29, 1987, the senior Mr. Hopkins called respondent at home and told him that John Hopkins, Jr., had been arrested for armed robbery and asked for the name of a lawyer who had previously represented the family. Respondent gave the senior Mr. Hopkins the name of the attorney. Respondent was aware that many tragedies had recently befallen the family. He told Mr. Hopkins that later that morning he would be in the courthouse where the son was to be arraigned.

4. Mr. Hopkins came to respondent's courtroom later that morning. Respondent met with him in chambers and consoled him. He also met with Mr. Hopkins' wife in a courthouse hallway and consoled her.

5. Respondent attempted to look for the attorney whom he believed would be representing the junior Mr. Hopkins but was unable to find him.

6. Respondent then approached Assistant District Attorney Ira S. Rosenberg, who was handling the arraignment part, and asked to speak to him.

7. Respondent led Mr. Rosenberg from the courtroom to a loading dock. He told Mr. Rosenberg that he had represented the junior Mr. Hopkins in the past and that Mr. Hopkins had a good record of appearing in court when he was scheduled to do so. Respondent also told Mr. Rosenberg about the recent tragedies in the Hopkins family and that the defendant had a drinking problem.

8. Respondent then approached Judge Joseph F. Klein, who was scheduled to preside at the arraignment part that day. He told Judge Klein that he had previously represented the junior Mr. Hopkins and that he had a good record of appearing in court when he was scheduled to do so. Respondent also told Judge Klein of the defendant's drinking problem and of the family's problems.

9. Respondent then rejoined Mr. and Mrs. Hopkins in the hallway and met their attorney, Terry J. Karl. He then returned to his own courtroom.

10. The junior Mr. Hopkins was arraigned before Judge Klein later that day. Mr. Rosenberg asked that bail be set at $10,000. Judge Klein set bail at $500.

As to Charge II of the Formal Written Complaint:

11. On February 22, 1988, in connection with a duly-authorized investigation, respondent testified before a member of the Commission with respect to his conduct in connection with the Hopkins case.

12. Upon questioning by a staff attorney, respondent persistently testified, as indicated in paragraphs 6(h), 6(j) and 6(k) of Charge II of the Formal Written Complaint and the specifications thereto, that he spoke to Mr. Rosenberg and Judge Klein only for the purpose of providing them with information relevant to the question of bail. Respondent denied that his purpose in speaking to Judge Klein was to seek to have low bail imposed in the Hopkins case. In so testifying, respondent was evasive and less than forthcoming, and his testimony was lacking in candor.

13. Paragraphs 6(a) through 6(g) and 6(i) of Charge II of the Formal Written Complaint are not sustained and are, therefore, dismissed.

As to Charge III of the Formal Written Complaint:

14. On October 17, 1987, respondent, a former New York City police officer, attended a reunion of officers from a Brooklyn precinct. Vincent James Laudani, another former officer and a long-time friend of respondent, told respondent that another officer by the name of Begg was concerned about a case in respondent's court involving Mr. Begg's son. Respondent did not know Mr. Begg.

15. Several days later, respondent inquired in court about the case and learned that it was scheduled to come before him. Between October 19 and 23, 1987, respondent examined the file of People v. Matthew M. Begg and learned that the defendant, who was about 17 or 18 years old, was charged with criminal trespass on the grounds of the abandoned Edgewood State Hospital.

16. On November 12, 1987, the case came before respondent. The People were represented by John H. Rouse. Jacqueline Lupichuk appeared for Mr. Begg and asked for a trial date.

17. Respondent called Mr. Rouse into chambers and asked him why he was not offering to dispose of the case with an Adjournment in Contemplation of Dismissal (ACD).

18. Mr. Rouse explained that his office had a policy not to offer ACDs on trespass cases at Edgewood because there had been repeated problems with youths on the property.

19. Respondent then asked Mr. Rouse to summon his supervisor, Marcie I. Rudner, to the courtroom. When Ms. Rudner arrived, respondent returned to chambers with her and Mr. Rouse.

20. Respondent told the prosecutors that he would like an ACD in the Begg case. He said that the defendant's father was a police officer with whom respondent had once worked and that an ACD would be "appreciated."

21. Ms. Rudner said that an ACD would not be possible, repeating Mr. Rouse's explanation for the policy.

22. Respondent, Ms. Rudner and Mr. Rouse then returned to the courtroom. Respondent put on the record that he had discussed the case "with the view that there might be a possible ACD disposition." Ms. Rudner put her position on the record. Respondent scheduled the matter for trial before another judge.

23. Respondent did not disqualify himself or offer to disqualify himself from the Begg case. He did not disclose on the record that he had had a conversation with a friend concerning the case.

As to Charge IV of the Formal Written Complaint:

24. The charge 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, 100.3(a)(1), 100.3(a)(4), 100.3(c)(1) and 100.3(c)(1)(i) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(4), 3C(1) and 3C(1)(a) of the Code of Judicial Conduct. Charges I and III and paragraphs 6(h), 6(j) and 6(k) of Charge II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Paragraphs 6(a) through 6(g) and 6(i) of Charge II and Charge IV are dismissed.

In the Hopkins case, respondent approached the prosecutor and the presiding judge and offered information which was clearly designed to influence their decisions as to bail. Although it cannot be demonstrated that he specifically asked the prosecutor to recommend low bail or asked the judge to set low bail, that does not excuse the conduct. He spoke of the defendant's good record for appearing in court in the past. That argument could only have had one purpose: to cast favor on the defendant as a bail risk. See Matter of DeLuca, 1985 Annual Report 119 (Com. on Jud. Conduct, July 2, 1984).

Respondent knew or should have known that the prosecutor and the other judge would "regard his words and actions with heightened deference simply because he is a Judge." Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 81 (1980). Such requests are cause for discipline. Matter of McGee, 1985 Annual Report 176 (Com. on Jud. Conduct, Apr. 12, 1984).

In addition, respondent failed to disqualify himself and asked the prosecutors ex parte for a favorable disposition in the Begg case. Having received an inquiry on behalf of the defendant, respondent should have disqualified himself upon learning that Begg was before him. Section 100.3(c)(1)(i) of the Rules Governing Judicial Conduct. His ex parte requests of the prosecutors for an ACD were plain attempts to gain special consideration, which is "wrong and always has been wrong." Matter of Byrne, 47 NY2d (b) (Ct. on the Judiciary 1979). See also Matter of Seiffert v. State Commission on Judicial Conduct, 65 NY2d 278 (1985).

This serious misconduct is exacerbated by respondent's failure to recognize that what he did was wrong (see Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349, 356 [1984]; Matter of Shilling v. State Commission on Judicial Conduct, 51 NY2d 397, 404 [1980]), and by his evasive testimony about the Hopkins case. "Devious answers in disciplinary proceedings are viewed as proffered for lack of legitimate explanation and as compounding the weight of the charge in question." Matter of Waltemade, 37 NY2d (a), (nn), (hhh) (Ct. on the Judiciary 1975).

If we were confronted only with respondent's conduct in the Hopkins case, serious consideration would have to be given to a sanction less than removal. For there, respondent's judgment was arguably impaired by knowledge of the tragic circumstances in which his friends found themselves. See Matter of Figueroa, 1980 Annual Report 159, 161 (Com. on Jud. Conduct, Nov. 1, 1979). But the impaired judgment was not limited to the case of close friends. Respondent was not acquainted with the Begg family except for casual reference to a case by an old friend. Respondent's conduct in Begg makes it clear that he has no compunction about using the entire power of his office to benefit another. Taken as a whole, respondent's conduct indicates insensitivity to the ethical standards of judicial office and demonstrates that he is not fit to be a judge.

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

Mrs. Robb, Judge Altman, Mr. Berger, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Kovner, Judge Ostrowski and Judge Rubin concur, except that Mrs. Del Bello dissents as to Charges II and IV only and votes that the charges be sustained in toto.

Mr. Bower and Mr. Sheehy were not present.

Dated: April 3, 1989

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 J. KILEY,

a Judge of the District Court, Suffolk County.

OPINION BY MRS. DEL BELLO, DISSENTING IN PART

I concur that Charges I and III are sustained and that respondent should be removed from office. I write separately because I feel that the findings of the majority of the Commission do not go far enough with respect to respondent's lack of candor. Accordingly, I would sustain in toto Charges II and IV of the Formal Written Complaint.

With respect to the Hopkins case, respondent testified unequivocally in this proceeding that he went looking for the prosecutor, Mr. Rosenberg, and the presiding magistrate, Judge Klein, because Mr. Hopkins' attorney was not available and because respondent wanted to convey certain information which he felt would be relevant to their "independent" judgments concerning bail. Respondent insisted that he had no recollection of discussing with Mr. Rosenberg the amount of his bail recommendation or of asking him whether he could "do better" than a $10,000 bail recommendation, as Mr. Rosenberg testified.

The defense counsel, Mr. Karl, on the other hand, clearly recalled that respondent asked him what judge would be presiding over the Hopkins arraignment, indicating that respondent spoke to Mr. Karl before his sequential conversations with Mr. Rosenberg and Judge Klein. If Mr. Karl's version of the events is accepted, it becomes obvious that repondent's intent in talking to the prosecutor and Judge Klein was not, as he maintains, to present information that would properly have been put forth by Mr. Karl, but to lend the prestige of judicial office to the defendant's case for low bail.

Thus, it is apparent that respondent's version of his conversation with Mr. Karl and his failure to recall discussing bail with Mr. Rosenberg serves his own position that he was not seeking favoritism for the Hopkins family. The testimony of Mr. Karl and Mr. Rosenberg carries no such taint.

The referee found that the difference on these points between the attorneys and respondent was attributable to an honest difference in recollection, and the majority of the Commission adopted this view. I cannot agree. Respondent's first testimony was less than four months after

the events in Hopkins. He was close to the family, and the incident was an emotional one. It was not routine and must have been memorable. Respondent recounted many insignificant details of his conversations that day and meticulously retraced his steps. He failed to recall events and testified at variance with other witnesses only when their version of the facts tended to incriminate him. It is no wonder that the referee found that respondent's testimony was "evasive and less than forthcoming." That sounds like lack of candor to me.

For these reasons, I would reject respondent's testimony concerning his conduct in the Hopkins case and would find that he was deliberately untruthful concerning his conversations with Mr. Karl and Mr. Rosenberg, as well as evasive about his reasons for speaking to the prosecutor and Judge Klein.

With respect to the Begg case, the referee and the majority reject respondent's testimony and adopt the facts as presented by other witnesses. Yet the majority does not sustain Charge IV, which alleged that respondent lacked candor in his testimony about the case. I find this to be a contradiction.

Respondent's position is that when the Begg case came before him, he had no recollection that he had spoken to a friend about it less than a month before, despite the fact that he knew the name of the defendant, had examined the case file only three weeks before, knew about the facts of the crime alleged and knew that the case was to come before him. Only after he had asked the prosecutors, Mr. Rouse and Ms. Rudner, to agree to dismiss the case without trial did he recall that the Begg case was the one in which his friend had an interest, respondent claimed. If this version of the events were accepted, it would have to be found that respondent's requests were based on the merits, not on favoritism, since at the time he made the requests he did not know of his personal interest in the case.

The majority rightfully rejects this contrived scenario and adopts facts as recounted by the prosecutors. Yet the majority also holds that respondent's unequivocal and self-serving testimony was the result only of a faulty memory.

I conclude that the preponderance of the evidence, as well as respondent's personal appearance at oral argument, clearly indicate that respondent repeatedly fabricated events to mitigate his misconduct in connection with these two matters. Such lack of candor 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).

Accordingly, I vote to sustain in toto Charges II and IV, as well as Charges I and III, and concur that respondent should be removed from office.

Dated: April 3, 1989

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

IRVING W. LEVINE,

a Judge of the Civil Court of the City of New York, Kings County.

APPEARANCES:

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

Alain M. Bourgeois (Nathan R. Sobel, Of Counsel) for Respondent

The respondent, Irving W. Levine, a judge of the Civil Court of the City of New York, Kings County, was served with a Formal Written Complaint dated July 11, 1988, alleging that he promised a former political leader that he would adjourn a pending case at the leader's request. Respondent filed an answer dated August 10, 1988. A Supplemental Formal Written Complaint was served on September 6, 1988.

On October 10, 1988, 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 October 21, 1988.

The administrator and respondent submitted memoranda as to sanction. On December 15, 1988, 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 Civil Court of the City of New York and was during the time herein noted.

2. On August 1, 1985, respondent presided over 2121 Emmons Ave. Corp. v. Randazzo Clam Bar, Frank Geraci and Patricia Geraci, a commercial holdover proceeding. Respondent approved a stipulation in which the parties agreed that Randazzo Clam Bar would pay $600 per month rent, that the landlord would be granted a final judgment of possession effective November 30, 1985, and that there would be no application for an extension of time.

3. On November 26, 1985, Randazzo moved to stay the landlord from enforcing the judgment of possession. The matter was referred to respondent.

4. In early December 1985, Samuel Plotkin, public administrator of Kings County, called respondent by telephone. He advised respondent that Meade Esposito, former chairman of the Executive Committee of the Kings County Democratic Party, wanted respondent to call Mr. Esposito.

5. On December 2, 1985, respondent called Mr. Esposito, who said that he wanted to meet respondent for breakfast at a restaurant the following morning. Respondent agreed to meet with Mr. Esposito.

6. On December 3, 1985, Mr. Esposito told respondent that a close friend was a defendant in a case that was being heard by respondent and that the case involved Randazzo Clam Bar. Mr. Esposito told respondent that Randazzo Clam Bar had been a tenant for more than 30 years, was in the process of constructing new premises in the immediate vicinity and needed an adjournment of approximately three months to allow for completion of construction and relocation. Mr. Esposito said that the tenant was willing to pay a rent increase.

7. Respondent told Mr. Esposito that he would adjourn the case pursuant to Mr. Esposito's request. Respondent intended to convey the impression that he would grant Mr. Esposito's request. As the two men were about to part, respondent kissed Mr. Esposito on the forehead.

8. Respondent knew that Mr. Esposito was referring to 2121 Emmons Ave. Corp. v. Randazzo Clam Bar, Frank Geraci and Patricia Geraci over which respondent had previously presided. Respondent also recalled that Alan Firestone, the attorney for Randazzo Clam Bar, had advised respondent that he was about to go before him on this matter and that the principals of Randazzo Clam Bar wished to settle the matter.

9. Prior to his meeting with Mr. Esposito, respondent had known Mr. Esposito for approximately 25 years. Mr. Esposito had been instrumental in assisting respondent in his career. Respondent believed that Mr. Esposito had assisted him in obtaining the positions of Civil Court law assistant in 1970 and Supreme Court law assistant in 1974 and in arranging a

transfer of respondent's assignment as a Supreme Court law assistant from one Supreme Court Justice to another at the end of 1975 when respondent had become displeased with his assignment. Mr. Esposito had also supported respondent's candidacy for Civil Court Judge in 1983.

10. On December 3, 1985, after he had met with Mr. Esposito earlier that day, respondent presided over the Randazzo case. The attorneys for the landlord and tenant requested an adjournment, and respondent adjourned the matter to December 17, 1985.

11. On December 17, 1985, respondent presided over Randazzo. Mr. Firestone was present, but Harvey Lustig, the attorney for the landlord, was not present because he was on trial in another part of the Civil Court, Kings County. Mr. Firestone communicated to respondent the joint request of respective counsel that the matter be adjourned, and respondent adjourned the proceeding until January 27, 1986. When Mr. Lustig subsequently learned of the adjournment, he was surprised at the length of the adjournment.

12. Effective January 1, 1986, respondent was assigned to the Criminal Court. Although it is rare for a judge assigned to Criminal Court to preside over a Civil Court landlord-tenant matter, the Randazzo case was assigned to respondent in Criminal Court.

13. On January 27, 1986, respondent presided over Randazzo in Criminal Court. Mr. Lustig was present, but Mr. Firestone was ill and was not present. Respondent adjourned the proceeding to February 24, 1986.

14. On February 24, 1986, respondent presided over Randazzo in Criminal Court. The attorneys for the landlord and tenant were present. Respondent adjourned the proceeding to March 13, 1986, after both attorneys agreed to adjourn the proceeding until that date.

15. On March 13, 1986, respondent presided over Randazzo in Criminal Court. Both attorneys were present. Respondent approved a stipulation whereby the parties agreed that enforcement of the judgment of possession would be stayed until October 31, 1986, and that the tenant would pay a monthly rent of $2,250, effective April 1, 1986.

16. Respondent never informed the attorneys in Randazzo of his meeting with Mr. Esposito.

17. Respondent did not preside over the case after March 13, 1986.

As to Charge I of the Supplemental Formal Written Complaint:

18. On June 2, 1986, two FBI agents asked respondent whether he had met with Mr. Esposito on December 3, 1985, and, if so, whether the Randazzo case was discussed at the meeting. Respondent replied that he met with Mr. Esposito, but he falsely stated that he did not recall what was

discussed at the meeting and that he did not discuss the Randazzo case or any case involving Mr. Esposito's friend.

19. Respondent lied when he told the FBI agents that he did not recall the subject of his conversation with Mr. Esposito and that he did not discuss the Randazzo case. At the time of his interview by the FBI agents, respondent recalled the conversation but lied to protect Mr. Esposito. Subsequently, respondent met with the FBI and made full disclosure of the facts of the meeting with Mr. Esposito.

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. Charge I of the Formal Written Complaint and Charge I of the Supplemental Formal Written Complaint, as amended by the agreed statement of facts, are sustained, and respondent's misconduct is established.

By telling Mr. Esposito that he would adjourn the Randazzo case, respondent intentionally conveyed the impression that the former political leader was in a special position to influence him, contrary to Section 100.2(c) of the Rules Governing Judicial Conduct. He engaged in an ex parte communication concerning a matter that he knew would come before him and discussed the merits of the case. He promised Mr. Esposito that his rulings would be based not on merit but on his allegiance and loyalty to the political leader. The discussion was not one merely about the scheduling of the case. The tenant was seeking a stay of eviction beyond the previously agreed-upon date. By agreeing to adjourn the case until the tenant could relocate, respondent was promising, in effect, to grant the relief that the tenant was seeking in the matter before him. Respondent has conceded that it was likely that Mr. Esposito reported respondent's promise to the tenant or the tenant's attorney, a factor that plainly could have influenced further negotiations concerning the amount of rent during the holdover period.

Simply by making the promise, respondent conveyed the appearance that his decisions thereafter were influenced by Mr. Esposito's request. "To be sure, a Judge must view matters before him on their merits alone, without regard to public or professional disapproval. Moreover, a Judge must also avoid creating the appearance that he would decide a matter before him in any other manner." Matter of Cunningham v. State Commission on Judicial Conduct, 57 NY2d 270, 274-75 (1982). To create such an appearance has been called a "perversion of the judicial process...." Cunningham, supra (dissenting opinion at 276). Standing alone, this perversion of the judicial process warrants removal.

Respondent exacerbated his misconduct by lying to the FBI agents about his meeting with Mr. Esposito. His subsequent misgivings do not excuse the egregiousness of his initial misconduct. 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). One who gives false information or conceals information in order to obstruct the administration of justice or of government is not fit to hold judicial office. Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389 (1988); Matter of Bailey v. State Commission on Judicial Conduct, 67 NY2d 61 (1986); Matter of Fabrizio v. State Commission on Judicial Conduct, 65 NY2d 275 (1985); Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105 (1984); Matter of Boulanger v. State Commission on Judicial Conduct, 61 NY2d 89 (1984).

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

Mrs. Robb, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Kovner and Judge Ostrowski concur.

Judge Altman did not participate.

Judge Rubin and Mr. Sheehy were not present.

Dated: January 23, 1989

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

DONALD G. MASNER,

a Justice of the Westmoreland Town Court, Oneida County.

Determination

APPEARANCES:

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

Antonio Faga for Respondent

The respondent, Donald G. Masner, a justice of the Westmoreland Town Court, Oneida County, was served with a Formal Written Complaint dated September 28, 1987, alleging that he failed to perform his judicial duties in a dignified and impartial manner, engaged in a course of conduct prejudicial to the administration of justice, failed to advise defendants charged with criminal conduct of basic due process rights and failed to perform the administrative and adjudicative duties of his office. Respondent filed an answer dated October 22, 1987.

By order dated March 3, 1988, 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 April 25, 26 and 29, 1988, and the referee filed his report with the Commission on July 29, 1988.

By motion dated September 23, 1988, the administrator of the Commission moved to confirm the referee's report, to adopt additional findings of fact and for a finding that respondent be removed from office. Respondent opposed the motion on October 12, 1988. The administrator filed a reply on October 31, 1988.

On November 16, 1988, 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 has been a justice of the Westmoreland Town Court since January 1, 1976, and has attended all the required training sessions sponsored by the Office of Court Administration.

2. On January 23, 1986, respondent arraigned Mary Jo Felice on two motor vehicle charges. Ms. Felice was represented by an attorney, Brian Miga.

3. Mr. Miga entered a plea of not guilty and requested a motion date.

4. Following Mr. Miga's request for a motion date, respondent sarcastically asked, "Why, do you want to get some more of this woman's money?"

5. On January 23, 1986, David S. Haddad, a used car dealer, appeared before respondent in response to a speeding ticket.

6. When Mr. Haddad requested an opportunity to explain his case prior to entering a plea, respondent stated, "Well, I heard them all before, but go ahead and amuse me."

7. Mr. Haddad attempted to explain that he was a registered dealer, but before he could go further, respondent interrupted and asked sarcastically, "In what, drugs?"

As to Charge II of the Formal Written Complaint:

8. It was respondent's custom to conduct a "pretrial hearing" whenever a plea of not guilty by mail was received by him.

9. The assistant district attorney assigned to respondent's court neither knew about nor attended these pretrial hearings. Respondent routinely sent form letters advising defendants of the prehearing practice, and although the letter indicated that he had the "mutual consent of the district attorney's office," neither the district attorney nor his assistants knew about the letter or consented to its use.

10. At the pretrial hearings, respondent asked defendants to give a statement as to their defense and thereupon respondent determined whether such defense warranted a trial. Frequently, respondent offered defendants reductions of the charge as an alternative to reappearing for trial.

11. Some defendants, believing the "pretrial hearing" was the trial date, pled guilty to a lesser charge rather than travel long distances back to respondent's court.

12. In several cases, respondent offered and granted reductions and adjournments in contemplation of dismissal without the knowledge or consent of the district attorney or his assistant.

13. After respondent granted an adjournment in contemplation of dismissal in People v. Gary Jones and People v. Daniel O'Neill, Assistant District Attorney William Weber telephoned respondent and told him that he should not have granted these dispositions without Mr. Weber's consent and requested that respondent reinstate the charges. Respondent did as requested.

14. Respondent frequently lowered the charged speed to less than 15 miles per hour over the posted limit in satisfaction of the speeding charge and frequently and erroneously advised defendants that their insurance rates would not be affected thereby.

15. In People v. Christopher Barley, respondent induced a guilty plea from the defendant, who had pled not guilty to speeding charges, by offering an unauthorized reduction.

16. In People v. Marilyn Bielby, People v. Phyllis Oleksy and People v. Karl Stewart, respondent convicted the defendants, even though they had not pled guilty to any charge nor had respondent offered the defendants any opportunity for trial.

17. In People v. Harold Moore and People v. Harold Robert Murphy, respondent improperly suspended the defendants' licenses, even though the defendants properly responded to the charges against them.

18. In People v. Christopher Barley, People v. Donna Geer and People v. Helen Setera, respondent improperly elicited incriminating facts from the defendants following their pleas of not guilty.

19. In People v. Christopher Barley, People v. Marilyn Bielby, People v. Chris Newmiller, People v. Helen Setera and People v. Rudolph Strasswimmer, respondent failed to properly advise defendants of their rights, in violation of Section 170.10 of the Criminal Procedure Law.

20. In People v. Donna Geer, People v. Kevin Hinman and People v. Richard Moran, respondent offered or granted reductions in the charges without the knowledge or consent of the district attorney's office.

21. In People v. Chris Newmiller, respondent induced the defendant's guilty plea by offering a reduction in the charge despite the defendant's request for a trial. Respondent entered in his records a conviction to the same charge, Speeding, but at 55 miles per hour rather than the 65 miles per hour alleged.

22. In People v. Donna Geer, respondent failed to advise the defendant of her right to an attorney, to an adjournment to obtain an attorney or to a supporting deposition.

As to Charge III of the Formal Written Complaint:

23. On September 17, 1986, Marilyn Bielby, a 42 year-old mentally retarded person, was charged with Criminal Trespass, Third Degree, a misdemeanor.

24. Ms. Bielby's parents brought her to respondent's home, where respondent advised the Bielbys that the defendant was entitled to an attorney. However, respondent did not advise them of Ms. Bielby's right to have an attorney appointed if she could not afford one, nor of Ms. Bielby's right to an adjournment to consult with an attorney. Moreover, a copy of the accusatory instrument was not furnished.

25. Neither the defendant nor her parents could afford an attorney.

26. It is doubtful that Ms. Bielby was aware of the charge against her.

27. Respondent did not ask Ms. Bielby for a plea, nor did she plead guilty. One of her parents acknowledged that she probably was guilty.

28. Respondent imposed a conditional discharge and a $60 surcharge, which the Bielbys paid.

29. Respondent failed to maintain adequate records of the case of People v. Marilyn Bielby, in violation of Section 30.9 of the Uniform Justice Court Rules then in effect, Section 214.11(1) of the Uniform Civil Rules for the Justice Courts and Sections 107, 2019 and 2019-a of the Uniform Justice Court Act. The only record of the case was a docket page.

As to Charge IV of the Formal Written Complaint:

30. On May 2, 1986, the defendant in People v. Rudolph Strasswimmer appeared in respondent's court for trial on a Speeding charge.

31. The defendant advised respondent that he was ready to proceed to trial.

32. With the defendant in an outside room, a conversation took place between respondent and the assistant district attorney. Respondent related to the ADA that the arresting officer was notified of the trial date but that the trooper had told respondent that he had no intention of appearing for the trial. The trooper had stated that he would be at home if respondent needed him.

33. Respondent told the ADA that it was the trooper's responsibility to be present and that if he did not appear, respondent would not telephone him.

34. The ADA stated that the Strasswimmer case was serious because the defendant was charged with Speeding at 85 miles per hour in a 55 mile-per-hour zone and that if the trooper failed to appear and the defendant requested a dismissal, the court should grant the motion.

35. Subsequently, Mr. Strasswimmer returned to respondent's chambers and again announced his readiness for trial, having pled not guilty.

36. Respondent offered Mr. Strasswimmer a reduction of the five-point violation to a three-point violation.

37. In response, the defendant stated that he had received such an offer in the mail and that it was unacceptable. He further stated that he wanted a trial because he felt he was innocent.

38. Thereupon, respondent stated that the officer was not present and that if the defendant wanted a trial, the court would have to adjourn the matter.

39. The defendant stated that the matter had been set down for trial and that if the officer was not present, respondent should dismiss the case. He further told respondent that he had driven four and a half hours from Yorktown Heights, that he had lost a day's wages and that it had cost him considerable money for gas.

40. Respondent refused to dismiss the case and restated his offer of a reduction.

41. When Mr. Strasswimmer repeated his request for a trial that evening, respondent again stated that if the defendant wanted a trial, it would have to be adjourned until a later date.

42. At one point during the exchange, the defendant became so upset and frustrated that he began to bang his head against a wall and then said that since he had no other choice but to plead guilty to the reduction, he would do so, although he felt that he was innocent of the Speeding charge.

43. A Mr. Pratt, an attorney who was present as a spectator, approached respondent and asked whether he could speak with Mr. Strasswimmer privately, to which respondent agreed.

44. After speaking with the defendant, Mr. Pratt repeated defendant's motion to dismiss the charge, and again respondent refused to grant the motion.

45. Subsequently, Mr. Pratt advised the defendant to plead guilty to the reduced charge, and the defendant reluctantly did so.

As to Charge V of the Formal Written Complaint:

46. Respondent failed to maintain complete and adequate motor vehicle dockets since November 1985, in violation of Section 105.3 of the Recordkeeping Requirements for Town and Village Courts then in effect and Sections 107, 2019 and 2019-a of the Uniform Justice Court Act.

47. The only record respondent kept of motor vehicle cases was the court copy of the traffic ticket.

48. Respondent did not fill out the backs of the tickets, notwithstanding that on the back of the court's copy of the traffic ticket there is room to enter the entire record of the proceeding. Respondent received and read the handbook instructing him in this respect.

49. Respondent failed to maintain case files, in violation of Section 105.1 of the Recordkeeping Requirements for Town and Village Courts and Section 30.9 of the Uniform Justice Court Rules then in effect, Section 214.11(1) of the Uniform Civil Rules for the Justice Courts and Sections 107, 2019 and 2019-a of the Uniform Justice Court Act.

50. Respondent destroyed or discarded correspondence, supporting depositions and other court records kept in the normal course of business, in violation of Sections 104.1(e), 104.3 and 104.4 of the Rules of the Chief Administrator of the Courts and Section 89 of the Judiciary Law.

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) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(3), 3A(4) and 3B(1) of the Code of Judicial Conduct. Charges I through V of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The facts reflect a sad, but compelling, example of a nonlawyer justice of a town court who is demonstrably unfit to hold judicial office. Respondent has held his judicial office for the past 12 years and has attended all the required training sessions sponsored by the Office of Court Administration. Regrettably, the record of this proceeding is barren of any evidence that these training sessions had their intended effect upon respondent.

Respondent engaged in a pattern of conduct during arraignment and other pretrial proceedings in criminal cases which evidenced a predisposition not only against the particular defendant appearing before him, but to defendants generally. Any judge who has convicted defendants without trial or plea, misinformed defendants of the consequences of a plea of guilty and formed conclusions on cases before him on the bases of matters

not in the record violates the fundamental due process rights of the citizens of this State and must be removed from office. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286 (1983). Further, respondent's conduct offended virtually every minimum standard of appropriate judicial conduct, including material ex parte communications, offensive and insulting demeanor, coercive tactics and failure to keep adequate records of cases in his court.

One particularly egregious example of respondent's incompetence and unfitness for judicial office involved his mistreatment of a mentally-retarded defendant appearing before him charged with a crime. In this instance, respondent, knowing the defendant was mentally retarded and that her parents were people of modest means, failed to inform the parents and their daughter of her right to an appointed attorney, failed to furnish a copy of the accusatory instrument, failed to explain the nature of the charge to them and found the incompetent defendant guilty on a wholly improper and unsubstantiated basis: her parent's acknowledgment that the daughter might be guilty. This is an abuse of power which brings disrepute to the judiciary as a whole and destroys public confidence in the integrity of respondent's court. Matter of McGee v. State Commission on Judicial Conduct, 59 NY2d 870 (1983).

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Kovner, Judge Ostrowski and Mr. Sheehy concur.

Judge Rubin was not present.

Dated: January 25, 1989

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

STEPHEN A. MORE,

a Justice of the Springfield Town Court, Otsego County.

APPEARANCES:

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

The respondent, Stephen A. More, a justice of the Springfield Town Court, Otsego County, was served with a Formal Written Complaint dated January 20, 1989, alleging that he failed to promptly deposit court funds in his official account and failed to remit funds to the state comptroller in a timely fashion. Respondent did not answer the Formal Written Complaint.

By motion dated March 28, 1989, 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 April 25, 1989, the Commission granted the administrator's motion.

The administrator filed a memorandum as to sanction and a supplementary letter dated July 10, 1989. Respondent neither filed a memorandum nor requested oral argument.

On July 17, 1989, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent was a justice of the Springfield Town Court from January 1, 1976, until he notified the Chief Administrator of the Courts of his resignation on May 18, 1989.

2. Between July 1984 and November 1988, respondent failed to remit court funds to the state comptroller within ten days of the month after he received them, as required by 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, and as denominated in Schedule A appended hereto. Respondent remitted court funds late in all but four of the 53 months of the period. Money was remitted between one and 116 days late.

3. Between September 1984 and September 1988, respondent failed to promptly deposit court funds in his official account, as required by Section 30.7(a) of the Uniform Justice Court Rules in effect until January 5, 1986, and by Section 214.9(a) of the Uniform Civil Rules for the Justice Courts in effect since January 6, 1986, amended on March 25, 1987, and as denominated in Schedule B appended hereto.

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

Respondent has mishandled court funds by keeping them in his own possession rather than promptly depositing them in the bank and by failing to turn them over to the state comptroller in a timely fashion as required by law.

The failure by respondent to timely deposit and remit court funds raises questions about the interim use of such funds and diminishes public confidence in the individual judge and in the judiciary as a whole. See Matter of Rater, 1987 Annual Report 135, 137 (Com. on Jud. Conduct, July 25, 1986), accepted, 69 NY2d 208 (1987). Respondent failed to comply with the law and to diligently perform his administrative duties. Respondent has offered no excuse or mitigating factors which would moderate the otherwise severe penalty to be imposed. See Matter of Rater v. State Commission on Judicial Conduct, 69 NY2d at 209.

This determination is rendered pursuant to Section 47 of the Judiciary Law in view of respondent's resignation from the bench.

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

Mrs. Robb, Mr. Berger, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Kovner, Judge Rubin, Judge Salisbury and Mr. Sheehy concur.

Judge Altman and Mr. Bower were not present.

Dated: August 25, 1989

Schedule A

Received	Remitted	Number of Days Late
July 1984	August 31, 1984	21
August 1984	October 15, 1984	35
September 1984	November 26, 1984	47
October 1984	December 3, 1984	23
November 1984	December 7, 1984	0
December 1984	February 21, 1985	42
January 1985	March 11, 1985	29
February 1985	April 5, 1985	26
March 1985	April 3, 1985	0
April 1985	May 23, 1985	13
May 1985	June 24, 1985	14
June 1985	August 21, 1985	42
July 1985	August 28, 1985	18
August 1985	November 4, 1985	55
September 1985	November 4, 1985	25
October 1985	November 14, 1985	4
November 1985	February 19, 1986	71
December 1985	February 21, 1986	42
January 1986	June 6, 1986	116
February 1986	June 6, 1986	88
March 1986	June 6, 1986	57
April 1986	June 12, 1986	33
May 1986	June 11, 1986	1
June 1986	September 4, 1986	56
July 1986	September 4, 1986	25
August 1986	September 4, 1986	0
September 1986	December 31, 1986	82
October 1986	February 11, 1987	93
November 1986	February 11, 1987	63
December 1986	February 18, 1987	39
January 1987	February 18, 1987	8
February 1987	March 11, 1987	1
March 1987	April 14, 1987	4
April 1987	May 15, 1987	5
May 1987	June 9, 1987	0
June 1987	August 12, 1987	33
July 1987	August 14, 1987	4
August 1987	December 10, 1987	91
September 1987	December 17, 1987	68
October 1987	December 29, 1987	49
November 1987	February 16, 1988	68
December 1987	March 8, 1988	58
January 1988	March 3, 1988	22
February 1988	March 11, 1988	1
March 1988	May 11, 1988	31
April 1988	August 8, 1988	90
May 1988	September 8, 1988	90
June 1988	September 8, 1988	60
July 1988	September 16, 1988	37
August 1988	October 17, 1988	37
September 1988	January 6, 1989	88
October 1988	January 3, 1989	54
November 1988		

Schedule B

Dates of Receipt	Total of Receipts	Date of Deposit	Total of Deposit	Deficiency or Surplus	Cumulative Deficiency or Surplus
9/10/84	$ 60.00	9/13/84	$ 25.00	- 35.00	- 35.00
9/14-10/8/84	285.00	10/11/84	65.00	- 220.00	- 255.00
10/15-11/19/84	730.00	11/26/84	70.00	- 660.00	- 915.00
11/26/84	80.00	12/03/84	995.00	+ 915.00	0
12/01-28/84	1,437.50	12/31/84	1,357.50	- 80.00	- 80.00
1/14-2/25/85	1,055.00	3/05/85	640.00	- 415.00	- 495.00
3/25/85	110.00	4/03/85	525.00	+ 415.00	- 80.00
4/15-17/85	180.00	4/19/85	150.00	- 30.00	- 110.00
4/22-29/85	338.75	5/01/85	368.75	+ 30.00	- 80.00
5/01-20/85	868.75	5/22/85	113.75	- 755.00	- 835.00
5/27-6/13/85	735.00	6/18/85	633.75	- 101.25	- 936.25
6/18-20/85	0	6/20/85	910.00	+ 910.00	- 26.25
6/20-25/85	182.50	6/25/85	250.00	+ 67.50	+ 41.25
6/25-7/15/85	925.00	7/16/85	92.50	- 832.50	- 791.25
7/22-8/19/85	235.00	8/20/85	220.00	- 15.00	- 806.25
8/26/85	35.00	8/27/85	885.00	+ 850.00	+ 43.75
8/30-9/25/85	410.00	9/27/85	65.00	- 345.00	- 301.25
9/29-30/85	535.00	10/01/85	665.00	+ 130.00	- 171.25
10/01/85	350.00	10/07/85	500.00	+ 150.00	- 21.25
10/07-09/85	375.00	10/10/85	350.00	- 25.00	- 46.25
10/11-21/85	910.00	10/22/85	615.00	- 295.00	- 341.25
10/28/85	35.00	11/01/85	130.00	+ 95.00	- 246.25
11/1-3/85	0	11/04/85	195.00	+ 195.00	- 51.25
11/04/85	32.50	11/13/85	70.00	+ 37.50	- 13.75
11/24/85-1/20/86	1,622.50	2/12/86	165.00	-1,457.50	-1,471.25
2/17/86	110.00	2/18/86	1,025.00	+ 915.00	- 556.25
2/18-26/86	0	2/27/86	265.00	+ 265.00	- 291.25
2/27-5/30/86	464.00	6/05/86	639.50	+ 175.50	- 115.75
6/07-09/86	50.00	6/10/86	165.00	+ 115.00	- .75
6/16-8/18/86	955.00	8/19/86	435.00	- 520.00	- 520.75
8/25/86	62.50	9/03/86	552.50	+ 490.00	- 30.75
9/03-15/86	405.00	9/18/86	345.00	- 60.00	- 90.75
9/29-11/24/86	515.00	12/29/86	260.00	- 255.00	- 345.75

Dates of Receipt	Total of Receipts	Date of Deposit	Total of Deposit	Deficiency or Surplus	Cumulative Deficiency or Surplus
12/29/86-2/02/87	57.00	2/09/87	290.00	+ 233.00	- 112.75
2/02-18/87	0	2/18/87	55.00	+ 55.00	- 57.75
2/23-3/02/87	660.05	3/05/87	571.05	- 89.00	- 146.75
3/09/87	285.00	3/12/87	374.00	+ 89.00	- 57.75
3/16/87	50.00	3/23/87	50.00	0	- 57.75
3/31-4/03/87	205.00	4/07/87	180.00	- 25.00	- 82.75
4/13-27/87	691.20	4/30/87	685.00	- 6.20	- 88.95
5/04-26/87	436.20	6/01/87	436.20	0	- 88.95
6/01/87	295.00	6/03/87	295.00	0	- 88.95
6/22-29/87	375.00	6/30/87	375.00	0	- 88.95
7/13-27/87	580.00	8/11/87	580.00	0	- 88.95
8/13-17/87	45.00	8/18/87	35.00	- 10.00	- 98.95
8/24/87	170.00	8/28/87	60.00	- 110.00	- 208.95
8/31-11/30/87	770.00	12/01/87	250.00	- 520.00	- 728.95
12/04/87	3.87	12/10/87	500.00	+ 496.13	- 232.82
12/10-20/87	0	12/21/87	133.87	+ 133.87	- 98.95
12/28/87	355.00	12/31/87	355.00	0	- 98.95
1/04-2/22/88	205.00	2/29/88	135.00	- 70.00	- 168.95
2/29/88	480.00	3/03/88	500.00	+ 20.00	- 148.95
3/07/88	630.00	3/10/88	630.00	0	- 148.95
3/14/88	305.00	3/18/88	305.00	0	- 148.95
4/04-7/17/88	2,542.75	7/18/88	750.00	-1,792.75	-1,941.70
7/18-8/02/88	0	8/03/88	1,320.00	+1,320.00	- 621.70
8/31-9/5/88	165.00	9/06/88	388.50	+ 223.50	- 398.20
9/6-11/88	0	9/12/88	144.25	+ 144.25	- 253.95
9/26/88	25.00	9/29/88	100.00	+ 75.00	- 178.95

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 T. PHILLIPS, JR.,

a Justice of the Morristown Town Court, St. Lawrence County.

Determination

APPEARANCES:

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

Brown and Silver (Michael P. Ribley, Of Counsel) for Respondent

The respondent, James T. Phillips, Jr., a justice of the Morristown Town Court, St. Lawrence County, was served with a Formal Written Complaint dated January 30, 1989, alleging that he allowed his personal attorney to appear in his court and to draft several documents in a case without the knowledge of the prosecutor and that he neglected his judicial duties in another case. Respondent filed an answer dated March 3, 1989.

On June 12, 1989, 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 parties subsequently stipulated that the transcript of respondent's testimony before a member of the Commission on October 25, 1988, be made part of the record of the proceeding. The Commission approved the agreed statement of facts by letter dated July 19, 1989.

The administrator and respondent submitted memoranda as to sanction.

On September 22, 1989, 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, who is not a lawyer, has been a justice of the Morristown Town Court since July 1977.

2. On October 14, 1987, charges of Driving While Intoxicated and Speeding were filed in respondent's court against Donald Ceresoli.

3. On November 16, 1987, Mr. Ceresoli's attorney, Mahlon T. Clements, filed a motion to dismiss the charges.

4. On November 30, 1987, Mr. Clements and his client appeared before respondent on the motion. No representative of the district attorney's office appeared, and respondent had received no papers in response to the motion. Respondent heard oral argument by Mr. Clements and reserved decision.

5. The next day, December 1, 1987, respondent received an answering affidavit from the district attorney's office, opposing the motion to dismiss.

6. Thereafter, respondent spoke with Mr. Clements and told him that he had decided to grant the motion. Mr. Clements offered to prepare a written decision for respondent, and respondent accepted. Respondent did not write a decision and did not dictate one to Mr. Clements. Respondent did not inform the prosecutor of his decision or of his conversation with Mr. Clements.

7. Mr. Clements prepared an order granting the motion to dismiss in the interest of justice and forwarded it to respondent without notice to the prosecutor. Respondent signed the order on December 19, 1987, without making any changes.

8. Mr. Clements filed the order and sent a copy to the district attorney's office.

9. Mr. Clements subsequently learned that the prosecutor planned to appeal the dismissal of the charges. He called respondent. Respondent agreed to have Mr. Clements prepare an amended order, specifying the factors a court must consider in granting a motion to dismiss in the interest of justice.

10. Mr. Clements prepared an amended order and forwarded it to respondent without notice to the prosecutor. Respondent signed the amended order on January 21, 1988, without making any changes. He returned it to

Mr. Clements, who filed it and sent a copy to the district attorney's office.

11. Respondent never informed the prosecutor of his conversations with Mr. Clements or of the fact that Mr. Clements had prepared the Ceresoli orders.

12. After the district attorney's office filed an Affidavit of Errors with respondent for appeal of the dismissal, respondent spoke again with Mr. Clements. Respondent asked Mr. Clements what he should do to respond. Respondent agreed to have Mr. Clements prepare respondent's return.

13. Mr. Clements prepared a return, and, on March 3, 1988, respondent signed it in the lawyer's office without making any changes. Respondent then delivered it to the district attorney's office. Respondent did not inform the prosecutor that Mr. Clements had prepared the return. The return erroneously states that respondent had "received testimony" on the motion to dismiss.

14. The district attorney subsequently objected that it appeared that Mr. Clements had prepared respondent's return. Mr. Clements contacted respondent and prepared a draft letter from respondent to the district attorney, replying to the objection. Respondent incorporated portions of Mr. Clements' draft into a letter that he sent to the district attorney.

15. Mr. Clements has represented respondent in several legal matters. Mr. Clements' law firm represented respondent and his wife in the adoption of their children in 1979. He represented respondent in the purchase of real property in 1983 and again in 1984. Mr. Clements represented respondent in a matter before the Department of Environmental Conservation from the Fall of 1984 to April 1985. In 1983, he represented respondent in connection with the filing of a business certificate. From December 1987 to March 1988, while Ceresoli was pending, Mr. Clements represented respondent's wife on a Speeding charge before the Richland Town Court, Oswego County.

16. Respondent did not disclose to the prosecutor in Ceresoli that Mr. Clements had represented him in personal matters in the past or that he was representing respondent's wife while the case was pending.

As to Charge II of the Formal Written Complaint:

17. On June 3, 1985, James Franz was arraigned before respondent on charges of Driving While Ability Impaired and Leaving The Scene Of An Accident. Respondent set bail at $50 and adjourned the case without date.

18. On May 31, 1985, the district attorney's office sent respondent a letter, stating its readiness for trial. On December 20, 1985, the prosecutor wrote to respondent and recommended that the court accept a

guilty plea to Driving While Ability Impaired in satisfaction of both charges or, in the alternative, schedule the case for trial. Respondent did not respond or schedule the matter.

19. Fifteen months later, on March 19, 1987, after the case was brought to his attention by his court clerk, respondent issued a warrant for Mr. Franz's arrest for failure to appear in court on September 19, 1986, notwithstanding that the defendant had never been scheduled to appear on that date nor had respondent notified him or his attorney to appear.

20. On March 30, 1987, Mr. Franz's attorney, Katherine Hannan Wears, made a motion to dismiss the charges for failure to provide a speedy trial. The district attorney's office opposed the motion.

21. Respondent did not decide the motion, notwithstanding letters from Ms. Wears on June 3, 1987, September 29, 1987, and January 20, 1988, requesting that he do so.

22. In July or August 1987, respondent went to Ms. Wears' law office and left a message with her secretary, indicating that he would grant the motion to dismiss if Ms. Wears would remove from her papers an allegation that the court was at fault for delaying the Franz trial.

23. Respondent did not decide the motion or schedule the case until June 1988, when he accepted a plea agreed to by defense counsel and the prosecutor.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3, 100.3(a)(1), 100.3(a)(4), 100.3(a)(5) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3, 3A(1), 3A(4), 3A(5) and 3C(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 impartiality might reasonably be questioned in Ceresoli since defense counsel had represented him in personal matters on several past occasions and was representing his wife at the time that the case was pending. Thus, respondent should have disclosed the relationship to the prosecutor and should have offered to disqualify himself. See Section 100.3(c)(1) of the Rules Governing Judicial Conduct; Matter of Conti v. State Commission on Judicial Conduct, 70 NY2d 416, 418-19 (1987); Matter of Sardonia, 2 Commission Determinations 3 (Com. on Jud. Conduct, Jan. 14, 1980).

The appearance of partiality was greatly exacerbated by respondent's handling of the case. He conducted numerous ex parte communications with defense counsel and treated him as a law secretary, discussing the case and permitting him to draft decisions and court papers without notice to the prosecutor. By signing the attorney's amended order

after he knew that his original order would be appealed, respondent was clearly attempting to strengthen the decision and enhance Mr. Clements' chances of winning on appeal.

While we sympathize with respondent's need for assistance, he should have known that it is wrong for him to rely on one party to a dispute for help without notice to the other side. See Matter of Rider, 1988 Annual Report 212 (Com. on Jud. Conduct, Jan. 30, 1987).

Respondent's total neglect of the Franz matter also constituted misconduct. See Matter of Lenney v. State Commission on Judicial Conduct, 71 NY2d 456 (1988). It was especially improper for him to suggest ex parte to defense counsel that he would dismiss the case if she would withdraw her criticism of the court. Respondent had a duty to decide the motion on the merits. He should not have withheld a favorable decision as barter for the advancement of his personal interests. See Matter of Sullivan, 1984 Annual Report 152, 156 (Com. on Jud. Conduct, Apr. 22, 1983).

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

Mr. Kovner, Judge Altman, Mr. Berger, Judge Ciparick, Mr. Cleary, Judge Rubin and Judge Salisbury concur.

Mrs. Del Bello, Mrs. Robb and Mr. Sheehy dissent as to sanction only and vote that respondent be removed from office.

Mr. Bower was not present.

Dated: November 3, 1989

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

EDWARD A. RATH,

a Justice of the Supreme Court,
8th Judicial District, Erie County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

John P. Lane for Respondent

The respondent, Edward A. Rath, a justice of the Supreme Court, 8th Judicial District, was served with a Formal Written Complaint dated April 28, 1988, alleging political activity and improper service on a government committee. Respondent filed an answer dated June 2, 1988.

On November 16, 1988, 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 17, 1988.

The administrator and respondent submitted memoranda as to sanction. On January 20, 1989, 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. The charge is not sustained and is, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

2. Respondent has been a justice of the Supreme Court since January 1985.

3. Respondent and Mary Lou Rath have been married since 1959. Ms. Rath has been an Erie County legislator since 1977.

4. On August 28, 1986, respondent and his wife attended a $50-per-person fund-raiser in West Seneca in support of her campaign for Erie County clerk. A gross amount of more than $6,000 was raised by the event. Neither respondent nor any member of his family purchased a ticket. Respondent was not introduced, nor did he participate in the program.

5. On October 9, 1986, respondent and his wife attended a $150-per-person fund-raiser in Cheektowaga in support of her campaign for Erie County clerk. The event was attended by more than 100 people and raised a gross amount of approximately $56,000. Neither respondent nor any member of his family purchased a ticket. Respondent was not introduced, nor did he participate in the program.

6. On April 6, 1987, respondent and his wife attended a fund-raiser in Cheektowaga in support of Jack Kemp's campaign for President of the United States. Tickets were $150 per person or $300 per couple. Ms. Rath purchased a ticket for respondent, who attended as her escort. Respondent was not introduced, nor did he participate in the program.

7. On April 12, 1987, respondent and his wife attended a fund-raiser in Aurora in support of Tom Reynolds' campaign for Erie County legislator. Members of the county legislature and their spouses were given complimentary tickets. Respondent attended as his wife's escort. The event was attended by more than 100 people and raised a gross amount of more than $11,000. Respondent was not introduced, nor did he participate in the program.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.7(a) of the Rules Governing Judicial Conduct and Canons 1, 2 and 7A(1)(c) of the Code of Judicial Conduct. Charge II of the Formal Written Complaint is sustained, and respondent's misconduct is established. Charge I is dismissed.

"...Judges must hold themselves aloof from and refrain from engaging in political activity, except to the extent necessary to pursue their candidacies during their public election campaigns." Matter of Maney v. State Commission on Judicial Conduct, 70 NY2d 27, 30 (1987). Consequently, judges may not accompany their spouses to political events, nor may they participate in their spouses' political campaigns.

Respondent's attendance as his wife's escort at fund-raisers for candidates for President and for county legislator were in clear violation of the standards that prohibit such political activity by judges. Section 100.7 of the Rules Governing Judicial Conduct. He also attended two fund-raisers for his wife's campaign. While it is understandable that a husband would want to support his wife's independent aspirations, a judge must refrain from doing so where prohibited by ethical constraints.

In mitigation, we note that respondent has recognized his misconduct and has been candid and cooperative with the Commission in this proceeding. Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153, 155 (1986); Matter of Kelso v. State Commission on Judicial Conduct, 61 NY2d 82, 87 (1984).

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Mrs. Del Bello, Mr. Kovner, Judge Rubin and Mr. Sheehy concur, except that Mrs. Robb, Mr. Berger and Mrs. Del Bello dissent as to Charge I only and vote that the charge be sustained.

Judge Ciparick and Mr. Cleary dissent as to sanction only and vote that the appropriate disposition would be to issue a confidential letter of dismissal and caution.

Judge Ostrowski did not participate.

Dated: February 21, 1989

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

E. WENDELL ROSS,

a Justice of the Chester Town Court, Warren County.

APPEARANCES:

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

James T. Curry for Respondent

The respondent, E. Wendell Ross, a justice of the Chester Town Court, Warren County, was served with a Formal Written Complaint dated January 25, 1989, alleging that he improperly failed to disqualify himself in numerous cases. Respondent did not answer the Formal Written Complaint.

On May 17, 1989, 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 July 19, 1989.

The administrator submitted a memorandum as to sanction. Respondent did not submit any papers with respect to sanction.

On August 18, 1989, 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 has been a justice of the Chester Town Court since 1974.

2. Paul Shambo is the nephew of respondent's wife.

3. On January 19, 1984, Mr. Shambo was charged with Driving With One Headlight in the Town of Chester. On February 7, 1984, respondent dismissed the charge on presentation of proof that the headlight had been repaired.

4. On May 3, 1984, Mr. Shambo was charged with Speeding and Inadequate Exhaust in the Town of Chester. On May 15, 1984, respondent dismissed the Inadequate Exhaust charge upon presentation of proof of repair and fined Mr. Shambo $60 on the Speeding charge.

5. On December 16, 1985, Mr. Shambo was charged with Unlawfully Dealing With A Child in the Town of Chester. Respondent's stepson, Charles "Corky" Roberts, had given a statement to police that was a basis of the charge that Mr. Shambo had given alcohol to minors. Mr. Roberts lived with respondent at the time. His statement was part of the court file of the case. Respondent did not advise the prosecution that Mr. Roberts and Mr. Shambo were his relatives. On January 7, 1986, respondent accepted Mr. Shambo's guilty plea and imposed a fine of $250.

6. William F. Olden, Jr., is the nephew of respondent's wife.

7. On March 9, 1987, Mr. Olden was charged with Driving With No Inspection in the Town of Chester. On March 24, 1987, respondent granted an Unconditional Discharge and a $10 surcharge upon presentation of proof of inspection.

As to Charge II of the Formal Written Complaint:

8. Thomas L. Shambo is the nephew of respondent's wife.

9. On August 23, 1988, Thomas Shambo was charged with Criminal Mischief, Fourth Degree, and Harassment in the Town of Chester. On August 23, 1988, respondent arraigned Thomas Shambo, adjourned the matter and released him on his own recognizance. Respondent did not disqualify himself or transfer the matter to another judge until after Commission staff inquired about the case in November 1988.

As to Charge III of the Formal Written Complaint:

10. Respondent is the sole owner and manager of a tax preparation business. At all times between August 1984 and December 1987, Bradford Hayes, Francis Springer and Richard Gagnon were clients of the business.

11. On September 7, 1984, Mr. Hayes was charged with Uncovered Load. On September 18, 1984, respondent dismissed the charge without trial. He did not inform the prosecution that Mr. Hayes was a business client.

12. On December 7, 1986, Mr. Springer was charged with Driving While Intoxicated, Failure To Yield Right Of Way and Failure To Keep Right after an accident in the Town of Chester. On December 30, 1986, respondent dismissed the Driving While Intoxicated charge and fined Mr. Springer a total of $55 on the other charges. Respondent did not inform the prosecution that Mr. Springer was a business client.

13. On October 31, 1987, Mr. Springer was charged with Unsafe Backing. On November 10, 1987, respondent accepted his guilty plea and fined him $20.

14. On December 26, 1986, Mr. Gagnon was charged with Harassment. On August 10, 1987, respondent dismissed the charge. Respondent did not inform the prosecution that Mr. Gagnon was a business client.

As to Charge IV of the Formal Written Complaint:

15. On April 30, 1984, respondent discovered that a stream feeding a trout pond on his property was heavily silted. He reported it to the Department of Environmental Conservation, and an officer, Ron Robert, was sent to investigate. The next day, Officer Robert told respondent that he had arrested Gary Hill for a violation of the Environmental Conservation Law in connection with the silting of the stream.

16. On May 1, 1984, respondent failed to disqualify himself and presided over Mr. Hill's case. Mr. Hill pled guilty, and respondent fined him $90. Respondent did not advise Mr. Hill that he had initiated the complaint.

As to Charge V of the Formal Written Complaint:

17. Frederick Monroe has been respondent's personal attorney since 1981. Since 1981, Mr. Monroe has appeared in respondent's court representing clients, and respondent has disposed of seven of his cases, as denominated in Schedule C appended to the Formal Written Complaint and the Agreed Statement of Facts. Respondent did not inform the parties opposing Mr. Monroe that Mr. Monroe was his personal attorney.

18. On September 1, 1983, Mr. Monroe's son, Shawn, was charged with Failure To Keep Right, Unlicensed Operation and Uninsured Motor Vehicle after a fatal automobile accident. The matter was returnable in respondent's court. Respondent failed to disqualify himself and never docketed or disposed of the case even though Shawn Monroe expressed willingness in September 1985 to plead guilty to Unregistered Motor Vehicle.

As to Charge VI of the Formal Written Complaint:

19. On October 21, 1985, respondent failed to disqualify himself and presided over James McCluskey v. Neil Duell. Respondent awarded

Mr. McCluskey a default judgment in the amount claimed. The dispute involved merchandise allegedly purchased by Mr. Duell from McCluskey Hardware. Respondent owned the building in which the business was located, and the plaintiff was paying rent to respondent at the time. Respondent did not disclose to Mr. Duell his financial relationship with Mr. McCluskey.

20. Before the case was disposed of on October 21, 1985, respondent called Mr. Duell by telephone and told him that he should pay Mr. McCluskey for the merchandise. Mr. Duell denied that he was responsible for the purchase.

21. Mr. Duell never received formal notification of the claim or of a date to appear in 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), 100.3(a)(5), 100.3(b)(1) and 100.3(c)(1) of the Rules Governing Judicial Conduct; Canons 1, 2, 3A(1), 3A(5), 3B(1) and 3C(1) of the Code of Judical Conduct and Section 14 of the Judiciary Law. Charges I through VI of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A judge must disqualify himself or herself in matters in which his or her impartiality might reasonably be questioned. Section 100.3(c)(1) of the Rules Governing Judicial Conduct. This includes matters in which a party is related within the sixth degree of relationship to the judge or the judge's spouse. Section 100.3(c)(1)(iv)(a) of the Rules; Matter of Wait v. State Commission on Judicial Conduct, 67 NY2d 15 (1986). It also includes matters in which a judge's relative is a material witness. Section 100.3(c)(1)(iv)(c); Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349 (1984).

A judge must disqualify himself or herself in a proceeding in which he or she has a personal bias concerning a party or the appearance thereof, including a business relationship. Section 100.3(c)(1)(i); Matter of DelPozzo, 1986 Annual Report 77 (Com. on Jud. Conduct, Jan. 25, 1985). A judge may not participate in a proceeding in which he or she is a material witness or has personal knowledge of disputed evidentiary facts. Sections 100.3(c)(1)(i) and 100.3(c)(1)(iv)(c); Matter of Tobey, 1986 Annual Report 163 (Com. on Jud. Conduct, Sept. 19, 1985).

A judge's impartiality might reasonably be questioned in a proceeding in which an attorney is the judge's personal attorney (Matter of Conti v. State Commission on Judicial Conduct, 70 NY2d 416, 418-19 [1987]; Matter of Sardonia, 2 Commission Determinations 3 [Com. on Jud. Conduct, Jan. 14, 1980]), and in which the judge has a financial relationship with a party (see Section 100.3[c][1][iii]).

By his conduct, respondent violated all of these clear prohibitions and precedents. In mitigation, we note that he has been candid, cooperative and contrite in this proceeding. See Matter of Kelso v. State Commission on Judicial Conduct, 61 NY2d 82, 87 (1984); Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153, 155 (1986).

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

Mr. Kovner, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mrs. DelBello, Mrs. Robb, Judge Rubin and Judge Salisbury concur.

Mr. Cleary and Mr. Sheehy dissent as to sanction only and vote that respondent be admonished.

Dated: September 29, 1989

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 SLAVIN,

a Judge of the Civil Court of the City of New York and Acting Supreme Court Justice, 2nd Judicial District, Kings County.

Determination

APPEARANCES:

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

Meissner, Kleinberg & Finkel (By George S. Meissner and Richard A. Finkel) for Respondent

The respondent, Joseph Slavin, a judge of the Civil Court of the City of New York, Kings County, and acting justice of the Supreme Court, 2d Judicial District, was served with a Formal Written Complaint dated December 18, 1987, alleging that he improperly jailed a criminal defendant because his lawyer failed to appear in court and that he engaged in intemperate and discourteous conduct in five cases. Respondent filed an answer dated January 28, 1988.

By order dated March 4, 1988, the Commission designated Michael A. Cardozo, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 27 and October 7, 1988, and the referee filed his report with the Commission on December 12, 1988.

By motion dated March 1, 1989, the administrator of the Commission moved to disaffirm 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 April 28, 1989.*

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*Respondent's papers included numerous affidavits attesting to respondent's character and appropriate conduct in other matters--testimony that was excluded by the referee at the hearing. While we do not find that it was in error for the referee to exclude such testimony, it is appropriately before us on the question of sanction, upon notice and without objection by the administrator.

On May 19, 1989, 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 has been a judge of the Civil Court of the City of New York since January 1, 1976, and an acting justice of the Supreme Court since January 3, 1986. He also sat as an Acting Supreme Court Justice from September 1977 to December 1981.

2. On December 2, 1986, Albert Mattocks appeared before respondent on two indictments charging Criminal Sale of A Controlled Substance, Third Degree.

3. Mr. Mattocks was free on bail pending trial. He had previously appeared in connection with the first indictment on each of 20 scheduled court dates. In the second case, he had appeared for six of seven scheduled court dates. On the seventh date, Mr. Mattocks had not appeared because of illness.

4. Mr. Mattocks' attorney, Eugene Prosnitz, did not appear before respondent on December 2, 1986. Mr. Prosnitz had also failed to appear for three previous court dates in connection with the first indictment, causing the matter to be adjourned. The first case had also been adjourned on nine other occasions at Mr. Prosnitz's request. In the second case, respondent had also granted three adjournments because of Mr. Prosnitz's absence and gave three additional adjournments at his request.

5. Because of Mr. Prosnitz's absence on December 2, 1986, respondent decided to remand Mr. Mattocks to jail and adjourn the case to December 11, 1986.

6. On the record and in open court, respondent said:

> ...I've had it up to here with this lawyer, and the only way I'll get him to move is if I put his client in. If his client walks around, he don't care; he just doesn't care....
>
> Somebody better go tell Mr. Prosnitz I'm sick and tired of this. The only way I'll get this case tried is if his client is in. He won't come in to try these cases. He's always busy with something else, and enough is enough is enough.
>
> Goodbye.

7. Mr. Mattocks remained in jail for nine days, until another judge ordered that his prior bail conditions be restored.

As to Charge II of the Formal Written Complaint:

8. The charge 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 and 100.3(a) of the Rules Governing Judicial Conduct; Canons 1, 2 and 3A of the Code of Judicial Conduct, and Sections 700.5(a) and 700.5(e) of the Special Rules Concerning Court Decorum of the Appellate Division, Second Department. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established. Charge II is dismissed.

A judge's only legitimate concern with regard to bail is insuring a defendant's future appearances in court. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 289 (1983); Section 510.30(2)(a) of the Criminal Procedure Law. In the Mattocks case, the defendant had demonstrated in 26 appearances on scheduled court dates that he was a good bail risk. Respondent acknowledges that his sole purpose in revoking Mr. Mattocks' bail and ordering him jailed was to insure the presence of his lawyer.

While a judge has broad discretion in setting and revoking bail for "good cause shown" (Section 530.60[1] of the Criminal Procedure Law), the cases cited by respondent* do not give a judge the right to revoke a defendant's bail because of the acts of another and, thus, do not provide an arguable basis to believe that respondent could jail Mr. Mattocks for the conduct of his lawyer, an act respondent now concedes was in error.

We conclude that respondent knew or should have known that it was improper to deny Mr. Mattocks his liberty because of the actions of another

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*People ex rel. Calascione v. Ramsden, 20 AD2d 142 (2d Dept. 1963), in which defendants' bail was revoked after the prosecutor alleged repeated intimidation of his witnesses and after one witness had drowned and the property of another had been damaged; State ex rel. Shakur v. McGrath, 62 Misc2d 484 (Sup. Ct., Queens Co. 1970), in which numerous interruptions of court proceedings by the defendants, fist fights in the courtroom, demonstrations outside the court and the firebombing of the trial judge's home were said to have interfered with the expeditious trial of the case; People v. Torres, 112 Misc2d 145 (Sup. Ct., NY Co. 1981), in which the defendant continually threatened the life of a witness against him and was subsequently arrested for stabbing him; People ex rel. Corcione v. Krueger, 309 NYS2d 773 (Sup. Ct., Nassau Co. 1970), in which no facts are given.

person over whom he had no control. To do so constituted an abuse of judicial power. Matter of Sharpe, 1984 Annual Report 134, 139 (Com. on Jud. Conduct, June 6, 1983).

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

Mrs. Robb, Mr. Bower, Mrs. Del Bello, Mr. Kovner, Judge Salisbury and Mr. Sheehy concur, except that Mrs. Del Bello dissents as to Charge II only and votes that the charge be sustained.

Judge Altman dissents and votes that the Formal Written Complaint be dismissed.

Mr. Berger and Judge Ciparick dissent as to sanction only and vote that the appropriate disposition would be to issue a confidential letter of dismissal and caution.

Mr. Cleary and Judge Rubin were not present.

Dated: August 7, 1989

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 SLAVIN,

DISSENTING OPINION
BY JUDGE ALTMAN

a Judge of the Civil Court of the City of New York and Acting Supreme Court Justice, 2nd Judicial District, Kings County.

I dissent and vote to confirm the referee's report in its entirety. The remanding of a defendant is a bail decision within the discretion of the court and is immediately reviewable by writ of habeas corpus.

Respondent's difficulty arises because the press of business prevented him from making a record adequate to justify his action. Further, the pressure of potential judicial discipline caused him to leap to a statement of contrition without giving sufficient thought to the catechism.

Section 510.30 of the Criminal Procedure Law sets forth the criteria to be used by a judge in setting bail. Thereafter a judge has broad discretion to change a defendant's bail status for "good cause shown" (CPL 530.60[1]).

An experienced judge is well aware that, notwithstanding the constitutional right to a speedy trial, delay is frequently a defendant's strategy of choice.* With that knowledge, respondent, who saw defense counsel repeatedly request adjournments while failing to appear on three separate occasions, had a sound basis for believing that the strategy of delay may well have included the risk that if the case finally did proceed to trial, the defendant would fail to appear. The failure to articulate that fear should not be the linchpin which allows the Commission to intrude on matters of law (see Matter of Lenney v. State Commission on Judicial Conduct, 71 NY2d 456). Indeed, there is authority for increasing bail on the basis of a defendant's delaying tactics (see People v. Pearson, 55 AD2d 685).

*See e.g., "Rothwax - Here Comes the Judge," Vanity Fair, June 1989, Vol. 52, No. 6, p. 123.

Without supporting authority, the majority has adopted a rule that the remanding of a defendant to ensure the appearance of counsel, in and of itself, constitutes misconduct. Such a bail ruling might be inappropriate or constitute an abuse of discretion, but in this case the error, if any, does not rise to the level of judicial misconduct.

The majority reliance upon Matter of Sharpe (1984 Annual Report 134, 139 [Com. on Jud. Conduct, June 6, 1983]), is misplaced. There the prosecutor, who had been held in contempt, had no control over a police witness. A defendant does have control over retained counsel.* Such counsel can be discharged. It is the judge who appears to have no control. I can find no cases in New York in which a judge has relieved retained counsel. Neither reporting counsel to a departmental grievance committee nor resort to the contempt power would have accelerated counsel's trial readiness. A judge must, consequently, rely on the judicious exercise of discretionary powers to control a calendar.

This case is also distinguishable from Matter of Sardino v. State Commission on Judicial Conduct (58 NY2d 286). There the judge had engaged in a pattern of misconduct, including the setting of bail, without regard to the statutory standards (supra, 289, 290). This case involves a single decision under colorable legal authority (see People v. Pearson, 55 AD2d 685, supra).

Respondent's problem is compounded by the nature of his statement of contrition, which was no doubt made to conform with the premium we appear to place on a judge's admission of wrongdoing. A more carefully worded statement, developing every step of the reasoning process which went into the making of the bail decision, might have been closer to reality and have avoided the result reached by the majority. Respondent might well have honestly said that he did not remand the defendant solely to ensure the appearance of counsel, but also because of the possibility that if the defendant were really forced to trial, he might not appear in court.

To convert respondent's bail ruling into an act of misconduct undermines the independence of the judiciary and unduly interferes with a judge's exercise of discretion. A good-faith bail decision, reviewable on appeal and by writ of habeas corpus, should not be the subject of disciplinary action. If the judge made a mistake in this case, it was a mistake of law that does not rise to the level of misconduct. I would, therefore, confirm the referee's report and dismiss the charges.

Dated: August 7, 1989

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*I am assuming counsel was retained as assigned counsel could readily have been relieved and new counsel assigned.

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

CARMELO J. TAVORMINA,

a Judge of the Civil Court of the City of New York, Kings County.

Determination

APPEARANCES:

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

Santangelo, Santangelo & Cohen (By George L. Santangelo) for Respondent

The respondent, Carmelo J. Tavormina, a judge of the Civil Court of the City of New York, Kings County, was served with a Formal Written Complaint dated September 26, 1988, alleging four instances of discourteous conduct. Respondent filed an answer dated October 26, 1988.

On February 16, 1989, 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 February 17, 1989.

The administrator and respondent submitted memoranda as to sanction. Oral argument was waived.

On March 30, 1989, 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 has been a judge of the Civil Court of the City of New York for 18 years.

2. On January 25, 1988, Lisa C. Pearlstein, an attorney with Brooklyn Legal Services Corporation A, and several other attorneys of Brooklyn Legal Services Corporation A submitted a complaint to the Commission concerning respondent's courtroom demeanor.

3. On February 24, 1988, Ms. Pearlstein met with clients in respondent's empty courtroom. A court officer entered the courtroom and told Ms. Pearlstein and her clients that they could stay. Respondent then entered the courtroom and asked Ms. Pearlstein whether she had permission to be in the courtroom. She replied that the court officer had given permission. After the court officer explained what had occurred, respondent told Ms. Pearlstein, "There, you didn't have permission to enter. That's a big difference." Ms. Pearlstein and her clients left the courtroom.

4. Shortly thereafter, respondent approached Ms. Pearlstein in the public hallway outside the courtroom where she was standing next to her clients. Respondent yelled at Ms. Pearlstein that she had not had permission to enter the courtroom. Ms. Pearlstein responded that she had permission to be in the courtroom. Respondent yelled at Ms. Pearlstein, "He gave you permission to come in. That's the question I asked you. You're a liar. You don't listen to me." Ms. Pearlstein replied that she was listening to respondent but that perhaps she had misunderstood him.

5. Respondent asked the court officer, who was also in the hallway, whether he had given Ms. Pearlstein permission to enter the courtroom. The court officer responded negatively. Respondent then yelled at Ms. Pearlstein, "You're a liar. Aren't you? Aren't you? You lied in there. You lie all the time. Don't you? Don't you?" Ms. Pearlstein responded negatively, and respondent yelled at her, "Stay out of my courtroom. Will you? Stay out of my life!" A court officer led respondent away from Ms. Pearlstein.

6. Respondent's remarks to Ms. Pearlstein about her being a liar were due, in part, to respondent's knowledge that Ms. Pearlstein had participated in the filing of a complaint with the Commission about respondent's conduct.

As to Charge II of the Formal Written Complaint:

7. On December 17, 1987, while presiding over a crowded courtroom, respondent gestured for New York City Assistant Corporation Counsel Gail Donoghue to come to the bench, and she did so. Respondent told Ms. Donoghue that there was no newspaper reading in court, and Ms. Donoghue replied that she had not been reading a newspaper. Respondent asked whether Ms. Donoghue was an attorney and whether she would read a newspaper in Supreme Court.

8. Ms. Donoghue apologized for having offended respondent. Respondent replied that this "was not good enough for me" and ordered Ms.

Donoghue to leave the courtroom. Ms. Donoghue stated that she had a case on the calendar and wanted to make a record.

9. Respondent stated that he could have Ms. Donoghue placed in handcuffs. Respondent insisted that Ms. Donoghue leave the courtroom, and she did so.

10. As Ms. Donoghue was leaving the courtroom, respondent twice stated in a loud voice that there was no newspaper reading, food or sex in the courtroom.

As to Charge III of the Formal Written Complaint:

11. On November 19, 1987, Paul Peloquin, a newly-hired attorney with Brooklyn Legal Services Corporation A, appeared before respondent representing the defendant in Seerojini Sukhnanan v. Maria Santana. During a discussion concerning possible settlement, Mr. Peloquin conferred with his superior, Jim E. Provost, who was in court, concerning the terms of the possible settlement. Respondent asked the identity of Mr. Provost. Mr. Provost replied that he was Mr. Peloquin's supervisor and co-counsel and that Mr. Peloquin was inexperienced. Respondent yelled that there was only one attorney on a case. Respondent refused to allow Mr. Peloquin and Mr. Provost to confer.

As to Charge IV of the Formal Written Complaint:

12. On December 15, 1987, Adriana Agudelo, a law school graduate who was permitted to practice law and was employed by Brooklyn Legal Services Corporation A, was in the spectator section of respondent's court while the court calendar was being called. Ms. Agudelo, who was about to leave the courtroom to go to another courtroom, spoke to Audrey Bazard, a client, in order to instruct her as to how to obtain an adjournment.

13. Respondent asked whether Ms. Agudelo was an attorney, whether she was something "special," and whether she deserved special privileges. Respondent loudly told Ms. Agudelo, "You're nothing." Ms. Agudelo attempted to apologize, but respondent did not permit her to do so.

14. On the same date, the case of Ms. Bazard was called while Ms. Agudelo was not in the courtroom. Respondent spoke to Ms. Bazard and stated that Ms. Agudelo was "a new attorney who didn't know what she was doing." Respondent stated that Ms. Agudelo was probably not in court because she was afraid that respondent would assign Ms. Bazard's case to Judge Theodore Diamond. The clerk then assigned the case to Judge Diamond.

Additional finding:

15. Respondent has acknowledged that his conduct on each of the four occasions was intemperate and discourteous.

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)(2) and 100.3(a)(3) of the Rules Governing Judicial Conduct; Canons 1, 2, 3A(2) and 3A(3) of the Code of Judicial Conduct, and Sections 700.5(a) and 700.5(e) of the Special Rules Concerning Court Decorum of the Appellate Division, Second Department. Charges I through IV of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

On four occasions in as many months, respondent exhibited undignified, intemperate and discourteous conduct toward attorneys in his courtroom. His loud and continual accusations that Ms. Pearlstein was a "liar," in the presence of her clients, and his threat to have Ms. Donoghue placed in handcuffs, were especially egregious. Respondent failed to exhibit the dignity and courtesy expected of every judge. See Section 100.3(a)(3) of the Rules Governing Judicial Conduct; Matter of Evens, 1986 Annual Report 103 (Com. on Jud. Conduct, Sept. 18, 1985); Matter of Sena, 1981 Annual Report 117 (Com. on Jud. Conduct, Jan. 18, 1980); Matter of Hopeck, 1981 Annual Report 133 (Com. on Jud. Conduct, Aug. 15, 1980).

Respondent acknowledges that his anger at Ms. Pearlstein was prompted by his knowledge that she and others had filed a complaint with the Commission concerning his demeanor. His continued verbal abuse of Ms. Pearlstein was plainly in retaliation for the fact that she had exercised her legal right. Such retaliation, standing alone, constitutes misconduct. Matter of Taylor, 1983 Annual Report 197 (Com. on Jud. Conduct, Jan. 13, 1982).

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Kovner, Judge Ostrowski and Mr. Sheehy concur.

Judge Rubin was not present.

Dated: May 3, 1989

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

JOSEPHINE D. TYLER,

a Justice of the Caneadea Town Court, Allegany County.

Determination

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Lipsitz, Green, Fahringer, Roll, Schuller & James (By Herbert L. Greenman) for Respondent

The respondent, Josephine D. Tyler, a justice of the Caneadea Town Court, Allegany County, was served with a Formal Written Complaint dated September 23, 1987, alleging, inter alia, that she presided over a case in which her husband was the complaining witness and that she struck a youth in the face with a telephone book. Respondent filed an answer dated December 3, 1987. A Supplemental Formal Written Complaint was served on January 27, 1988, and respondent filed a supplemental answer dated February 19, 1988.

By order dated December 21, 1987, the Commission designated Alexander C. Cordes, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 16, 17 and 18 and June 1, 1988, and the referee filed his report with the Commission on December 13, 1988.

By motion dated January 20, 1989, 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 March 15, 1989. The administrator filed a reply on March 23, 1989. Oral argument was waived.

On March 30, 1989, 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 has been a justice of the Caneadea Town Court since 1978.

2. On May 12, 1986, respondent's husband, Richard M. Tyler, told her that a bank had refused to honor for insufficient funds a check written to Mr. Tyler's business by David G. Smyers. Mr. Tyler showed respondent Mr. Smyers' check and a certificate of protest by the bank.

3. Respondent advised her husband to file a complaint with the State Police and provided him with instructions by the State Police for handling bad checks.

4. Trooper Thomas McDonnell came to Mr. Tyler's business the same day and took a complaint from him accusing Mr. Smyers of Issuing A Bad Check. Respondent subscribed the complaint, listing her judicial title after her name.

5. Respondent then signed a warrant for Mr. Smyers' arrest, returnable in her court, and wrote a recommended bail of $5,000 cash or $10,000 property bond at the bottom of the warrant in the event that Mr. Smyers was arraigned before another judge. Respondent told Trooper McDonnell that the matter was a "priority."

6. Trooper McDonnell arrested Mr. Smyers on May 13, 1986, and brought him before respondent for arraignment.

7. Respondent arraigned Mr. Smyers and set bail at $5,000 cash or $10,000 property bond. In determining the amount of bail, respondent considered information that she had heard outside of court from a third party that Mr. Smyers had plans to leave the area for Canada. She also considered information that she had obtained outside of court that Mr. Smyers owed a total of approximately $5,000 in debts to four persons, including her husband.

8. Respondent indicated that she intended to disqualify herself from further action in the case but did not do so at the arraignment.

9. Mr. Smyers filled out an application for assigned counsel and was sent to jail in lieu of bail.

10. Respondent did not mail until May 16, 1986, the application for assigned counsel to the assistant public defender who regularly appeared in her court, and took no other steps to notify him that Mr. Smyers was in jail and desired assigned counsel.

11. From jail, Mr. Smyers contacted the public defender's office, and on May 16, 1986, the assistant public defender, Jerry Fowler, made a motion before Allegany County Court Judge Wayne A. Feeman, Jr., for a reduction in bail.

12. On May 15 or 16, 1986, the district attorney, James E. Euken, called respondent by telephone to discuss the bail reduction application. Respondent told Mr. Euken that the amount of the check was sizable enough to have a significant impact on her husband's business. Mr. Euken advised her that he felt that she should have disqualified herself from the case. Respondent replied that she had taken steps to do so.

13. While the motion and both counsel were before him, Judge Feeman spoke to respondent by telephone concerning bail. Respondent told Judge Feeman that Mr. Smyers was a criminal and was adamant that he should stay in jail.

14. Judge Feeman also told respondent that she should not preside over the matter because her husband was the complaining witness. On May 19, 1986, he sent respondent a letter, indicating the proper procedures for transferring a case and drawing her attention to the ethical standards concerning disqualification.

15. Judge Feeman reduced Mr. Smyers' bail to $2,500.

16. After the hearing before Judge Feeman, Mr. Euken again spoke to respondent by telephone and advised her to disqualify herself. He also wrote to her concerning the issue.

17. Respondent took no steps to advise the County Court that she was disqualified from the Smyers case and that the matter would have to be transferred to another court since she is the only judge in her court.

18. Mr. Euken obtained an order from County Court Judge Peter R. Sprague transferring the Smyers case to another court, where it was dismissed on May 19, 1986, after Mr. Smyers had spent one week in jail.

As to Charge II of the Formal Written Complaint:

19. The charge is not sustained and is, therefore, dismissed.

As to Charge III of the Formal Written Complaint:

20. On June 25, 1984, respondent arraigned David J. Nagel on a charge of Harassment filed by Matilda Westfall.

21. Respondent issued a temporary protective order in favor of Ms. Westfall, ordering Mr. Nagel to pay child support "at $25.00 per load of wood at least $25.00 per week and try for the provision of $50.00 per wk. / Amended by Family Court."

22. No support order had been entered in Family Court against Mr. Nagel.

As to Charge IV of the Formal Written Complaint:

23. The charge is not sustained and is, therefore, dismissed.

As to Charge V of the Formal Written Complaint:

24. On April 27, 1985, respondent wrote a letter on her judicial stationery to Pomeroy Brothers concerning a dispute over the cost of work performed by Pomeroy Brothers on an apartment building which respondent managed on behalf of her father.

25. Respondent wrote the letter even though she had been advised by the town attorney in 1983 that the use of court stationery for private purposes could be viewed as improper.

As to Charge VI of the Formal Written Complaint:

26. In July 1980, respondent learned that an obscenity that referred to her had been written on a table outside her courtroom. She concluded that it had been written by Steven J. Fish, who had appeared before her on traffic charges at the previous court session.

27. Respondent summoned Mr. Fish, who was then 19 years old, to the court. She repeatedly and loudly accused him of writing the obscenity. She was angry and upset. He denied it and refused respondent's command that he clean the table.

28. Mr. Fish suggested that respondent question two other men who were in court the same evening. Respondent consulted a telephone book and called the two men.

29. She then again accused Mr. Fish of writing the obscenity. He used an obscenity, and she struck him in the face with the phone book.

As to Charge I of the Supplemental Formal Written Complaint:

30. On June 23, 1983, respondent sent a letter to tenants of an apartment building which she managed on behalf of her father. The letter advised them that the building's water source was contaminated and that they should obtain water from another source or vacate the premises. The letter was mailed in an envelope with respondent's court as the return address.

31. On August 9, 1983, respondent mailed a letter on the same subject to Caneadea Town Attorney David T. Pullen. The letter was also mailed in an envelope bearing the return address of respondent's 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), 100.3(a)(3), 100.3(a)(4) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(3), 3A(4) and 3C(1) of the Code of Judicial Conduct. Charges I, III, V and VI of the Formal Written Complaint and Charge I of the Supplemental Formal Written Complaint are sustained, and respondent's misconduct is established. Charges II and IV of the Formal Written Complaint are dismissed.

Public confidence in the judicial system requires a neutral and impartial magistrate at all stages of a legal proceeding. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290-91 (1983). "The handling by a judge of a case to which a family member is a party creates an appearance of impropriety as well as a very obvious potential for abuse, and threatens to undermine the public's confidence in the impartiality of the judiciary." Matter of Wait v. State Commission on Judicial Conduct, 67 NY2d 15, 18 (1986). It is equally inappropriate for a judge to sign an arrest warrant in a case in which the complaining witness is a relative. Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349 (1984).

Respondent should have had no part in the Smyers matter since her husband was the complaining witness. Section 100.3(c)(1) of the Rules Governing Judicial Conduct clearly requires her disqualification in a case in which she has personal knowledge of disputed evidentiary facts and in which her spouse has an interest that could be substantially affected by the outcome of the proceeding, even though she is the sole judge of the court. See Matter of Merkel, 1989 Annual Report 111 (Com. on Jud. Conduct, May 19, 1988).

It was also improper for her to rely in setting bail on extra-judicial information concerning debts owed by the defendant. See Section 510.30 of the Criminal Procedure Law; Matter of Mullen, 1987 Annual Report 129 (Com. on Jud. Conduct, May 22, 1986). By permitting the defendant to remain in jail for three days before taking affirmative action to effectuate his right to assigned counsel, respondent violated Section 170.10(4)(a) of the Criminal Procedure Law. See Matter of Earl, unreported (Com. on Jud. Conduct, Mar. 31, 1989). These errors of law in connection with a case in which she had a personal interest significantly contributed to the appearance of partiality. See Matter of Zapf, 1988 Annual Report 251 (Com. on Jud. Conduct, July 24, 1987).

In addition, respondent knew or should have known that a town justice does not have authority to impose child support on the defendant in a family offense matter. In doing so in the Nagel case, respondent violated her ethical duty to be faithful to the law and maintain professional competence in it. Section 100.3(a)(1) of the Rules Governing Judicial Conduct.

Respondent's physical abuse of Mr. Fish was highly inappropriate. See Matter of Cerbone v. State Commission on Judicial Conduct, 61 NY2d 93

(1984); Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465 (1980).

Finally, by using her court letterhead in three instances involving personal disputes, she lent the prestige of her judicial office to advance her private interests. See Section 100.2(c) of the Rules Governing Judicial Conduct.

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski and Mr. Sheehy concur.

Judge Rubin was not present.

Dated: May 1, 1989

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

KENNETH VAN BUSKIRK,

a Justice of the Whitehall Town Court, Washington County.

APPEARANCES:

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

Honorable Kenneth Van Buskirk, pro se

The respondent, Kenneth Van Buskirk, a justice of the Whitehall Town Court and the Whitehall Village Court, Washington County, was served with a Formal Written Complaint dated March 24, 1988, alleging improper conduct in connection with two cases. Respondent filed an undated answer which was received on April 21, 1988.

By order dated April 26, 1988, the Commission designated Michael G. Breslin, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 9 and 15, 1988, and the referee filed his report with the Commission on February 7, 1989.

By motion dated March 20, 1989, the administrator of the Commission moved to confirm the referee's report, to adopt additional findings and conclusions and for a determination that respondent be admonished. Respondent did not file any papers in response thereto. Oral argument was waived.

On April 25, 1989, the Commission considered the record of the proceeding and made the following findings of fact.

Preliminary findings:

1. Respondent has been a justice of the Whitehall Town Court since January 1, 1986. He also serves by appointment as acting justice of the Whitehall Village Court.

2. Respondent has known the parents of Girard Marcino for 40 years. Respondent's wife and Ms. Marcino grew up together. About eight years ago, the Marcinos bought a house across the street from respondent's home, and respondent has known Girard Marcino since that time. Respondent and his wife and Mr. Marcino's parents socialize together, and respondent occasionally does plumbing on the Marcinos' house as a favor.

3. Respondent has known John Dalton since he was a child. He feels that Mr. Dalton has trouble getting along with people.

4. Mr. Dalton and Girard Marcino were once friends but have been bitter enemies for about six years. Their disputes have resulted in continual litigation in respondent's and other courts.

5. During his campaign in 1985 for town justice, respondent told voters that previous judges had failed to deal effectively with Mr. Dalton, whom respondent described as "running the court."

As to paragraphs 4(a) and 4(b) of Charge I of the Formal Written Complaint:

6. On September 11, 1986, Mr. Dalton signed a complaint of Harassment against Mr. Marcino in the Warren County Town of Queensbury. Based on the complaint, Queensbury Town Justice J. David Little subsequently signed an arrest warrant for Mr. Marcino.

7. On September 13, 1986, Warren County Deputy Sheriff Shane Ross called Whitehall Village Police Officer Richard LaChapelle and asked him to arrest Mr. Marcino on the warrant.

8. Officer LaChapelle brought Mr. Marcino to the village police station and notified respondent, who also came to the police station.

9. Officer LaChapelle called Deputy Ross by telephone and told him that respondent wanted to speak with him.

10. In a raised voice, respondent asked Deputy Ross the basis of the complaint, whether there were witnesses to the incident and whether the sheriff's department took complaints without having corroborating witnesses. Respondent said that there was an "on-going situation" between Mr. Dalton and Mr. Marcino that was "plugging up" the court.

11. Respondent told Deputy Ross that he had imposed a condition on Mr. Dalton not to harass Mr. Marcino. Respondent also said that previous

charges brought at Lake George by Mr. Dalton against Mr. Marcino had been dismissed.

12. Respondent said that he did not feel that an arrest should be made, and he asked Deputy Ross for the name of the judge who had issued the warrant.

13. Deputy Ross gave respondent Judge Little's name but suggested that he, rather than respondent, should contact Judge Little.

14. After his conversation with respondent, Deputy Ross contacted Judge Little and relayed respondent's information. Judge Little told the deputy to destroy the complaint by Mr. Dalton and the arrest warrant and not to arrest Mr. Marcino.

15. While respondent was talking to Deputy Ross, Mr. Dalton came to the police station wearing a neck brace and said that he wanted to report an accident caused by Mr. Marcino. Respondent told Officer LaChapelle to inspect Mr. Dalton's car for damage. The officer did so and reported to respondent that there was no damage.

16. Respondent then told Mr. Dalton to leave the police station. He asked Mr. Marcino whether there had been an accident. Mr. Marcino said that he was not present at the time and place at which Mr. Dalton had claimed the accident had occurred.

17. Based on the conversation with Mr. Marcino, respondent concluded that Mr. Dalton was harassing Mr. Marcino by attempting to file a false complaint against him, and respondent issued a warrant for Mr. Dalton's arrest on a charge which he listed as "Violation of Conditional Discharge."

18. No accusatory instrument was before respondent as the basis for the warrant. He testified in this proceeding that the warrant was based on a complaint that respondent had handled on August 12, 1986, against Mr. Dalton by Lee Ann Williams. In that case, respondent had granted an adjournment in contemplation of dismissal and, on a court form labelled "Order and Conditions of Conditional Discharge," he had listed certain conditions, including, "Do not harass by phone or personally people you have been harassing." Respondent testified that he considered Mr. Dalton's attempt to file an accident report against Mr. Marcino as a violation of this condition.

19. Mr. Dalton was arrested and brought before respondent for arraignment. Mr. Dalton repeatedly asked why he had been arrested. Respondent told him that he had been "harassing people." At the arraignment, respondent told Mr. Dalton:

> ...You have been running roughshod. You've made a mockery of this court. You and some other people. The mockery is ceasing. You are not going, not going to disturb people in this community. There are other people that you have disturbed here. I'm not bringing them up now because the charges might come up later on. You know who I am talking about. There are so many that you don't, that you can't keep track....
>
> You have caused nothing but problems. Now you violated this ACD that I granted you....

20. Respondent set bail at $250 and adjourned the matter.

21. On September 16, 1986, Mr. Dalton pled guilty and paid a $225 fine. Respondent's docket lists the offense as "Violation of ACD" and lists Mr. Marcino as the complainant. He reported the matter to the state comptroller as a conviction for Harassment.

As to paragraph 4(c) of Charge I of the Formal Written Complaint:

22. In April 1987, an incident involving Mr. Marcino occurred in the driveway of Mr. Dalton's grandmother's home. Thereafter, respondent learned that Mr. Dalton blamed Mr. Marcino for his grandmother's death and also blamed respondent for contributing to her death. Respondent decided and informed the district attorney's office that he could not be impartial and that he should disqualify himself from any cases involving Mr. Dalton.

23. Nevertheless, on July 31, 1987, respondent issued a criminal summons to Mr. Dalton on a charge of Criminal Mischief, Fourth Degree, brought by Mr. Marcino.

As to paragraph 4(d) of Charge I of the Formal Written Complaint:

24. Mr. Dalton's complaint against Mr. Marcino for Trespass and Harassment stemming from the April incident at Mr. Dalton's grandmother's home and Mr. Marcino's Criminal Mischief complaint against Mr. Dalton were both scheduled before respondent on August 21, 1987.

25. Before Mr. Marcino's arraignment and before Mr. Dalton's attorney had arrived, respondent allowed the prosecutor, Assistant District Attorney Robert Winn, to examine Mr. Dalton under oath in an attempt to impugn his credibility as the complaining witness against Mr. Marcino.

26. Both cases were subsequently transferred to another court.

As to Charge II of the Formal Written Complaint:

27. In March 1987, Donald J. Williams, Sr., then the Village of Whitehall dog warden, prepared an appearance ticket charging Joseph L. Galone with a violation of the village leash law on the complaint of David B. Gebo, who was a part-time village police officer. Mr. Williams mistakenly made the ticket returnable on March 25, 1987, although court was not scheduled to be in session on that date.

28. On March 24, 1987, Mr. Williams served the appearance ticket on Mr. Galone's wife, Antoinette Lynn Galone. He told Ms. Galone that her husband should appear in court that evening.

29. Mr. Williams then delivered a copy of the ticket to respondent's home and told him that he had just served the ticket on Ms. Galone.

30. Mr. Galone was out of town. His wife called respondent by telephone, explained that she had just received the appearance ticket and that she had been unable to reach her husband. She asked for an adjournment. Respondent denied the request and insisted that Mr. Galone was to appear in court that evening.

31. Ms. Galone eventually contacted her husband, who appeared in court that evening before respondent. Several times Mr. Galone demanded a copy of the accusatory instrument. Respondent repeatedly and angrily refused to provide it. Eventually, Mr. Galone was given a copy by Officer Gebo, the complaining witness, who was also in court.

32. Respondent then granted Mr. Galone an adjournment to obtain counsel. There was a discussion among respondent, Mr. Galone and Officer Gebo as to the adjourned date. Mr. Galone testified that the three agreed to a date a few weeks later in April. Respondent and Officer Gebo testified that the matter was adjourned to March 31, 1987. Respondent kept no record of the date.

33. On March 25, 1987, Mr. Galone lodged a complaint concerning a dog owned by Robert Rice. Mr. Williams made the matter returnable before respondent on April 7, 1987.

34. On March 31, 1987, Mr. Galone went to respondent's court, believing that his complaint against Mr. Rice was to be heard. He waited from about 6:40 P.M. until about 7:30 P.M. for the case to be heard. Respondent saw Mr. Galone and his mother, Marion, in court.

35. Mr. Galone concluded that the Rice case would not be heard and left the courthouse.

36. Shortly thereafter, respondent issued a warrant for Mr. Galone's arrest for failure to appear on the leash law violation in which he was the defendant. Respondent testified that Mr. Galone had been scheduled to appear as a defendant and that he considered his leaving the court to be "contempt of court."

37. Officer Gebo, the complaining witness against Mr. Galone, executed the warrant and returned Mr. Galone to respondent's court.

38. Mr. Galone asked why he had been arrested and demanded to see the arrest warrant.

39. Respondent refused. He told Mr. Galone not to make a big deal out of the matter. He stated that Mr. Galone's dogs had been running loose and that he was guilty of violating a village ordinance.

40. Respondent insisted that a trial be conducted immediately. Without swearing him as a witness, respondent asked Officer Gebo whether Mr. Galone's dogs were unleashed. He replied that they had been.

41. Respondent pronounced Mr. Galone guilty and imposed a $20 fine.

42. Respondent failed to keep a docket or other suitable records of the Galone case, in violation of Sections 107, 2019 and 2019-a 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), 100.3(a)(2), 100.3(a)(3), 100.3(a)(4), 100.3(b)(1) and 100.3(c)(1)(i) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(2), 3A(3), 3A(4), 3B(1) and 3C(1)(a) 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 herein, and respondent's misconduct is established.

Attempting to find solutions to difficult community problems involving contentious parties, respondent abandoned his proper role as a neutral and detached magistrate in the Dalton- Marcino disputes and in the Galone case. By his informality and inattention to proper legal procedure, respondent repeatedly conveyed the appearance of partiality and denied parties their right to be fully heard.

In view of respondent's close relationship to the Marcinos, his impartiality might reasonably be questioned in any matter in which they are involved, and he should have disqualified himself in all disputes involving Mr. Dalton and Girard Marcino. See Section 100.3(c)(1)(i) of the Rules Governing Judicial Conduct. It was particularly improper for him to entertain Mr. Marcino's complaint and issue a criminal summons to Mr. Dalton in July 1987, after respondent had determined that he could no longer fairly judge Mr. Dalton's cases because of the accusations made against him.

Regardless of his relationship with the family, it was improper for respondent to intervene on Mr. Marcino's behalf to have the warrant issued by Judge Little withdrawn. See Matter of LoRusso, 1988 Annual Report 195 (Com. on Jud. Conduct, June 29, 1987); Matter of Montaneli, 1983 Annual Report 145 (Com.

on Jud. Conduct, Sept. 10, 1982). Respondent's statements to Deputy Ross were clearly designed to favor Mr. Marcino and demonstrated bias against Mr. Dalton.

Compounding this pattern of partial conduct, respondent then ordered Mr. Dalton arrested for attempting to file a complaint against Mr. Marcino. Although he had no accusatory instrument before him, respondent signed a warrant on the spurious ground that Mr. Dalton had violated a condition of the disposition of another case not involving Mr. Marcino. His information was based solely on unsworn, ex parte conversations with Mr. Marcino and a police officer.

In the Galone matter, respondent again demonstrated bias and denied the defendant his right to be heard. No matter how minor the charge, a defendant has the right to contest the allegations against him and to be fully heard by a fair and impartial judge. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290-91 (1983); Matter of Edwards, 1987 Annual Report 85 (Com. on Jud. Conduct, Nov. 21, 1986); Matter of Wilkins, 1986 Annual Report 173 (Com. on Jud. Conduct, Dec. 24, 1985).

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Rubin, Judge Salisbury and Mr. Sheehy concur.

Mr. Bower and Judge Ciparick were not present.

Dated: May 23, 1989

1989 MATTERS ACCORDING TO COURT (See Tables on Pages 4-8)

1989 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	72 / 278	40 / 143	92	115	26	5	51	220	19
COMPLAINTS INVESTIGATED	20 / 121	10 / 18	0	8	2	0	5	10	1
NUMBER OF JUDGES CAUTIONED AFTER INVESTIGATION	5 / 32	2 / 2	1	3	0	0	0	4	1
NUMBER OF FORMAL WRITTEN COMPLAINTS AUTHORIZED	2 / 13	2 / 1	0	1	0	0	0	1	0
NUMBER OF JUDGES CAUTIONED AFTER FORMAL WRITTEN COMPLAINT	1 / 0	0 / 2	0	1	0	0	0	1	0
NUMBER OF JUDGES PUBLICLY DISCIPLINED	2 / 11	0 / 3	1	0	1	0	0	2	0
NUMBER OF FORMAL WRITTEN COMPLAINTS DISMISSED OR CLOSED	1 / 4	0 / 0	0	0	0	0	1	1	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, 1988.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	TOTALS
Incorrect Ruling								
Non-Judges								
Demeanor		1	15	5			6	27
Delays		2	1	3	2	1	2	11
Confl/Interest		1	3	2			3	9
Bias		2	5					7
Corruption		1	1	1	2	1		6
Intoxication					1			1
Disable/Qualif								
Political Activ				6		2	1	9
Finan/Recrds/Trng		1	5	2	4	2	5	19
Ticket-Fixing								
Asser'n of Infl		3	8	1	1	2	8	23
Viol'n of Rights		2	10	5	1			18
Miscellaneous		6	14	4	3	1	3	31
TOTALS		19	62	29	14	9	28	161

* 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.

TABLE OF NEW CASES CONSIDERED BY THE COMMISSION IN 1989.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	TOTALS
Incorrect Ruling	432							432
Non-Judges	110							110
Demeanor	98	25	16	5	1			145
Delays	58	7	2	3		1		71
Confl/Interest	16	10	3	2				31
Bias	73	5	6	2	1			87
Corruption	11	2						13
Intoxication	3	2		1				6
Disable/Qualif	1	1						2
Political Activ	10	5	1	2	1	1		20
Finan/Recrds/Trng	3	10	2	2	4	1		22
Ticket-Fixing		3						3
Asser'n of Infl	21	14	9	3				47
Viol'n of Rights	39	15	4	4	2			64
Miscellaneous	101	5	7	3	2			118
TOTALS	976	104	50	27	11	3		1171

* 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 1989: 1171 NEW COMPLAINTS AND 161 PENDING FROM 1988.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	TOTALS
Incorrect Ruling	432							432
Non-Judges	110							110
Demeanor	98	26	31	10	1		6	172
Delays	58	9	3	6	2	2	2	82
Confl/Interest	16	11	6	4			3	40
Bias	73	7	11	2	1			94
Corruption	11	3	1	1	2	1		19
Intoxication	3	2		1	1			7
Disable/Qualif	1	1						2
Political Activ	10	5	1	8	1	3	1	29
Finan/Recrds/Trng	3	11	7	4	8	3	5	41
Ticket-Fixing		3						3
Asser'n of Infl	21	17	17	4	1	2	8	70
Viol'n of Rights	39	17	14	9	3			82
Miscellaneous	101	11	21	7	5	1	3	149
TOTALS	976	123	112	56	25	12	28	1332

* 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 SINCE THE INCEPTION OF THE TEMPORARY COMMISSION (JANUARY 1975).

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	TOTALS
Incorrect Ruling	4890							4890
Non-Judges	846							846
Demeanor	757	26	528	106	41	41	115	1614
Delays	417	9	56	35	6	8	13	544
Confl/Interest	201	11	255	73	26	12	83	661
Bias	563	7	135	23	15	11	10	764
Corruption	95	3	52	1	13	7	9	180
Intoxication	15	2	21	4	3	2	12	59
Disable/Qualif	25	1	19	2	12	6	6	71
Political Activ	100	5	69	84	4	11	10	283
Finan/Recrds/Trng	121	11	91	46	62	55	55	441
Ticket-Fixing	18	3	60	149	33	59	158	480
Asser'n of Infl	57	17	54	20	5	2	18	173
Viol'n of Rights	39	17	14	9	3			82
Miscellaneous	447	11	170	56	16	27	36	763
TOTALS	8591	123	1524	608	239	241	525	11,851

* 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.