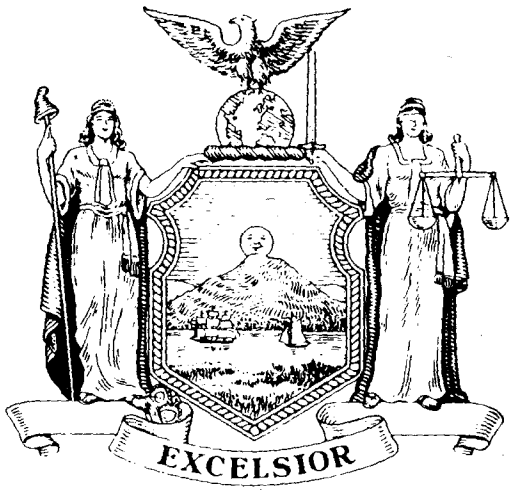
ANNUAL REPORT

1993

New York State Commission on Judicial Conduct



1993 ANNUAL REPORT

OF THE

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

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

Pursuant to Section 42, paragraph 4, of the Judiciary Law of the State of New York, the New York State Commission on Judicial Conduct respectfully submits this annual report of its activities. The report covers the period from January 1, 1992, through December 31, 1992.

Respectfully submitted,

Henry T. Berger, Chair
On Behalf of the Commission

March 1, 1993
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 are also accountable for their misconduct.

The ethics standards that the Commission enforces are found primarily in the Rules Governing Judicial Conduct, a copy of which is annexed as Appendix D, 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 6, Sections 20 and 28 of the New York State Constitution. The Code was adopted in 1972 by the New York State Bar Association.

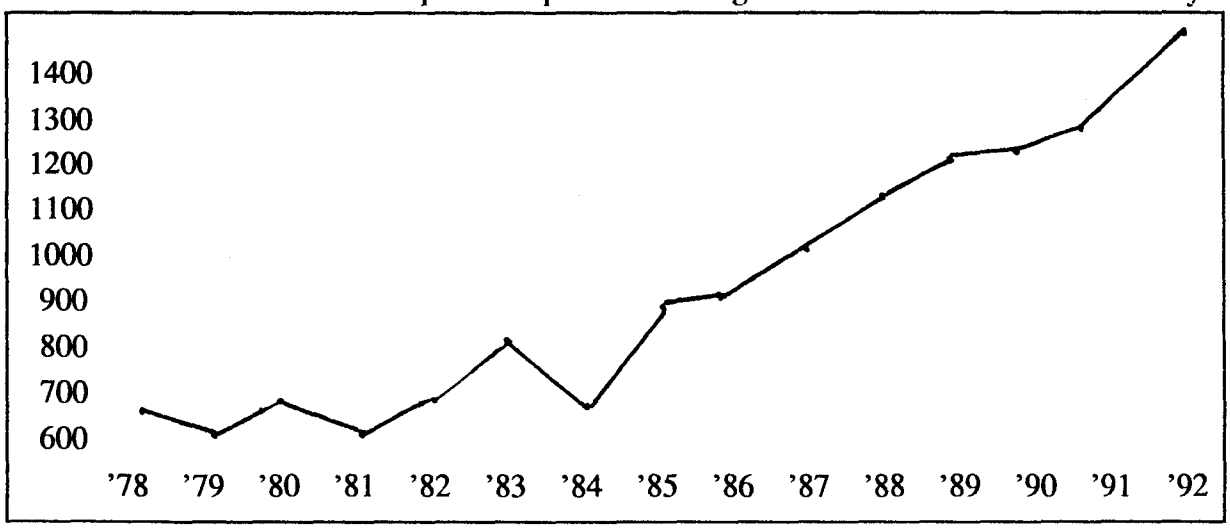
A history of the development of the Commission, beginning with the creation in 1975 of a temporary State Commission on Judicial Conduct, and a description of the Commission's authority and procedures, are annexed to this report as Appendix B.

This Annual Report covers the Commission's activities during calendar year 1992.

COMPLAINTS AND INVESTIGATIONS IN 1992

In 1992, 1452 new complaints were received, compared with 1207 the year before. Of these, 1272 (87.6%) were dismissed by the Commission upon initial review, and 180 investigations were authorized and commenced.[1] In addition, 181 investigations and proceedings on formal charges were pending from the prior year.

The 1452 new complaints represent the largest number in Commission history:



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[1] The statistical period in this report is January 1, 1992, through December 31, 1992. Detailed statistical analysis of the matters considered by the Commission is annexed in chart form as Appendix F.

In 1992, as in previous years, the majority of complaints received were submitted by civil litigants and by 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 35 initiated by the Commission on its own motion. 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, intemperate conduct, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate such matters, as they involve questions of law reviewable by appellate courts.

ACTION TAKEN IN 1992

The Commission conducted 361 investigations or formal disciplinary proceedings during 1992, 181 of which were carried over from 1991 and 180 of which were authorized in 1992. Those 361 matters break down as follows:

Investigations

On January 1, 1992, 150 investigations were pending from the previous year. During 1992, the Commission commenced 180 new investigations. Of the combined total of 330, the Commission made the following dispositions:

- 115 complaints were dismissed outright.
- 45 complaints involving 43 different judges were dismisssed with letters of dismissal and caution.
- 11 complaints involving 6 different judges were closed upon the judges' resignation.
- 15 complaints involving 12 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.
- 33 complaints involving 29 different judges resulted in formal charges being authorized.
- 111 investigations were pending as of December 31, 1992.

Formal Written Complaints

On January 1, 1992, Formal Written Complaints from the previous year were pending in 31 matters, involving 23 different judges. During 1992, Formal Written Complaints were authorized in 33 additional matters, involving 29 different judges. Of the combined total of 64 matters, the Commission made the following dispositions.

-- 18 matters involving 18 different judges resulted in formal discipline (admonition, censure or removal from office).

-- 1 matter was dismissed with a letter of dismissal and caution.

-- 10 matters involving 5 different judges were closed upon the judges' resignation.[2]

-- 5 matters involving 4 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.

-- 30 matters involving 21 judges were pending as of December 31, 1992.

The Commission's dispositions involved judges in various levels of the unified court system, as indicated in the following tables and in the chart included in Appendix F.

TABLE 1: TOWN & VILLAGE JUSTICES -- 2253,* ALL PART-TIME

	Lawyers	*Non-Lawyers*	*Total*
Complaints Received	79	275	354
Complaints Investigated	18	103	121
Judges Cautioned After Investigation	3	27	30
Formal Written Complaints Authorized	1	20	21
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	1	12	13
Formal Complaints Dismissed or Closed	0	9	9

*Refers to the approximate number of such judges in the state unified court system.

[2]One judge who resigned while under Formal Written Complaint was also under investigation in another case and is included in the "Investigations" subheading above.

TABLE 2: CITY COURT JUDGES -- 381, ALL LAWYERS

	Part-Time	*Full-Time*	*Total*
Complaints Received	24	185	209
Complaints Investigated	5	20	25
Judges Cautioned After Investigation	5	3	8
Formal Complaints Authorized	3	0	3
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	0	0	0
Formal Complaints Dismissed or Closed	0	0	0

TABLE 3: COUNTY COURT JUDGES -- 81, FULL-TIME, ALL LAWYERS*

Complaints Received	120
Complaints Investigated	6
Judges Cautioned After Investigation	0
Formal Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Formal Complaints Dismissed or Closed	0

*Includes seven judges who serve concurrently on County and Family Court.

TABLE 4: FAMILY COURT JUDGES -- 127, FULL-TIME, ALL LAWYERS

Complaints Received	121
Complaints Investigated	7
Judges Cautioned After Investigation	3
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

TABLE 5: DISTRICT COURT JUDGES -- 50, FULL-TIME, ALL LAWYERS

Complaints Received	20
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 6: COURT OF CLAIMS JUDGES -- 63, FULL-TIME, ALL LAWYERS*

Complaints Received	3
Complaints Investigated	0
Judges Cautioned After Investigation	0
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

*Complaints against Court of Claims judges who serve as Acting Justices of the Supreme Court were recorded on Table 8 if the alleged misconduct occurred in Supreme Court.

TABLE 7: SURROGATES -- 74, FULL-TIME, ALL LAWYERS*

Complaints Received	27
Complaints Investigated	2
Judges Cautioned After Investigation	0
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

*Includes 10 who serve concurrently as Surrogates and 30 who serve concurrently as Surrogate, Family and County Court judges.

TABLE 8: SUPREME COURT JUSTICES -- 339, FULL-TIME, ALL LAWYERS

Complaints Received	241
Complaints Investigated	16
Judges Cautioned After Investigation	2
Formal Complaints Authorized	3
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

TABLE 9: COURT OF APPEALS JUDGES & APPELLATE DIVISION JUSTICES -- 55, FULL-TIME, ALL LAWYERS

Complaints Received	13
Complaints Investigated	2
Judges Cautioned After Investigation	0
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 10: NON-JUDGES*

Complaints Received	338

*The Commission's jurisdiction is limited to judges of the state unified court system. It does not have jurisdiction over non-judges, administrative law judges, housing judges of the New York City Civil Court, or federal judges.

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 of the charges served, hearings commenced or other matters, absent a waiver by the judge, until a case has been concluded and a determination of admonition, censure, removal or retirement 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 1992 and made public pursuant to the applicable provisions of the Judiciary Law. Copies of the determinations are appended.

DETERMINATIONS OF REMOVAL

The Commission completed two disciplinary proceedings in 1992 in which it determined that the judge involved should be removed from office.

Matter of Rudolph L. Mazzei

The Commission determined that Rudolph L. Mazzei, a judge of the County Court, Suffolk County, be removed from office for, *inter alia*, signing his deceased mother's name to applications for credit cards and then, for his own use, obtaining and using an additional card on the same account. Judge Mazzei is a lawyer.

In its determination of December 23, 1992, the Commission found that Judge Mazzei had, over a seven-month period, "engaged in unlawful and serious acts of deception" by twice signing "his dead mother's name to a credit card application in order to procure a user's card for himself."

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

Matter of Neil W. Moynihan

The Commission determined that Neil W. Moynihan, the Surrogate of Schenectady County, be removed from office for continuing to act as a fiduciary in several estates after becoming a full-time judge, continuing to perform legal services for former clients, altering documents in an attempt to deceive the Commission during its investigation, failing to report his extra-judicial activities and maintaining improper financial and business relations with a law firm. Judge Moynihan is a lawyer.

In its determination of April 17, 1992, the Commission found, *inter alia*, that Judge Moynihan's actions were not "isolated efforts to conclude some outstanding ministerial matters [from his law practice] left open when he ascended the bench" but represented a continuing, prohibited involvement in his law firm's cases. The Commission also found, *inter alia*, that Judge Moynihan's misconduct was exacerbated by his alteration of numerous documents in a cover-up attempt.

Judge Moynihan requested review by the Court of Appeals. On November 18, 1992, the Court accepted the Commission's determination and ordered Judge Moynihan removed from office.

DETERMINATIONS OF CENSURE

The Commission completed one disciplinary proceeding in 1992 in which it determined that the judge involved should be censured.

Matter of Stuart L. Ain

The Commission determined that Stuart L. Ain, a judge of the County Court and an Acting Justice of the Supreme Court, Nassau County, be censured for making improper ethnic comments, an obscene gesture and other improper remarks to an attorney of Arabic ancestry, during settlement discussions immediately prior to commencement of a non-jury trial. Judge Ain is a lawyer.

In its determination of September 21, 1992, the Commission found that Judge Ain's "hostile and insulting words and gestures were intemperate" and "inappropriate and conveyed the impression that he was biased."

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

DETERMINATIONS OF ADMONITION

The Commission completed fifteen disciplinary proceedings in 1992 in which it determined that the judges involved should be admonished.

Matter of Paul F. Bender

The Commission determined that Paul F. Bender, a justice of the Marion Town Court, Wayne County, be admonished for making inappropriate remarks about a female assault victim. Judge Bender is a lawyer.

In its determination of February 7, 1992, the Commission found that, during the

arraignment in a domestic assault case, Judge Bender asked whether this was "just a Saturday night brawl where he smacks her around and she wants him back in the morning," and he thereafter warned the defendant, who subsequently pleaded guilty, to "watch your back" because "women can set you up." The Commission found that such remarks understate the seriousness of domestic assault, discourage complaints by victims and convey the impression of partiality toward the men in such cases.

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

Matter of Peter E. Corning

The Commission determined that Peter E. Corning, a judge of the County and Family Courts, Cayuga County, be admonished for falsely certifying bail bonds and releasing criminal defendants in three cases.

In its determination of November 4, 1992, the Commission found *inter alia* that Judge Corning "wrongly and negligently" certified that a bail bondsman had personally appeared before him and "approved bail bonds presented by someone ... not authorized to do so."

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

Matter of Norman Feiden

The Commission determined that Norman Feiden, a judge of the Family Court, Nassau County, be admonished for making improper comments in court and to a newspaper reporter concerning a custody proceeding.

In its determination of July 29, 1992, the Commission found that Judge Feiden, based on his own religious beliefs, criticized a mother's practice of putting up a Christmas tree and giving gifts to her children. He thereafter told a reporter that the mother was using her holiday observance to "manipulate the custody situation."

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

Matter of Edwin B. Winkworth

The Commission determined that Edwin B. Winkworth, a non-lawyer justice of the Granby Town Court, Oswego County, be admonished for driving a vehicle while impaired by alcohol and thereafter referring to his judicial office and threatening the arresting officer.

In its determination of September 23, 1992, the Commission noted that the judge had recognized the seriousness of his conduct and sought treatment for alcohol abuse.

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

Matters of Homer J. Bristol, Roger I. Conner, Lawrence J. Fleckenstein, Robert K. Goodsell, John H. Gregory, Raymond E. Lockwood, Jr., Oliver H. McGraw, John W. McMullen, Richard J. Smith, Sr., John L. Steimle and Herbert F. Titus

In eleven separate proceedings arising out of the same factual situation, the Commission determined that the following non-lawyer justices, all from Cayuga County, be admonished:

Homer J. Bristol, Throop Town Justice,
Roger I. Conner, Genoa Town Justice,
Lawrence J. Fleckenstein, Moravia Town Justice and Acting Village Justice,
Robert K. Goodsell, Sterling Town Justice and Fair Haven Village Justice,
John H. Gregory, Sennett Town Justice,
Raymond E. Lockwood, Jr., Aurelius Town Justice,
Oliver H. McGraw, Moravia Town Justice,
John W. McMullen, Brutus Town Justice,
Richard J. Smith, Sr., Montezuma Town Justice,
John L. Steimle, Owasco Town Justice and
Herbert F. Titus, Ira Town Justice and Cato Acting Village Justice.

Each of these justices participated in a practice set forth in a resolution passed by the Cayuga County Magistrates' Association, delegating authority to the county sheriff's department to review and approve bail bonds presented by any certified bondsman at the county jail vis a vis defendants who had been committed to the jail by these justices. The sheriff's department was also authorized to release the defendants on behalf of the justices and sign the justices' names to the certificates of release. Over a period of years, a number of defendants were released according to this procedure.

In its determinations against these eleven justices, all dated November 4, 1992, the Commission found that the justices had failed to comply with provisions of the Criminal Procedure Law requiring that bonds be submitted to the court with various statutory safeguards. The Commission found that, by delegating these judicial duties to non-judicial personnel, the eleven justices had violated the Rules Governing Judicial Conduct, in that they had been unfaithful to the law and had not diligently performed their judicial duties.

None of the eleven justices requested review by the Court of Appeals.

DISMISSED OR CLOSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of ten Formal Written Complaints in 1992 without rendering public discipline.

In one 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 for improperly closing and locking the courtroom and barring observers from a public proceeding.

Five Formal Written Complaints were closed because the judges resigned from judicial office, and four others were closed because the judges retired or otherwise vacated office.

LETTERS OF DISMISSAL AND CAUTION

Pursuant to Commission rule, 22 NYCRR 7000.1(l), 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 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 1992, 44 letters of dismissal and caution were issued by the Commission, 43 of which were issued upon conclusion of an investigation and one of which was issued after a Formal Written Complaint proceeding was concluded. Thirty-one town or village justices, three of whom are lawyers, were cautioned; five part-time and three full-time City Court Judges were cautioned; and five other full-time judges were cautioned -- three Family Court Judges and two Supreme Court Justices.

The caution letters addressed various types of conduct. For example, several judges were cautioned for engaging in improper political activity, such as attending or contributing funds to political events at times when the judges were not candidates for re-election.

A number of judges were cautioned for inappropriate demeanor, such as using repugnant or otherwise intemperate language in court or making improper public comments about pending or impending matters.

Several town and village justices were cautioned for failing to make timely reports of their case dispositions or timely accountings of court funds to the State Comptroller.

Nine judges were cautioned for conducting unauthorized *ex parte* communications with one party or another, or with witnesses, to ongoing proceedings, without notice to the other participants in the case.

Numerous judges were cautioned for failing to make timely filings of their mandatory annual financial disclosure forms with the State Ethics Commission.

Two part-time justices were cautioned for failing to disqualify themselves in cases involving clients of their law practices.

MATTERS CLOSED UPON RESIGNATION

Ten judges resigned in 1992 while under investigation or formal charges by the Commission. The matters pertaining to these judges were closed.

By statute, the 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 appropriate prosecutors' offices. Complaints against lawyers are referred for appropriate disciplinary action.

In 1992, the Commission referred 34 administrative matters, involving judges of the unified court system, housing court judges, or court employees, to either the Office of Court Administration or an administrative judge. Two complaints against lawyers were referred to the appropriate disciplinary committee.

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.

In 1992, the Court decided the two matters summarized below. A third request for review, *Matter of Mazzei*, is pending.

Matter of Lawrence J. LaBelle

On February 6, 1991, the Commission determined that Lawrence J. LaBelle, a judge of the Saratoga Springs City Court, Saratoga County, be removed from office for deliberately ignoring defendants' fundamental rights and conveying the impression of bias in numerous cases, by, *inter alia*, "consistently and intentionally" disregarding a statute that required him to order bail or recognizance for defendants charged with violations or misdemeanors. Some defendants were incarcerated at the pre-trial stage for periods longer than the maximum sentence had they subsequently been convicted of the charged crimes. Judge LaBelle requested review of the Commission's determination by the Court of Appeals.

In a 4 to 3 decision on April 3, 1992, the Court modified the sanction from removal to censure. *Matter of LaBelle*, 79 NY2d 350 (1992).

Noting the Commission's finding that Judge LaBelle had "improperly committed defendants without bail 'on 96 occasions in 59 cases involving 44 defendants,'" the Court concluded that the Commission had "inflate[d] the numbers" by counting multiple events involving a single defendant as separate instances of misconduct. *Id* at 358-59. In some instances, the Court credited Judge LaBelle's explanation that his errors were "inadvertent" or that court records did not reflect that he had taken appropriate action. *Id* at 361.

Nevertheless, the Court found that in approximately 24 cases, Judge LaBelle "failed to set bail without legal justification." The Court ordered censure rather than removal, however, because the judge was "contrite," "readily agreed to change those practices found to be improper," had not "acted to advance his own interests" and was "motivated primarily by compassion" for the defendants, who were "homeless and in many cases suffering from...drug or alcohol abuse...[and whom Judge LaBelle] believed...were more comfortable, safer and better cared for in jail" than on the streets. *Id* at 362, 363. At worst, the Court noted, Judge LaBelle "exhibited impatience with those who abused their right to bail." *Id* at 363.

The dissent by Judge Kaye, which was joined by Judges Simons and Alexander, favored removal from office. Notwithstanding the issue of how the Commission arrived at its numbers, the dissent noted that the "Court acknowledges that on at least 24 occasions, petitioner

'improperly committed defendants to jail without bail, knowing that the law required that bail be set,'" thus denying defendants "'a benefit of obvious importance and to which the defendant is entitled as a matter of right'...at a time when 'the defendant is unlikely to be represented by counsel.'" *Id* at 363. The dissent noted that, notwithstanding Judge LaBelle's contrition and pledge to change his unlawful practice in the wake of a disciplinary proceeding, (1) in "at least two dozen instances he knowingly and wrongfully incarcerated individuals before any determination of their guilt, even for periods longer than a sentence after conviction," and (2) "[f]ar less egregious misconduct has warranted removal in the past." *Id* at 363-64.

Matter of Neil W. Moynihan

On April 17, 1992, the Commission determined that Neil W. Moynihan, Judge of the Surrogate's Court, Schenectady County, be removed from office for continuing to act as a fiduciary in several estates after becoming a full-time judge, continuing to perform legal services for former clients, altering documents in an attempt to deceive the Commission during its investigation, failing to report his extra-judicial activities and maintaining improper financial and business relations with a law firm. Judge Moynihan requested review of the Commission's determination by the Court of Appeals.

In its unanimous decision on November 18, 1992, the Court accepted the Commission's determination and ordered the judge's removal from office. *Matter of Moynihan*, 80 NY2d 322 (1992).

The Court upheld the Commission's findings and rejected the judge's defense that "his actions were necessary in order to wind up a busy practice with longstanding responsibilities...that could not readily be transferred," and that some of his acts were "ministerial." *Id* at 324, 325. The Court found that Judge Moynihan's "provision of fiduciary and other legal and business services for more than two years...after assuming the bench [was] an inexcusably long period. Moreover, the work he continued to perform involved matters that came before his own court (albeit before different Judges)." *Id* at 324-25. Finally, the Court noted that the judge did not adequately explain his "failure to file reports of the compensation he received from his extra-judicial activities [Section 100.6 of the Rules Governing Judicial Conduct] or his alteration of several checks and check stubs submitted to the Commission staff that obscured or concealed notations identifying client work." *Id* at 325.

CHALLENGES TO COMMISSION PROCEDURES

The Commission's staff litigated two matters in 1992 involving important constitutional and statutory issues involving the Commission's jurisdiction and procedures.

Matter of Anonymous

On May 15, 1992, in Supreme Court, New York County, Suffolk County Court Judge Rudolph Mazzei, the respondent in a then-confidential proceeding pending before the Commission, sought a temporary restraining order enjoining the hearing which was scheduled to begin on May 20th before a Commission-designated referee, Professor Walter Gellhorn. Claiming that the Commission had exceeded its jurisdiction by charging a violation of the Code of Professional Responsibility (in addition to violations of the Rules Governing Judicial Conduct), Judge Mazzei's attorney argued that only the Appellate Division has jurisdiction over violations of the Code's Disciplinary Rules and that the Commission had improperly denied his motion to dismiss the charge. The attorney also argued that Referee Gellhorn had improperly refused to postpone the hearing pending compliance by a bank with certain outstanding subpoenas.

Supreme Court Justice Kristin Booth Glen denied the application for a temporary restraining order. On September 30th, she dismissed the petition, holding that the Commission's denial of the motion to dismiss the charged Disciplinary Rule violation was "in accordance with well settled law," and noting that the other relief requested by Judge Mazzei was moot since the disciplinary hearing had already been held.

Judge Mazzei's attorney filed a notice of appeal on October 27th, which is pending. As reported in this Annual Report, the Commission determined in December that Judge Mazzei should be removed from office for misconduct related to his obtaining a credit card by signing his deceased mother's name to the applications.

LaBelle v. Commission

On March 10, 1992, Saratoga Springs City Court Judge Lawrence LaBelle commenced an Article 78 proceeding in Supreme Court, Saratoga County, seeking to vacate the Commission's denial of his motion for reconsideration of its determination that he be removed from office. On March 16th, the Commission filed a motion to change venue or, in the alternative, to dismiss the claim, since the removal determination was pending before the Court of Appeals. The Commission also requested that sanctions be imposed for instituting a frivolous proceeding.

After the Court of Appeals decision in *Matter of LaBelle*, 79 NY2d 350 (1992), the Supreme Court granted the judge's motion to discontinue the Article 78 proceeding.

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 outside the context of a specific disciplinary proceeding. We do this to advise the judiciary so that potential misconduct may be avoided and pursuant to our authority to make administrative and legislative recommendations.

IMPROPER DELEGATION OF JUDICIAL AUTHORITY

It is fundamental to the maintenance of an impartial and independent judiciary for a judge to exercise the powers of office without undue or unauthorized reliance upon non-judges. From time to time, the Commission has investigated cases in which judges have actually or effectively ceded certain non-delegable duties to others.

In ***Matter of Greenfeld***, 71 NY2d 389 (1988), a village court justice was removed from office for, *inter alia*, improperly permitting the deputy village attorney to perform judicial duties in certain cases, including accepting guilty pleas, determining the amount of fines to be paid by defendants, and entering dispositions on official court records.

In ***Matter of Rider***, 1988 Commission Annual Report, a town and village court justice was censured for permitting the local prosecutor to prepare the judge's decisions, without notice to the defense.

In ***Matter of Hopeck***, 1981 Commission Annual Report, a town court justice was censured for, *inter alia*, allowing his wife to preside over a series of traffic cases on an evening when the judge himself was unavailable.

This year's Annual Report includes the admonition of eleven non-lawyer town and village justices in Cayuga County for delegating to the county sheriff's department the authority to review and approve bail bonds and sign the judges' names to release the defendants.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several procedural safeguards (CPL 520.20). Upon the posting of bail in any form, a judge must examine it to determine that it complies with the court's order (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting bond on behalf of the defendant and promising to pay the court if the defendant does not appear (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received, any personal and real property pledged as security and the value of such property (CPL 520.20[4]).

The judge's responsibility to ensure that a bail bond provides adequate protection

that a defendant will return to court cannot be delegated. In the eleven Cayuga County cases reported in this Report, numerous defendants were, in fact, released on legally insufficient bail bonds at the discretion of the sheriff's department, without review by a judge.

Such improper delegations of power undermine a fundamental judicial obligation to hear both sides in a dispute independently and impartially and to render decisions accordingly.

FIDUCIARY ACTIVITIES OF A JUDGE

Section 100.5(d) of the Rules Governing Judicial Conduct severely proscribes the fiduciary activities in which a judge may engage, yet at least one aspect of the rule appears to require more specific language so as to eliminate a nettlesome ambiguity.

Except for part-time justices, no judge can serve as a fiduciary (such as executor, administrator, guardian or trustee) in any instance, "except for the estate, trust or person of a member of his or her family," and then only so long as it would not "interfere with the proper performance of judicial duties" or be "likely" that the judge, as fiduciary, would become engaged in proceedings in the judge's own court or one under his or her appellate jurisdiction.

Problems typically arise in the interpretation of "family." The rule specifically defines members of the judge's family to include a "spouse, child, grandchild, parent, grandparent or other relative *or person* with whom the judge maintains a close *familial* relationship." (Emphasis added.) Although it is obvious that the word "familial" is intended to mean more than a close, non-family relationship, its precise meaning is unclear.

The Advisory Committee on Judicial Ethics has issued several opinions in this regard, finding against serving as a fiduciary in all but one. For example, a judge cannot serve as fiduciary for "close friends" in another state (Opinion 88-19), nor for a "close family friend" who is without siblings and whose parents have died (Opinion 89-118). Even where the fiduciary relationship arose before the fiduciary became a judge, the judge must withdraw upon taking office (Opinion 90-86).

In another case, the Advisory Committee found it permissible for a judge to act as fiduciary for the "surrogate father" of the judge's spouse, with whom both the judge and spouse were close over many years (Opinion 90-116). Such advisory opinions suggest that interpreting the phrase "close familial relationship" remains difficult.

A 1990 amendment to Section 100.5(d) of the Rules provides that, with the approval of the Chief Administrator of the Courts, a judge may serve as fiduciary for a non-family member with whom the judge "has maintained a longstanding personal relationship of trust and confidence." Thus, if a judge has a "familial" relationship with a non-family member, the judge may serve as fiduciary without the approval of the Chief Administrator; but where the longstanding relationship has been "personal" and "close" but not "familial," the judge must seek

the approval of the Chief Administrator. The distinction seems elusive and confusing.

The best approach would be to restrict fiduciary service only to close, actual family (not "familial") relationships, and to other close, longstanding personal relationships of trust and confidence that are specifically approved by the Chief Administrator.

The Commission recommends that the fiduciary rule be reviewed and clarified with respect to serving as a fiduciary for close friends.

FINANCIAL DISCLOSURE

There are two aspects of a judge's obligation to make regular reports of financial activity that are appropriate to discuss in view of recent cases and events. One pertains to the requirement of the Rules Governing Judicial Conduct that a judge file reports of extra-judicial compensation, and the other involves the legal requirement that annual financial disclosure statements be filed with the State Ethics Commission.

Reports Filed With The Court Clerk

Certain quasi-judicial and extra-judicial activity is permitted by the Rules Governing Judicial Conduct, and Section 100.6 of the Rules sets forth certain requirements as to compensation received by judges for such activity. For example, the source of the payments must not "give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety." Moreover, the compensation must not exceed a "reasonable amount" nor exceed what a non-judge would receive for the same activity. Also, expense reimbursements "must be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his or her spouse." Any payment in excess of actual reimbursement is to be considered compensation.

Section 100.6 also includes a detailed reporting provision. All full-time judges are required to report the date, place and nature of any activity for which compensation is received, as well as the name of the payor and the amount of the compensation. The report is to be made annually and filed as a public document with the clerk of the judge's court or some other office designated by court rule.

Section 100.5(c)(3)(iii) of the Rules provides that judges must also report gifts and loans valued at more than $100 in the same manner as provided in Section 100.6, with certain stated exceptions. "A loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges" need not be reported, for example. One judge was removed from office in 1989 for, *inter alia*, receiving loans at favorable terms not available to the public at large. *Matter of Cohen*, 74 NY2d 272 (1989).

Notwithstanding the clear language of this reporting provision, some judges do not

comply with the rule. Failure to comply with the rule may well be inadvertent in some instances, but it inevitably raises the possibility that the non-reporting judge is attempting to conceal compensation for activity that might well be proscribed. In *Matter of Moynihan*, 80 NY2d 322 (1992), in which the Court of Appeals upheld a Commission determination to remove a Surrogate for engaging in a wide range of prohibited financial and business activity, the Court noted the judge's failure to comply with the reporting requirement and said there was no adequate explanation for it.

The Commission reminds all full-time judges of the limitations and reporting requirements set forth in Sections 100.5(c)(3)(iii) and 100.6 of the Rules, and we recommend that the Office of Court Administration remind judges and court clerks throughout the unified court system to comply with the rule.

Ethics Commission for the Unified Court System

Since 1989, the state's financial disclosure requirement has applied to judges as well as other public officials. Each year, judges are required to file a financial disclosure form with the Ethics Commission for the Unified Court System, listing, *inter alia*, income sources, creditors and debtors.

If a judge fails to file a financial disclosure form in a timely manner, or fails to respond to a Notice to Cure and is issued a Notice of Delinquency by the Ethics Commission, the matter is referred to the Commission on Judicial Conduct, which then inquires into the judge's alleged delinquency. Several judges have been cautioned in the last two years for failing to file their forms on time and ignoring or overlooking the Notice to Cure and the Notice of Delinquency.

Filing serves the additional purpose of disclosing potential conflicts of interest. For example, were a judge to be a creditor or debtor vis a vis a lawyer or business regularly appearing in court, that might well raise a disclosure or disqualification issue.

All judges who must file should do so on time and respond on a timely basis to requests from the Ethics Commission for information elicited by the disclosure form.

POLITICAL ACTIVITY

In previous annual reports, the Commission has discussed various aspects of the prohibition on political activity by judges.

As a general rule, judges cannot participate in political activity of any kind, except in connection with their own campaigns for elective judicial office, and then only for certain time periods and under limited circumstances. The appropriate provisions are found in Section 100.7

of the Rules Governing Judicial Conduct, Canon 7 of the Code of Judicial Conduct, and the Election Law.

Since 1987, the Advisory Committee on Judicial Ethics has issued numerous opinions on the subject, and the Commission has investigated a number of complaints alleging violations of the various political activity rules. Since certain aspects and questions relating to political activity come up frequently, the Commission thought it appropriate in this report to address the following matters.

Attendance At Political Events

A judge who is an announced candidate for elective judicial office may attend political dinners and affairs in the period beginning nine months before 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.

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

(1) may attend his or her own fund-raiser but may not personally solicit contributions there;

(2) 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; and

(3) may purchase tickets to a politically-sponsored dinner or affair, even where the cost of the ticket exceeds the proportionate share of the dinner or affair. Nevertheless, pursuant to Opinion 92-97 of the Advisory Committee on Judicial Ethics, certain ticket prices, such as $1000, "so far exceed the reasonable cost of the dinner as to constitute an [improper] political campaign contribution...;" Furthermore, pursuant to Amended Opinion 92-97, a judge is limited to purchasing ***two*** reasonably-priced tickets to such a political affair.

Except for those periods when a judge is permitted to engage in political activity on behalf of his or her own campaign, 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.

These prohibitions apply even when the judge's spouse is a political candidate. In *Matter of Rath*, 1990 Commission Annual Report, a judge was admonished for accompanying his candidate-wife to four political events, including two of her fund-raisers.

Contributions Or Payments To A Political Organization

The Rules prohibit a judge from belonging to a political club or organization. Neither a judge nor the judge's campaign committee may make a contribution to a political party or organization, except when purchasing a ticket to a political event during the permissible campaign period, as noted above.

However, as noted in Opinion 92-97 of the Advisory Committee on Judicial Ethics, the judge's campaign committee may reimburse the party for the judge's proportionate share of specified "reasonable and actual" expenses made on behalf of his or her campaign. In previous years, the Commission has cautioned particular judges for making large lump-sum payments to political organizations without appropriate receipts, itemizations or other records to support the expenditure. Such undocumented lump-sum payments at the very least appear to be prohibited political contributions in the guise of reimbursement.

ENDORSEMENT OF JUDICIAL CANDIDATES BY SINGLE-ISSUE POLITICAL ORGANIZATIONS

The Rules Governing Judicial Conduct prohibit a judicial candidate from (1) making pledges or promises of conduct in office or (2) announcing views on disputed legal or political issues. In this regard, the Commission has received numerous communications questioning whether it is a violation of this rule for a candidate to accept the endorsement of a political group which is, in fact or perception, dedicated to a single issue, such as the Right To Life Party. One argument that has been raised with regard to an endorsement by the Right To Life Party is that a judicial candidate is effectively announcing his or her position on abortion by accepting the endorsement.

As confrontational abortion-related protests increase at clinics and elsewhere, and as civil litigants resort to lawsuits on abortion-related matters, more abortion-related cases are coming before the courts. Inevitably, more judges who had accepted Right To Life endorsement will be presiding over these cases. Whether they can appear to be impartial is a legitimate issue.

In an informal, unpublished letter in 1982, the State Bar Association's Committee on Judicial Election Monitoring advised a judicial candidate that it would violate the Code of Judicial Conduct to accept the Right To Life endorsement. A year later, in a public opinion (83-3), the Committee reversed itself, stating that a judicial candidate *could* accept the party's endorsement. The Committee acted after being advised by the party's chairman that the party (1) does not require candidates to make pledges on the abortion issue and (2) does "not even inquire of a judicial candidate's views on abortion." The State Bar Committee "interpret[ed] this to mean that the Right To Life Party has chosen to participate in the judicial election system for the sole purpose of seeking and promoting those best qualified to serve the judiciary, regardless of their views on abortion...." (Emphasis in original.)

The Committee on Judicial Election Monitoring has since been disbanded. Neither the State Bar's Ethics Committee nor the court system's Advisory Committee on Judicial Ethics has issued an opinion on the propriety of accepting the Right To Life Party endorsement, or on the propriety of presiding over abortion-related cases after having accepted the Right To Life endorsement.

The Right To Life Party is not the only one which takes a position on the abortion issue. However, the Democratic, Republican, Liberal and Conservative parties issue platforms and take stands on such a broad range of issues that a judicial candidate could reasonably argue that accepting such a nomination would not require endorsing every position articulated by the party and therefore would not be tantamount to announcing one's views on abortion.

Candidates should consider seriously whether or not to accept the endorsement of the single-issue party.

CONTINUING COMMISSION PROCEEDINGS UPON RESIGNATION

Pursuant to Section 47 of the Judiciary Law, the Commission may continue proceedings against a judge who resigns from office, for a period of 120 days after the effective date of the resignation. However, the only action the Commission may take in this period is to determine to remove the judge from office. "Removal" of a judge who has already resigned serves the purpose of automatically barring the judge from ever again holding judicial office.

Section 47 took effect in 1978 by legislative enactment. Prior thereto, the Commission lost jurisdiction upon the effective date of resignation. The Commission had argued that in some cases it thwarted the disciplinary process to permit a respondent to end proceedings in a serious matter by resigning. Given the statutorily-mandated confidentiality of Commission proceedings, there was no accounting to the public in such a case, since resignation would not only terminate the proceeding but render the entire record secret. More than once, considerable Commission resources were expended in important cases, only to result in no further action when, near the end of the process, the judge left office rather than face public discipline.

The debate in 1978 was focused on how much time the Commission should be allowed to continue proceedings following a resignation, and to what end. The Commission argued that any case which had proceeded to formal charges should be allowed to continue as if the judge were still in office. At the end of such proceedings, charges could be dismissed, or the former judge could be removed and disqualified from future judicial office. The Commission also urged that jurisdiction to investigate be continued for six months, with an obligation to either dismiss the case within that time or commence formal disciplinary proceedings, which would then continue until concluded.

The Commission based its arguments on the extreme burden of finishing a due process proceeding in four months, which was the time limit being urged by others. The law

and promulgated Commission procedures build in numerous time and notice requirements which make the four-month deadline unrealistic. For example, a judge is allowed 20 days to file an answer to the Formal Written Complaint. The judge is also entitled to a hearing before a referee and must be given at least 20 days notice. After being supplied with a transcript of the hearing, a judge is given 30 days to file a brief with the referee. The referee is then given 30 days to submit a report to the Commission, after which the judge is given at least 20 days to submit papers to the Commission vis a vis the final disposition. The judge is also afforded the opportunity to appear for oral argument before the Commission, which can add another 30 to 45 days to the process. The Commission then needs 30 to 45 days to arrive at, circulate and finalize a determination and assemble three copies of the entire record of proceedings, which the law and Court of Appeals rules require must accompany the determination.

Assuming the fastest possible compliance with the law and rules -- for example, a one-day hearing, a transcript made available the following day, no interim motions, no legitimate requests for more time, and immediate finalization of the Commission determination on the same day as a promptly-scheduled oral argument -- these minimum requirements alone still take up 152 days, which is 32 days over the present period allowed by law to conclude a case following the judge's resignation. As a result, it is rare for the Commission to continue proceedings in a case after a judge resigns, unless a formal hearing has already been held.

At issue is the question of who controls the disciplinary process. Should a judge or any public official charged with serious misconduct be allowed to avoid the consequences of such behavior, and any public accounting for it, by resigning before the disciplinary authorities can properly finish their work? In some instances, a resignation would be an appropriate disposition and the Commission might not proceed, even if it had the power to do so. In other instances, the resignation prevents an appropriate disposition.

A lawyer subject to discipline by a grievance committee may resign from the practice of law, but such resignation is public and is usually accompanied by a public statement from the grievance committee or Appellate Division as to the underlying basis of the resignation. At least such a standard seems appropriate in judicial disciplinary proceedings as well. The Commission recommends that the Legislature review this issue and amend the Judiciary Law to extend the time in which the Commission may proceed following a judge's resignation.

THE COMMISSION'S BUDGET

In our 1988 Annual Report, we reported extensively on the Commission's annual budget, including an analysis of its growth over the ten preceding years and a detailed comparative examination of the budgets of New York's and other states' judicial conduct commissions. In last year's Annual Report, in view of the prevailing budget crisis being experienced by the state government, we commented on the great financial sacrifices we, like other state agencies, were enduring.

Budgetary constraints continue to affect the Commission's operations. The Commission's budget has been reduced again for fiscal year 1993-94.

In 1978-79, the first year of operations under the present system, the Commission's budget was $1.644 million. Thirteen years later, the 1991-92 budget was $1.936 million, which was $326,000 less than the previous year; however, due to the budget crisis, the Commission's spending was capped at $1.826 million, representing an annual budget growth of less than 1%. That percentage is substantially below inflation rates and dramatically lower than the growth rates of other government agencies. Six times since 1979, even before the current budget crisis materialized, we requested budgets no greater or even less than the previous year's amount. We were apprised by the Division of the Budget that ours was the only agency to seek less than before in the 1980's, when such sacrifices were not mandated by fiscal emergencies.

The herculean task of maintaining a markedly low-growth budget over more than 14 years has left virtually no bureaucratic "fat" to be trimmed from our budget. The financial cuts that state agencies have endured continue to hit hard, and among those agencies which have demonstrated austerity in pre-crisis times, such as the Commission, the cuts have had a disproportionately greater impact. We have been compelled to lay off some staff, reduce others from full-time to part-time status, and cut back in other ways.

The Executive Budgets for fiscal years 1992-93 and 1993-94 provided sums substantially less than the $1.826 million we were allotted for our operations in 1991-92. This essentially gave the Commission the same funding it had in 1978-79, when we were receiving half the number of complaints we now receive in a year. The Commission's total budget for 1993-94 will be $1.645 million, almost precisely what it was in 1978-79. Although such substantial reductions will continue to affect our operations adversely, we will continue to carry out our assigned responsibilities to the best of our ability.

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 that the Commission contributes to that ideal and to the fair and proper administration of justice.

Respectfully submitted,

Henry T. Berger, Chair
Myriam J. Altman
Helaine M. Barnett
Herbert L. Bellamy, Sr.
Carmen Beauchamp Ciparick
E. Garrett Cleary
Dolores DelBello
Lawrence S. Goldman
Eugene W. Salisbury
John J. Sheehy
William C. Thompson

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 Litigation of the Association of the Bar of the City of New York. She is a member of the Office of Court Administration's Committee on Civil Law and Procedure and a trustee of the New York State Association of Women Judges. She and her husband are the parents of three children.

HELAINE BARNETT, ESQ., is a graduate of Barnard College and New York University School of Law. She is the Deputy Attorney-in-Charge of the Civil Division of The Legal Aid Society. She has spent her entire professional career with The Legal Aid Society in both the Criminal and Civil Divisions. She is a member of the American Law Institute, the House of Delegates of the New York State Bar Association, the Executive Committee of The Association of the Bar of the City of New York, and the ABA Standing Committee on Professionalism, and immediate past chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility. She is also a fellow of both the New York Bar Foundation and the American Bar Foundation, a member of the Board of Directors of Homes for the Homeless, Inc., and a member of the Board of Directors of the Charles H. Revson Foundation. She is a past President of the Network of Bar Leaders, a former Adjunct Professor of Law of the Benjamin N. Cardozo School of Law, and author of several law review articles. She and her husband have two sons.

HERBERT L. BELLAMY, SR., is President and founder of 1490 Enterprises, Inc., in Buffalo, a not-for-profit community center which houses 32 local, state and federal government agencies and provides meals for 150 senior citizens daily. He is also owner and manager of Bellamy Enterprises. Mr. Bellamy has more than 20 years' experience in community service and fund-raising. He was the first Black Civil Service Commissioner in the City of Buffalo and served as Councilman-at-large for nine years. He was instrumental in completing several city projects, including Pilot Field Baseball Stadium and the waterfront development. The first Black Director and Vice President of the Buffalo Downtown Nursing Home, Mr. Bellamy has also served on the Canisius College Board of Regents, the Police Athletic Board, the Western New York Liquor Retailers Board, the Private Industry Council of Buffalo, the American Hardware Association, Bethel Headstart Program, Red Cross and the N.A.A.C.P. He was Vice President of the Buffalo Chamber of Commerce in 1973. Mr. Bellamy has received more than 150 awards and honors, including an honorary degree from Canisius College, the Canisius College President's Award, the Roberto Clemente Humanitarian Award, the 100 Black Men Award, the Buffalo Urban League Family Life Award, the N.A.A.C.P. Medgar Evers Award and the Congressional Record Award. He is the widower of the late Irene Parham and the father of six 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. He is a member of the House of Delegates of the New York State Bar Association, and a member of the Labor and Employment Law Committee and the Special Committee to Encourage Judicial Service of the Association of the Bar of the City of New York. Mr. Berger served as a member of the New York City Council in 1977.

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. Judge Ciparick is a member of the Board of Directors of the New York Association of Women Judges, the Board of Trustees of Boricua College and the Board of Directors of the Alumni Association of St. John's University School of Law.

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 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 a Grand Jury Investigation ordered by the late Governor Nelson A. Rockefeller to investigate financial irregularities in the Town of Arietta, Hamilton County. 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, 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 Partner in Westfair Communications and Publisher of the Westchester County and Fairfield County Business Journals. Mrs. DelBello is a member of Alpha Delta Kappa, the international honorary society for women educators; the Founders Club of the Yonkers YWCA; National Association of Negro Women; the Business Development Board of the Hudson Valley National Bank; the Entrepreneurial Center Council of Advisors; and Chairperson of the Board of Directors of the Northern Westchester Center for the Arts. She is also a member of the Advisory Board of the Association of Women Business Owners; the Westchester Community College Advisory Board on Communications; the Board of Directors of the American Lyme Disease Association; and the Board of Directors of the Westchester County Partnership For Elder Care. 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; and American Health Foundation. She and her husband Alfred live in Waccabuc and have one son, Damon, an orthopaedic surgeon.

LAWRENCE S. GOLDMAN, ESQ. is a graduate of Brandeis University and Harvard Law School. Since 1972, he has been a partner in the criminal law firm of Goldman & Hafetz in New York City. From 1966 through 1971, he served as an assistant district attorney in New York County. He has also been a consultant to the Knapp Commission and the New York City Mayor's Criminal Justice Coordinating Council. Mr. Goldman is currently a director of the National Association of Criminal Defense Lawyers, chairperson of its white-collar committee and former chairperson of its ethics advisory committee, a member of the executive committee of the criminal justice section of the New York State Bar Association and a member of the advisory committee on the Criminal Procedure Law. He has lectured at numerous bar association and law school programs on various aspects of criminal law and procedure, trial tactics, and ethics. He is an honorary trustee of Congregation Rodeph Sholom in New York City. He and his wife Kathi have two children and live in Manhattan.

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.

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 WILLIAM C. THOMPSON is a graduate of Brooklyn College and Brooklyn Law School. He was elected to the New York State Senate in 1965, and served until 1968. He was Chairman of the Joint Legislative Committee on Child Care Needs, and over 25 bills sponsored by him were signed into law. He served on the New York City Council from 1969 to 1973. He was elected a Justice of the Supreme Court in 1974 and was designated as an Associate Justice of the Appellate Term, 2nd and 11th Districts (Kings, Richmond and Queens counties) in November 1976. In December 1980 he was appointed Assistant Administrative Judge in charge of Supreme Court for Brooklyn and Staten Island. On December 8, 1980, he was designated by Governor Carey as Associate Justice of the Appellate Division, Second Department. Justice Thompson is one of the founders with the late Robert F. Kennedy of the Bedford Stuyvesant Restoration Corporation, one of the original Directors of the Bedford Stuyvesant Youth-In-Action, and a former Regional Director of the N.A.A.C.P. He is a Director of the Bedford Stuyvesant Restoration Corporation; Daytop Village, Inc.; Brookwood Child Care; Vice-President, Brooklyn Law School Alumni Association; Past President of the New York State Senate Club; and a member of the American Bar Association, Brooklyn Bar Association and the Metropolitan Black Bar Association.

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's staff in 1980 and has been Clerk of the Commission since 1983. He also teaches legal studies 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."

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.

DEPUTY ADMINISTRATOR

ROBERT H. TEMBECKJIAN, ESQ., is a graduate of Syracuse University, the Fordham University School of Law, and Harvard University's John F. Kennedy School of Government. 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.

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 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, OPERATIONS AND HISTORY

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 meets regularly. 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.

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[1] 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:

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[1]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.

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

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

Those proceedings resulted in the following:

-- 1 removal;
-- 2 suspensions;
-- 3 censures;
-- 10 cases closed upon resignation of 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.

SUMMARY OF COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION

Since January 1975, when the temporary Commission commenced operations, 15,694 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 11,845 (75%) were dismissed upon initial review and 3849 investigations were authorized. Of the 3849 investigations authorized, the following dispositions have been made through December 31, 1992:

-- 1849 were dismissed without action after investigation;

-- 724 were dismissed with letters of caution or suggestions and recommendations to the judge; the actual number of such letters totals 519, 39 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct;

-- 275 were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings; the actual number of such resignations was 202;

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

-- 572 resulted in disciplinary action; and

-- 141 are pending.

Of the 572 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission:[2]

-- 101 judges were removed from office;

-- 1 additional removal determination is pending review in the Court of Appeals;

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

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

-- 178 judges were censured publicly;

-- 113 judges were admonished publicly; and

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

Through December 1992, the Court of Appeals has reviewed 52 Commission determinations, 42 of which were for removal, eight for censure and two for admonition. The Court accepted the sanction determined by the Commission in 40 cases, 35 of which were removals. In two cases, the Court increased the sanction from censure to removal. In nine

[2]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 and the number of judges acted upon.

cases, the Court reduced the sanction that had been determined by the Commission, reducing seven removals to censure, and two censures to admonition. In one case the Court of Appeals found that the judge's actions did not constitute misconduct and dismissed the charges against the judge.

APPENDIX C

REFEREES WHO PRESIDED IN COMMISSION PROCEEDINGS IN 1992

REFEREE	CITY	COUNTY
Martin H. Belsky	Albany	Albany
Bruno Colapietro	Binghamton	Broome
Paul A. Feigenbaum	Albany	Albany
Walter Gellhorn	New York	New York
Gerald Harris	New York	New York
Jacob D. Hyman	Buffalo	Erie
John T. O'Friel	Central Valley	Orange
Roger W. Robinson	New York	New York

APPENDIX D

RULES GOVERNING JUDICIAL CONDUCT

Section 100.1 Upholding the independence of the Judiciary. An independent and honorable Judiciary is indispensable to justice in our society. Every judge shall participate in establishing, maintaining, and enforcing, and shall himself or herself observe, high standards of conduct so that the integrity and independence of the Judiciary may be preserved. The provisions of this Part shall be construed and applied to further that objective.

100.2 Avoiding impropriety and the appearance of impropriety. (a) A judge shall respect and comply with the law and shall conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the Judiciary.

(b) No judge shall allow his or her family, social, or other relationships to influence his judicial conduct or judgment.

(c) No judge shall lend the prestige of his or her office to advance the private interests of others; nor shall any judge convey or permit others to convey the impression that they are in a special position to influence him or her. No judge shall testify voluntarily as a character witness.

100.3 Impartial and diligent performance of judicial duties. The judicial duties of a judge take precedence over all his other activities. Judicial duties include all the duties of a judicial office prescribed by law. In the performance of these duties, the following standards apply:

(a) Adjudicative responsibilities. (1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge shall maintain order and decorum in proceedings before him or her.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom he or she deals in an official capacity, and shall require similar conduct of lawyers, and of his or her staff, court officials, and others subject to his or her direction and control.

(4) A judge shall accord to every person who is legally interested in a matter, or his or her lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending matter. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a matter before him or her if notice by the judge is given to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(5) A judge shall dispose promptly of the business of the court.

(6) A judge shall abstain from public comment about a pending or impending matter in any court, and shall require similar abstention on the part of court personnel subject to his or her direction and control. This subdivision does not prohibit judges from making public statements in the course of their official duties or from explaining for public information in procedures of the court.

(b) Administrative responsibilities. (1) A judge shall diligently discharge his or her administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge shall require his or her staff and court officials subject to his or her direction and control to observe the standards of fidelity and diligence that apply to the judge.

(3) A judge shall take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment only on the basis of merit, avoiding favoritism. A judge shall not appoint or vote for the appointment of any person as a member of his or her staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the sixth degree of relationship of either the judge or the judge's spouse. A judge shall also refrain from recommending a relative for appointment or employment to another judge serving in the same court. A judge shall not approve compensation of appointees beyond the fair value of services rendered. Nothing in this section shall prohibit appointment of the spouse of a town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that such justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(5) A judge shall prohibit members of his or her staff who are the judge's personal appointees from engaging in the following political activity:

(i) holding an elective office in a political party, or a club or organization related to a political party, except for delegate to a judicial nominating convention or member of a county committee other than the executive committee of a county committee;

(ii) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $300 in the aggregate during any calendar year commencing on January 1, 1976, to any political campaign for any political office or to any partisan political activity including, but not limited to, the purchasing of tickets to a political function, except that this limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference should be made to appropriate sections of the Election Law;

(iii) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fundraising activity of a political candidate, political party, or partisan political club; or

(iv) political conduct prohibited by section 25.39 of the Rules of the Chief Judge.

(c) Disqualification. (1) A judge shall disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including, but not limited to circumstances where:

(i) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(ii) the judge served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(iii) the judge knows that he or she, individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(iv) the judge or the judge's spouse, or a person within the sixth degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(c) is to the judge's knowledge likely to be a material witness in the proceeding;

(v) the judge or the judge's spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(2) A judge shall inform himself or herself about his or her personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(i) the degree of relationship is calculated according to the civil law system;

(ii) *fiduciary* includes such relationships as executor, administrator, trustee and guardian;

(iii) *financial interest* means ownership of a legal or equitable interest, however small, or a relationship as director, advisor or other active participant in the affairs of a party, except that:

(a) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(b) an office in an educational, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization;

(c) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome could substantially affect the value of the securities.

(d) Remittal of disqualification. A judge disqualified by the terms of subparagraph (c)(1)(iii), (iv) or (v) of this section, instead of withdrawing from the proceeding, may disclose on the record the basis of the disqualification. If, based on such disclosure, the parties (who have appeared and not defaulted), by their

attorneys, independently of the judge's participation, all agree that the judge's relationship is immaterial or that his or her financial interest is insubstantial, the judge no longer is disqualified, and may participate in the proceeding. The agreement shall be in writing, or shall be made orally in open court upon the record.

100.4 Activities to improve the law, the legal system, and the administration of justice. A judge, subject to the proper performance of his or her judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cause doubt on the capacity to decide impartially any issue that may come before him or her:

(a) A judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice.

(b) A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

(c) A judge may serve as a member, officer or director of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice. He or she may assist such an organization in raising funds and may participate in their management and investment, but shall not personally participate in public fundraising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

100.5 Extra-judicial activities. (a) Avocational activities. A judge may write, lecture, teach and speak on nonlegal subjects, and engage in the arts, sports and other social and recreational activities, if such avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties.

(b) Civic and charitable activities. A judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or nonlegal advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge shall not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or her or will be regularly engaged in adversary proceedings in any court.

(2) No judge shall solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of the office for that purpose, but may be listed as an officer, director or trustee of such an organization; provided, however, that no such listing shall be used in connection with any solicitation of funds. No judge shall be a speaker or the guest of honor at an organization's fund raising events, but he or she may attend such events. Nothing in this Part shall be deemed to prohibit a judge from being a speaker or guest of honor at a bar association or law school function.

(3) A judge shall not give investment advice to such an organization, but he or she may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

(c) Financial activities. (1) A judge shall refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit judicial position,

or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which he or she serves.

(2) No full-time judge shall be a managing or active participant in any form of business enterprise organized for profit, nor shall he or she serve as an officer, director, trustee, partner, advisory board member or employee of any corporation, company, partnership or other association organized for profit or engaged in any form of banking or insurance;

(i) provided, however, that this rule shall not be applicable to those judges who assumed judicial office prior to July 1, 1965 and maintained such nonjudicial interests prior to that date; and it is

(ii) further provided, that any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from this rule during the period of such interim or temporary appointment; and it is

(iii) further provided, that nothing in this section shall prohibit a judge from investing as a limited partner in a limited partnership, as contemplated by article 8 of the Partnership Law, provided that such judge does not take any part in the control of the business of the limited partnership and otherwise complies with this Part.

(3) Neither a judge nor a member or his or her family residing in his or her household shall accept a gift, bequest or loan from anyone, except as follows:

(i) a judge may accept a gift incident to a public testimonial to him or her; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his or her spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(ii) a judge or a member of his or her family residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(iii) a judge or member of his or her family residing in his or her household may accept any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds $100, the judge reports it in the same manner as he or she reports compensation in section 100.6 of this Part.

(4) For the purposes of this section, *member of his or her family residing in his or her household* means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his or her family, who resides in his or her household.

(5) A judge is not required to disclose his or her income, debts or investments, except as may be required by Part 40 of the Rules of the Chief Judge or by statute and as provided in this section and sections 100.3 and 100.6 of this Part.

(6) Information acquired by a judge in his or her judicial capacity shall not be used or disclosed by him or her in financial dealings or for any other purpose not related to his or her judicial duties.

(d) Fiduciary activities. No judge, except a judge who is permitted to practice law, shall serve as the executor, administrator, trustee, guardian or other fiduciary, designated by an instrument executed after January 1, 1974, except for the estate, trust or person of a member of his or her family, or with the approval of the Chief Administrator of the Courts, a person not a member of the family with whom the judge has maintained a longstanding personal relationship of trust and confidence, and then, only if such service will not interfere with the proper performance of judicial duties. *Members of his or her family* include a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(1) A judge shall not serve as a fiduciary if it is likely that as a fiduciary he or she will be engaged in proceedings that would ordinarily come before him or her, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in his or her personal capacity.

(e) Arbitration. No judge, other than a part-time judge, shall act as an arbitrator or mediator. A part-time judge acting as an arbitrator or mediator shall do so with particular regard to sections 100.1, 100.2 and 100.3 of this Part.

(f) Practice of law. A judge who is permitted to practice law shall, nevertheless, not practice law in the court in which he or she is a judge, whether elected or appointed, nor shall a judge practice law in any other court in the county in which his or her court is located which is presided over by a judge who is permitted to practice law. He shall not participate in a judicial capacity in any matter in which he or she has represented any party or any witness in connection with that matter, and he or she shall not become engaged as an attorney in any court, in any matter in which he or she has participated in a judicial capacity. No judge who is permitted to practice law shall permit his or her partners or associates to practice law in the court in which he or she is a judge. No judge who is permitted to practice law shall permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law. A judge may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law.

(g) Extra-judicial appointments. No judge shall accept an appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, state or locality on ceremonial occasions or in connection with historical, educational and cultural activities.

(h) Employment of part-time judges. A part-time judge may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties. No judge shall accept employment as a peace officer as that term is defined in section 1.20 of the Criminal Procedure Law.

100.6 Compensation received for extra-judicial activities. A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Part, if the source of such payments does not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety subject to the following restrictions:

(a) Compensation must not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement must be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his or her spouse. Any payment in excess of such an amount is compensation.

(c) A judge must report the date, place and nature of any activity for which he or she received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. Such report must be made annually and must be filed as a public document in the office of the clerk of the court on which he or she serves or other office designated by rule of court. This subdivision shall not apply to any judge who is permitted to practice law.

(d) Except as provided in section 100.5(h) of this Part, no judge shall solicit or receive compensation for extra-judicial activities performed for or on behalf of:

(1) New York State, its political subdivisions or any officer or agency thereof;

(2) a school, college or university that is financially supported, in whole or in part, by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for teaching a regular course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties; or

(3) any private legal aid bureau or society designed to represent indigents in accordance with article 18-B of the County Law.

100.7 Political activity of judges prohibited. No judge during a term of office shall hold any office in a political party or organization or contribute to any political party or political campaign or take part in any political campaign except his or her own campaign for elective judicial office. Political activity prohibited by this section includes:

(a) The purchase, directly or indirectly, of tickets to politically sponsored dinners or other affairs, or attendance at such dinners or other affairs, including dinners or affairs sponsored by a political organization for a nonpolitical purpose, except as follows:

(1) This limitation shall not apply during a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating a candidate for elective judicial office for which the judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported his or her candidacy, and ending, if the judge is a candidate in the general election for that office, six months after the general election. If the judge is not a candidate in the general election, this period shall end on the date of the primary election, convention, caucus or meeting.

(2) During the period defined in paragraph (1) of this subdivision:

(i) A judge may attend a fundraising dinner or affair on behalf of the judge's own candidacy, but may not personally solicit contributions at such dinner or affair.

(ii) Notwithstanding subdivision (b) of this section, a judge may purchase a ticket to a politically sponsored dinner or other affair even where the regular cost of a ticket to such dinner or affair exceeds the proportionate cost of the dinner or affair.

(iii) Notwithstanding subdivisions (c) and (d) of this section, a judge may attend a politically sponsored dinner or affair in support of a slate of candidates, and may appear on podiums or in photographs on political literature with the candidates who make up that slate, provided that the judge is part of the slate of candidates.

(b) Contributions, directly or indirectly, to any political campaign for any office or for any political activity. Where the judge is a candidate for judicial office, reference should be made to the Election Law.

(c) Participation, either directly or indirectly, in any political campaign for any office, except his or her own campaign for elective judicial office.

(d) Being a member of or serving as an officer or functionary of any political club or organization or being an officer of any political party or permitting his or her name to be used in connection with any activity of such political party, club or organization.

(e) Any other activity of a partisan political nature.

State of New York
Commission on Judicial Conduct

APPENDIX E

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

Determination

STUART L. AIN,

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

APPEARANCES:

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

Kenneth J. Weinstein for Respondent

The respondent, Stuart L. Ain, a judge of the County Court, Nassau County, was served with a Formal Written Complaint dated February 6, 1991, alleging that he made improper comments to an attorney of Arabic ancestry. Respondent filed an answer dated March 13, 1991.

By motion dated March 14, 1991, respondent moved to dismiss the Formal Written Complaint. The administrator of the Commission opposed the motion and cross-moved on March 27, 1991, to compel a responsive answer. Respondent opposed the cross motion by affirmation dated April 3, 1991. By determination and order of April 12, 1991, the Commission denied respondent's motion to dismiss and the administrator's cross motion.

Also on April 12, 1991, the Commission designated Nicholas Scoppetta, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 31, June 3 and September 5, 1991, and the referee filed his report with the Commission on March 6, 1992.

By motion dated April 13, 1992, the administrator moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion by cross motion dated June 12, 1992. The administrator filed a reply dated June 25, 1992.

On July 23, 1992, 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 judge of the Nassau County Court since January 1, 1983. He has also served by designation as an acting justice of the Supreme Court, 10th Judicial District, since 1985.

2. On October 2, 1990, respondent was assigned to the case of Carpe v. Modica, a non-jury trial in Supreme Court. Before the trial, he held an off-the-record conference in a robing room. The plaintiff was represented by Martin Bodian, Esq.; the defendant was represented by Paul Saqqal, Esq.

3. Respondent asked the attorneys to state their names. When Mr. Saqqal gave and spelled his name, respondent said, "You're not an Arab, are you?"

4. Mr. Saqqal said that he was of Arab ancestry, and respondent replied, "You're our sworn enemies."

5. Mr. Saqqal responded that he was of Christian Arab ancestry. Respondent said that it didn't matter that Mr. Saqqal was from Lebanon and repeated, "You're still our enemies, and here's what I have to say to you," extending the middle finger of his right hand at Mr. Saqqal.

6. "What the fuck do you people want, anyway?" respondent then asked Mr. Saqqal.

7. Respondent again extended the middle finger of his right hand at Mr. Saqqal and asked, "You know what this is, don't you?"

8. Respondent then asked Mr. Bodian whether he is Jewish and whether he knew Ariel Sharon. Respondent said that he had had the pleasure of being seated with General Sharon at a synagogue function and that he admired the Israeli general for his hawkish views toward Arabs. Respondent also expressed admiration for Israel and referred to the "Yom Kippur War" and Egypt.

9. Later in the day, respondent presided over the trial of the case. He subsequently rendered a decision which did not award damages to either party. There is no indication that respondent's decision is based on anything other than the facts and evidence in the case.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2 and 100.3(a)(3); Canons 1, 2 and 3A(3) of the Code of Judicial Conduct, and the Special Rules Concerning Court Decorum of the Appellate Division, Second Department, 22 NYCRR 700.5(a) and 700.5(e). The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's hostile and insulting words and gestures were intemperate, inappropriate and conveyed the impression that he was biased against Mr. Saqqal because of his ethnic background. The appearance of bias was compounded by respondent's favorable remarks about Israel and General Sharon to an attorney whom he knew to be Jewish.

Respondent's defense that his exchange with Mr. Saqqal was meant to be humorous and to put the attorneys at ease lacks credibility. His contention that the remark, "You're our sworn enemies," was a failed attempt at humor or sarcasm is belied by his further actions. Thrusting his middle finger at the attorney and asking, "What the fuck do you people want, anyway," could not be interpreted by any reasonable person as what respondent has described as a "parody". Once Mr. Saqqal stated that he was a Christian, respondent should have been aware that the lawyer was not, nor would he be, amused by these remarks.

Not only did these actions create the appearance of bias but they were intimidating and frightening to the lawyer. That Mr. Saqqal did not immediately object, seek respondent's recusal or complain to the Commission does not undermine his credibility. It speaks only to the superior position of a judge and his ability to intimidate lawyers and litigants whose fate lies in the judge's hands.

A judge must be and appear to be unbiased at all times so that "the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property." (Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290-91). He or she should maintain the role of a neutral and detached arbiter. (Matter of Wood, 1991 Ann Report of NY Commn on Jud Conduct, at 82, 86).

The law of New York is clear that language by a judge that reflects ethnic bias will not be tolerated. (Matter of Esworthy v. State Commission on Judicial Conduct, 77 NY2d 280, 282; Matter of Bloodgood, 1982 Ann Report of NY Commn on Jud Conduct, at 69; Matter of Cook, 1987 Ann Report of NY Commn on Jud Conduct, at 75).

Respondent's conduct is inexcusable. It involved more than a slip of the tongue; it included a series of biased and abusive statements and actions. His remarks, even though made in an informal conference, went well beyond the standards of acceptable behavior. Each of his actions and statements, on its own, constitutes misconduct. Taken together, they indicate a need for a severe sanction.

However, his conduct occurred on a single occasion in an informal, off-the-record conversation in a robing room. Further, it appears that, however improper his earlier comments were, respondent's conduct at the trial and his judicial determination in no way showed bias toward Mr. Saqqal's client. This persuades us that removal is unwarranted in this case.

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

All concur.

Dated: September 21, 1992

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

PAUL F. BENDER,

a Justice of the Marion Town Court, Wayne County.

APPEARANCES:

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

Lawrence M. Mooney for Respondent

The respondent, Paul F. Bender, a justice of the Marion Town Court, Wayne County, was served with a Formal Written Complaint dated March 22, 1991, alleging that he made inappropriate remarks during a court proceeding. Respondent filed an answer dated April 18, 1991.

On November 25, 1991, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On December 12, 1991, the Commission accepted the agreed statement and made the following determination.

1. Respondent has been a justice of the Marion Town Court since 1978.

2. On March 8, 1990, Carl Milke was arraigned before respondent on a charge of Assault, Third Degree. Investigator John E. Robinson and Deputy Richard Salerno of the Wayne County Sheriff's Department and Sarah Utter, coordinator of the Wayne County Victim/Witness Assistance Program, were present.

3. During the arraignment, respondent asked Investigator Robinson whether the alleged assault of the complaining witness, a woman with whom Mr. Milke lived, was "just a Saturday night brawl where he smacks her around and she wants him back in the morning."

4. Respondent granted the prosecution's request for a temporary order of protection and ordered Mr. Milke to avoid any contact with the complaining witness.

5. Respondent advised Mr. Milke of the meaning and significance of the conditions of the temporary order. He told Mr. Milke that his mere presence in the company of the complaining witness could be grounds for his arrest, even if she had initiated the contact. Respondent advised Mr. Milke to "watch your back" because "women can set you up."

6. On May 16, 1990, Mr. Milke pleaded guilty to Attempted Assault, Third Degree. Respondent granted him a conditional discharge, which included an order of protection for one year in favor of the complaining witness.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1) and 100.3(a)(3), and Canons 1, 2A, 3A(1) and 3A(3) 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's suggestion that the alleged assault might be "just a Saturday night brawl where he smacks her around and she wants him back in the morning," understates the seriousness of such conduct. Such remarks by a judge have the effect of discouraging complaints by the victims of domestic abuse, who look to the judiciary for protection. (Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135, 138; Matter of Chase, 1992 Ann Report of NY Commn on Jud Conduct, at 41).

This comment and respondent's advice to the defendant to "watch your back" because "women can set you up" conveyed the impression that respondent favors the men in such incidents over the women making the accusations. A judge must be impartial and appear impartial at all times in order to promote public confidence in his or her judgment. (Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290-91).

Respondent also failed to display the patience, dignity and courtesy expected of a judge in the courtroom. (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][3]).

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman and Judge Salisbury concur.

Mr. Sheehy and Judge Thompson were not present.

Dated: February 7, 1992

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

HOMER J. BRISTOL,

a Justice of the Throop Town Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Honorable Homer J. Bristol, pro se

The respondent, Homer J. Bristol, a justice of the Throop Town Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent answered the Formal Written Complaint by letter dated June 17, 1992.

On August 18, 1992, the administrator of the Commission and respondent entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Throop Town Court since 1969.

2. On February 11, 1983, respondent signed a resolution passed by the Cayuga County Magistrates' Association in which he delegated authority to the county sheriff's department to review and approve bail bonds presented by any certified bondsman at the county jail for defendants committed by respondent. The department was also authorized to release the defendants on respondent's behalf.

3. Between May 3, 1987, and November 13, 1988, in accordance with the authorization approved by respondent, Sheriff's Lt. Frank Thomas released three defendants who had been committed to jail by respondent, as set forth in Schedule A appended hereto. *

4. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

* Schedule A has not been reproduced for this report.

5. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though the three bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release three defendants on legally insufficient bail bonds, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

ROGER I. CONNER,

a Justice of the Genoa Town Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Cuddy, Durgala and Timian (By Milan M. Durgala) for Respondent

The respondent, Roger I. Conner, a justice of the Genoa Town Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer dated May 20, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Genoa Town Court since 1974.

2. On February 11, 1983, respondent approved a resolution passed by the Cayuga County Magistrates' Association in which he delegated authority to the county sheriff's department to review and approve bail bonds presented by any certified bondsman at the county jail for defendants committed by respondent. The department was also authorized to release the defendants on respondent's behalf.

3. Between February 28, 1988, and June 26, 1988, in accordance with the authorization approved by respondent, Sheriff's Lt. Frank Thomas released five defendants who had been committed to the jail by respondent, as set forth in Schedule A appended hereto.*

4. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

*Schedule A has not been reproduced for this report.

5. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though the five bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release five defendants on legally insufficient bail bonds, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

PETER E. CORNING,

a Judge of the County Court and Family Court, Cayuga County.

APPEARANCES:

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

John P. McLane and Emil M. Rossi for Respondent

The respondent, Peter E. Corning, a judge of the County Court and Family Court, Cayuga County, was served with a Formal Written Complaint dated January 14, 1992, alleging that he falsely certified a bail bond and released a criminal defendant. Respondent filed an answer dated February 5, 1992. On August 6, 1992, respondent was served with a Supplemental Formal Written Complaint. He filed an answer to that complaint on August 19, 1992.

On September 4, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts and on an agreed sanction of admonition and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

Preliminary findings:

1. Respondent has been a judge of the Cayuga County Court and Family Court since 1979.

2. From October 27, 1955, to December 21, 1981, Theodore Cheche was an insurance agent and a partner in the Matthew P. Cheche Insurance Agency. Both Theodore Cheche and the partnership were licensed by the state insurance department. Theodore Cheche and the Matthew P. Cheche Insurance Agency ceased doing business on December 21, 1981.

3. Theodore Cheche is the father of Matthew P. Cheche. Matthew Cheche was licensed as a bail bondsman and an agent of Peerless Insurance Company on September 27, 1983. He used the business name "Matty Cheche Bail Bonds." Matthew Cheche was never a partner or sublicensee of the Matthew P. Cheche Insurance Agency.

4. Theodore Cheche has never been licensed as a bail bondsman and has never been authorized by the Peerless Insurance Company to appear as its agent or attorney-in-fact.

As to Charge I of the Supplemental Formal Written Complaint:

5. On May 12, 1988, Theodore Cheche appeared before respondent and asked him to approve a $25,000 bail bond for Tony Frazier, who had been charged with Rape, First Degree.

6. The Undertaking of Bail was on an official form of the Peerless Insurance Company and bore the official company seal but had not been sworn to by Matthew Cheche or by any other agent or attorney-in-fact for the Peerless Insurance Company, as required by CPL 520.20(2).

7. Respondent signed the Undertaking of Bail, and Mr. Frazier was subsequently released from jail.

8. On September 29, 1988, Theodore Cheche appeared before respondent and asked him to approve a $10,000 bail bond for Nancy Oliver, who had been charged with Criminal Possession Of A Controlled Substance, Fourth Degree.

9. The Undertaking of Bail was on an official form of the Peerless Insurance Company and bore the official company seal but had not been sworn to by Matthew Cheche or any other agent or attorney-in-fact for the company.

10. Respondent signed the Undertaking of Bail and a Certificate of Release for Ms. Oliver.

11. The bail bond for Ms. Oliver did not include a Justifying Affidavit, as required by CPL 520.20(1), (4).

As to Charge I of the Formal Written Complaint:

12. On January 26, 1989, Theodore Cheche appeared at respondent's home and asked him to review and approve a $250,000 bail bond for Albert J. Brunner, IV, who had been charged with Criminal Possession Of A Controlled Substance, First Degree, and Criminal Sale Of A Controlled Substance, First Degree.

13. The Undertaking of Bail was on an official form of the Peerless Insurance Company and bore the official company seal but had not been sworn to by Matthew Cheche or any other agent or attorney-in-fact for the company.

14. Respondent examined the papers and questioned Theodore Cheche about the collateral posted as security for the bail bond. Theodore Cheche told respondent that $50,000 cash, the residence and business of Mr. Brunner's parents and certain property of the defendant's uncle had been pledged as collateral.

15. Respondent signed the Undertaking of Bail and a Certificate of Release. He told Theodore Cheche to file the bail bond with the Auburn City Court, where Mr. Brunner had been arraigned.

16. The bail bond for Mr. Brunner did not include a Justifying Affidavit, as required by CPL 520.20(1), (4).

17. At the time that he signed it, the $250,000 bail bond constituted the highest undertaking ever approved by respondent.

18. Mr. Brunner was released on January 26, 1989, on the authority of respondent's Certificate of Release.

19. On June 16, 1989, Mr. Brunner failed to appear for a suppression hearing in Cayuga County Court. On June 19, 1989, he failed to appear for trial.

20. On July 14, 1989, Theodore Cheche appeared before respondent and surrendered the bail bond for Mr. Brunner which had never been filed in the Auburn City Court. Theodore Cheche acknowledged that the bail bond had been issued without the authorization of the Peerless Insurance Company and was a forged instrument.

21. On August 3, 1989, respondent issued an order forfeiting the $250,000 bail bond. Cayuga County subsequently collected $250,000 from Theodore Cheche.

22. On November 2, 1989, Mr. Brunner was convicted, in absentia. He was apprehended on November 8, 1989, and is serving an indeterminate term of 25 years to life in prison.

23. On May 20, 1991, Theodore Cheche was convicted in Cayuga County Court of Offering A False Instrument for Filing, First Degree, and two counts of Forgery, Second Degree, in connection with the Brunner bail bond.

Additional findings:

24. Respondent acknowledges that, by signing the bail bonds in Frazier, Oliver and Brunner, he wrongly and negligently certified that Matthew Cheche had personally appeared before him, was sworn and had stated under oath that he was attorney-in-fact for the Peerless Insurance Company, even though Matthew Cheche had not appeared in connection with these bonds.

25. Respondent acknowledges that he did not, but should have, completely read the certifications at the bottom of the undertakings of bail in Frazier, Oliver and Brunner and that he did not, but should have, seen that the certifications bore Matthew Cheche's name. Respondent acknowledges that these failures constitute negligence in the performance of his duties as a judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1 and 100.2, and Canons 1 and 2 of the Code of Judicial Conduct. Charge I of the Formal Written Complaint and Charge I of the Supplemental Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

A judge is required to review and approve bail bonds to ensure that they comply with the court's order fixing bail. (CPL 510.40[3]). The judge must also determine that the bonds conform with the provisions of law and provide adequate security that a defendant will return to court. (See, CPL 520.20[1], [2]).

Respondent failed to fully review bail bonds presented to him by Theodore Cheche. As a result, respondent approved bail bonds presented by someone who was not authorized to do so. He inaccurately certified that an authorized bondsman had appeared, and he ordered the release of defendants on bonds that could not be used to secure their appearance in court. In the Brunner case, respondent should have been especially conscientious since the $250,000 bond represented the highest undertaking he had ever approved to that point. Nevertheless, he approved an unsworn bond and authorized the release of a defendant who subsequently failed to return to court for trial.

A judge's failure to properly review court papers does not relieve the judge from responsibility for any resulting consequences and constitutes a lack of diligence in performing judicial duties. (See, Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349, 354-55; Matter of Klein, 1985 Ann Report of NY Commn on Jud Conduct, at 167, 170).

Respondent's conduct is mitigated by the fact that he has acknowledged his negligence. (See, Matter of Rath, 1990 Ann Report of NY Commn on Jud Conduct, at 150, 152; Matter of Turner, 1988 Ann Report of NY Commn on Jud Conduct, at 235, 236; Matter of Doolittle, 1986 Ann Report of NY Commn on Jud Conduct, at 87, 89).

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

Mr. Berger, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mr. Goldman and Judge Thompson concur.

Judge Altman, Mrs. Del Bello and Judge Salisbury dissent and would reject the agreed statement because they believe the appropriate sanction is censure.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

NORMAN FEIDEN,

a Judge of the Family Court, Nassau County.

APPEARANCES:

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

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

The respondent, Norman Feiden, a judge of the Family Court, Nassau County, was served with a Formal Written Complaint dated October 22, 1991, alleging that he made improper comments in court and to a newspaper reporter concerning a custody proceeding pending before him. Respondent did not answer the Formal Written Complaint.

On March 25, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4) and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement by letter dated March 31, 1992.

The administrator and respondent filed memoranda as to sanction.

On June 4, 1992, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been a judge of the Nassau County Family Court since January 1985.

2. On December 6, 1990, respondent presided over Carla C. v. William C., a custody proceeding in which the litigants and their children are Jewish. Philip Sands, Esq., appeared representing the mother; Michael D. Solomon, Esq., appeared representing the father, and Alfred Reinbarz, Esq., appeared as law guardian.

3. The father requested visitation with his children on Christmas Eve and Christmas day. Respondent said, "I don't hear anybody say Hanukkah."

4. Mr. Sands said that the mother wanted to be with her children on Christmas Eve and Christmas day because she puts up a tree and gives gifts to the children. Respondent replied, "Sounds wonderful. Don't--you're talking to the wrong guy. I get offended, and I don't want to start."

5. Mr. Sands stated that he had been referring to a gift-giving process. Respondent rejoined, "Oh, come on. It's very Christian. It's idol worship. It's everything else."

6. Respondent subsequently gave the father visitation from 4:00 P.M. on Christmas Eve until 9:00 P.M. on Christmas day.

7. Respondent acknowledges that his above statements were inappropriate and improper and that they were influenced by his personal views about religion.

8. On December 27, 1990, respondent was told by the public information officer for the Nassau County courts that a newspaper reporter wanted to interview respondent about Carla C. v. William C.

9. Respondent consented to be interviewed and, during the interview, stated, "I understand the Christmas tree to be an expression of devotion by people who actively practice the Christian faith." He said that for the mother to be "using a devout celebration to be merely decorative and then using it as an excuse to manipulate the custody situation is not acceptable." The remarks were published in a Newsday article about the case on December 28, 1990.

10. Respondent acknowledges that it was improper to make public comments about a pending custody case and that it was inappropriate to criticize a litigant in a pending case.

11. On January 2, 1991, while presiding over Carla C. v. William C., respondent made the following statements, which he acknowledges were inappropriate and improper and were influenced by his personal views about religion:

a) that respondent wanted to educate Mr. Sands and that Christmas trees originated in Germany as a pagan ritual;

b) that it is irreverent for members of the Jewish faith to use Christmas trees and lights and to exchange Christmas gifts;

c) that the "celebration of Christmas is a celebration of the birth of the Christ child" which "is holy, very reverent and central to the theme of Christmas, and that's what celebrating of Christmas means";

d) that the "originality of the Christmas tree" is "a pagan custom and converted into a holy Christian custom in the Christmas--Christian celebration of Christmas";

e) that "any celebration without the religious content for Christmas" is "idol worship"; and,

f) that Mr. Sands's statement that his client followed a "gift-giving process" made her conduct "idol worship."

12. On January 2, 1991, respondent denied Mr. Sands's motion that respondent disqualify himself because of his inappropriate statements. On April 1, 1991, the Appellate Division, Second Department, reversed respondent's decision not to remove himself. The higher court ordered the case remitted to Family Court for proceedings before another judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a)(3) and 100.3(a)(6); Canons 1, 2, 3A(3) and 3A(6) of the Code of Judicial Conduct, and the Special Rules Concerning Court Decorum of the Appellate Division, Second Department, 22 NYCRR 700.5(a) and 700.5(e). The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent made improper statements on three occasions which, he concedes, were prompted by his personal views about religion. Each time, he disparaged the practices of one of the litigants in a case pending before him--once in an interview with a newspaper reporter. A judge's personal feelings about the holiday observances of litigants have no place in the courtroom. Respondent's criticism of the mother's practices of putting up a Christmas tree and giving gifts to her children, followed by his determination to grant the father visitation on Christmas, gave the appearance that his decision was based on his views that a Jewish family should not observe Christmas. (See, Matter of Levine v. State Commission on Judicial Conduct, 74 NY2d 294; Matter of Friess, 1984 Ann Report of NY Commn on Jud Conduct, at 84).

Respondent repeated and expounded upon his criticism in a later court appearance and in a discussion with a newspaper reporter in which he added that the mother was using her holiday observance to "manipulate the custody situation...." This demonstrates respondent's insensitivity to the limits placed on a judge. Such repeated comments undermine public confidence in the impartiality of the judiciary.

A judge should not make any public comments concerning a pending case. (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][6]). Respondent's remarks were especially improper because they conveyed the impression of partiality. (See, Matter of Sweetland, 1989 Ann Report of NY Commn on Jud Conduct, at 127). Respondent's misconduct is mitigated somewhat by the fact that he did not initiate the contact with the reporter but was placed in a situation in which he apparently felt that he had to defend his previous remarks.

Although respondent has acknowledged that his comments were inappropriate and improper, his attempts before the Commission at oral argument to justify his conduct indicate a continuing inability to fully appreciate the nature of his misconduct. (See, Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349, 356).

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mrs. Del Bello, Mr. Goldman and Judge Salisbury concur.

Judge Thompson did not participate.

Mr. Cleary and Mr. Sheehy were not present.

Dated: July 29, 1992

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

LAWRENCE J. FLECKENSTEIN,

a Justice of the Moravia Town Court and an Acting Justice of the Moravia Village Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Charles A. Marangola for Respondent

The respondent, Lawrence J. Fleckenstein, a justice of the Moravia Town Court and the Moravia Village Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer dated May 5, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Moravia Town Court since 1972 and acting justice of the Moravia Village Court since 1977.

2. On February 11, 1983, respondent signed a resolution passed by the Cayuga County Magistrates' Association in which he delegated authority to the county sheriff's department to review and approve bail bonds presented by any certified bondsman at the county jail for defendants committed by respondent. The department was also authorized to release the defendants on respondent's behalf.

3. On March 31, 1988, respondent arraigned Richard G. Maycumber on charges of Criminal Possession Of A Weapon, Fourth Degree; Illegal Possession Of Fireworks; Aggravated Harassment, and Harassment and committed him to jail in lieu of $2,500 cash bail or $5,000 bail bond.

4. On April 1, 1988, a bail bond was presented to Sheriff's Lt. Frank Thomas at the jail. He signed respondent's name to a Certificate of Release and released Mr. Maycumber pursuant to the authority delegated by respondent in the magistrates' association resolution.

5. Before Mr. Maycumber's release, respondent had not reviewed and approved the bail bond, as required by CPL 510.40(3).

6. After Mr. Maycumber's release, respondent received the bail bond from the sheriff's department. Respondent did not revoke bail, demand the production of a Justifying Affidavit or take any other corrective action, even though the bail bond was legally insufficient because it did not include a Justifying Affidavit and because the Undertaking of Bail had not been sworn to by the surety-obligor, as required by CPL 520.20.

7. On April 30, 1988, respondent arraigned Michael Klimoszewski on charges of Driving While Intoxicated, Driving With Blood Alcohol Content In Excess Of .10 Percent, Aggravated Unlicensed Operation and Speeding and committed him to jail in lieu of $500 cash bail or $1,000 bail bond.

8. On May 1, 1988, a bail bond was presented to Lieutenant Thomas at the jail. He signed respondent's name to a Certificate of Release and released Mr. Klimoszewski.

9. Before Mr. Klimoszewski's release, respondent did not review and approve the bail bond, as required by CPL 510.40(3).

10. After Mr. Klimoszewski's release, respondent received the bail bond from the sheriff's department. He did not revoke bail, demand the production of a Justifying Affidavit or take any other corrective action, even though the bail bond was legally insufficient because it did not include a Justifying Affidavit and because the Undertaking of Bail had not been sworn to by the surety-obligor, as required by CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release two defendants on legally insufficient bail bonds, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

ROBERT K. GOODSELL,

a Justice of the Sterling Town Court and the Fair Haven Village Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Cosentino and Yates (By Dale R. Yates) for Respondent

The respondent, Robert K. Goodsell, a justice of the Sterling Town Court and the Fair Haven Village Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent did not answer the Formal Written Complaint.

On August 21, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Sterling Town Court since 1987 and of the Fair Haven Village Court since 1988.

2. On January 17, 1988, respondent arraigned Matthew Ladd on a charge of Aggravated Unlicensed Operation, Third Degree, and committed him to jail in lieu of $250 cash bail or $500 bail bond.

3. Also on January 17, 1988, a bail bond was presented to Cayuga County Sheriff's Lt. Frank Thomas at the county jail. Lieutenant Thomas called respondent, told him that he had a bond application for Mr. Ladd and said that it was the policy of many town and village justices in the county to delegate to Lieutenant Thomas the authority to review and approve bail bonds and to sign the committing judge's name to a Certificate of Release.

4. Respondent authorized Lieutenant Thomas to release Mr. Ladd and to sign his name to the Certificate of Release. Respondent also authorized the lieutenant to review and approve future bail bonds and to sign his name to the certificates without the necessity of having respondent review the bonds.

5. Between August 21, 1988, and June 4, 1989, in accordance with the authorization given by respondent, Lieutenant Thomas released five additional defendants who had been committed to the jail by respondent, as set forth in Schedule A appended hereto. *

6. Respondent had not reviewed and approved any of the six bail bonds, as required by CPL 510.40(3).

7. After each of the six defendants was released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though the six bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release six defendants on legally insufficient bail bonds, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

* Schedule A has not been reproduced for this report.

State of New York
Commission on Judicial Conduct

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

Determination

JOHN H. GREGORY,

a Justice of the Sennett Town Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Contiguglia & Giacona (By Louis P. Contiguglia) for Respondent

The respondent, John H. Gregory, a justice of the Sennett Town Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer dated May 12, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Sennett Town Court since 1978.

2. On February 11, 1983, respondent signed a resolution passed by the Cayuga County Magistrates' Association in which he delegated authority to the county sheriff's department to review and approve bail bonds presented by any certified bondsman at the county jail for defendants committed by respondent. The department was also authorized to release the defendants on respondent's behalf.

3. Between February 12, 1987, and May 5, 1989, in accordance with the authorization approved by respondent, Sheriff's Lt. Frank Thomas released four defendants who had been committed to the jail by respondent, as set forth in Schedule A appended hereto.*

4. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

*Schedule A has not been reproduced for this report.

5. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though three of the bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B 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.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release four defendants, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

RAYMOND E. LOCKWOOD, JR.,

a Justice of the Aurelius Town Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Contiguglia & Giacona (By Louis P. Contiguglia) for Respondent

The respondent, Raymond E. Lockwood, Jr., a justice of the Aurelius Town Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer dated May 4, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Aurelius Town Court since 1976.

2. On December 2, 1980, respondent sent a letter in which he authorized Frank Thomas, then a Cayuga County sheriff's sergeant, to sign bail bonds on respondent's behalf.

3. On February 11, 1983, respondent signed a resolution passed by the county magistrates' association in which he delegated to the sheriff's department the authority to review and approve bail bonds presented by any certified bondsman for defendants committed by respondent. The department was also authorized to release defendants on respondent's behalf.

4. Between December 24, 1982, and June 9, 1989, in accordance with the authorizations approved by respondent, Frank Thomas released 20 defendants who had been committed to the jail by respondent, as set forth in Schedule A appended hereto.*

*Schedule A has not been reproduced for this report.

5. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

6. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though 19 of the bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B 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.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release 20 defendants, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

RUDOLPH L. MAZZEI,

a Judge of the County Court, Suffolk County.

APPEARANCES:

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

Giaimo & Vreeburg, P.C. (By Joseph O. Giaimo) for Respondent

The respondent, Rudolph L. Mazzei, a judge of the County Court, Suffolk County, was served with a Superceding Formal Written Complaint dated December 26, 1991, alleging that he signed his deceased mother's name to two applications for credit cards and obtained and used an authorized user's card in his own name. Respondent filed an amended answer dated February 21, 1992.

By order dated February 20, 1992, the Commission designated Walter Gellhorn, Esq., as referee to hear and report proposed findings of fact and conclusions of law.

On February 24, 1992, respondent moved to dismiss that portion of the charge that alleged a violation of the Code of Professional Responsibility. The administrator of the Commission opposed the motion by affirmation dated March 9, 1992. Respondent filed a memorandum of law on March 13, 1992, and the administrator replied on March 19, 1992. By determination and order dated April 14, 1992, the Commission denied respondent's motion.

A hearing was held on May 20, 21 and 27, June 16, 22 and 23 and July 16, 1992, and the referee filed his report with the Commission on August 31, 1992.

By motion dated September 28, 1992, the administrator moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion by cross motion dated October 27, 1992.

On October 29, 1992, 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, a lawyer, has been a judge of the Suffolk County Court since January 1983. His term expires December 31, 1992, and he was not nominated for re-election. He was a judge of the Suffolk County District Court from 1974 to 1982.

2. In the Spring of 1989, respondent received at his home a "pre-approved" application for a Visa Gold credit card with a $5,000 line of credit. The application was addressed to his mother, Carmela, who had lived with respondent before she died on April 3, 1989.

3. Respondent completed the application form and signed his mother's name to resemble her signature. He requested a second card for himself as authorized user and mailed the application to Chemical Bank. The application bore only one purported signature, that of Carmela Mazzei.

4. The bank rejected the application; it was received after May 19, 1989, the expiration date of the offer.

5. In the Fall of 1989, respondent received at his home another credit card application from Chemical Bank. It was also addressed to his mother and included a pre-approved, $5,000 line of credit on a Visa Gold card.

6. Respondent again completed the form, signed his mother's name to resemble her signature, requested a user's card for himself and mailed the application to Chemical Bank. The application bore only one purported signature, that of Carmela Mazzei.

7. Respondent put false information on the credit card applications: he listed his mother's birth date as 1909, even though she was born 10 years earlier; he listed her occupation as retired when she was dead; he included in what he labelled "family income" the income that she had received from social security, even though her social security payments had ceased when she died.

8. Respondent testified that his purpose in signing his mother's name was to obtain a line of credit available to him that would not be known to his wife. At the time, respondent and his wife were having marital difficulties that centered around financial matters. Since respondent's wife did not open mail that came to their home addressed to Carmela Mazzei, respondent saw the credit card as a means of concealing from his wife that he was spending money, he testified.

9. On December 4, 1989, Chemical Bank issued a Visa Gold card to Carmela Mazzei and an authorized user's card to respondent and sent the cards to respondent's home.

10. On December 11, 1989, at 6:55 P.M., respondent used the card bearing his name to obtain a $2,000 cash advance at an Atlantic City casino cash machine.

11. Between 9:51 P.M. and 10:11 P.M., respondent attempted fourteen times to use the card to obtain another $2,000 cash advance and once to obtain $1,000, but the bank rejected the requests.

12. At 11:31 P.M., a bank employee, Sanjay Muhki, ordered the account held so that no cards could be used.

13. On December 12, 1989, respondent spoke by telephone with Mr. Mukhi and said that he wanted the matter cleared up so that his "wife" could use the card.

14. On December 13, 1989, respondent again spoke with Mr. Mukhi. Respondent said that Carmela Mazzei was his mother and wanted to use her card.

15. On December 14, 1989, respondent spoke by telephone to another Chemical Bank employee, Paul Capobianco. Respondent told Mr. Capobianco that he wanted the matter cleared up so that his mother could use her card and urged the bank employee not to call Carmela Mazzei because it would upset her. When Mr. Capobianco said that he had learned that Carmela Mazzei's social security number had been used to file a death claim in April 1989, respondent replied that his mother must have mistakenly used the social security number of his father on her credit card application.

16. Respondent's statements to the bank employees were dishonest, deceitful, false and misleading, in violation of DR1-102(A)(4) of the Code of Professional Responsibility.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1 and 100.2, and Canons 1 and 2 of the Code of Judicial Conduct. The charge in the Superceding Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

Over a period of several months, respondent engaged in a pattern of deceptive behavior which violated his ethical obligations as a lawyer and a judge. A lawyer should not engage in dishonesty, fraud, deceit or misrepresentation (DR1-102[A][4] of the Code of Professional Responsibility), and a judge should act "at all times in a manner that promotes public confidence in the integrity and impartiality of the Judiciary," (Rules Governing Judicial Conduct, 22 NYCRR 100.2[a]).

On or off the bench, a judge is "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). 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) and "cannot be condoned..." (Matter of Intemann v. State Commission on Judicial Conduct, 73 NY2d 580, 582). This is true for behavior on or off the bench, sworn or unsworn. (See, e.g., Matter of Levine v. State Commission on Judicial Conduct, 74 NY2d 294; Matter of Gelfand v. State Commission on Judicial Conduct, 70 NY2d 211; Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105; Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74; Matter of Mossman, 1992 Ann Report of NY Commn on Jud Conduct, at 59).

During a seven-month period, respondent engaged in unlawful and serious acts of deception. On two occasions, he signed his dead mother's name to a credit card application in order to procure a user's card for himself.

The reason for this, he contends, was to deceive his wife; he did not want her to know that he had another credit card. In the process, he also deceived the bank which issued the card. By making his deceased mother appear to be alive and a good credit risk, he willfully and maliciously provided the bank with false information about her age and income.

He was discovered using his falsely obtained credit card while gambling in Atlantic City. The bank became suspicious when he attempted to obtain more cash. Questioned by investigators, he repeatedly misled them by implying his mother was alive.

It is unconscionable for a lawyer and judge to engage in such actions for any reason. By perpetrating a fraud and then lying to conceal his actions, respondent disgraced himself, compromising the integrity of his office in the process.

Respondent's duplicity in this case clearly demonstrates that he fails to meet the standards for office as set forth by the Court of Appeals:

"Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach." (Kuehnel, supra).

By his conduct, respondent has demonstrated that he is unfit to serve as a judge.

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mrs. Del Bello, Judge Salisbury and Judge Thompson concur.

Mr. Goldman dissents as to sanction only and votes that respondent be censured.

Mr. Cleary and Mr. Sheehy were not present.

Dated: December 23, 1992

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

DISSENTING OPINION BY MR. GOLDMAN

RUDOLPH L. MAZZEI,

a Judge of the County Court, Suffolk County.

I fully concur with the majority's finding that respondent committed serious misconduct. However, I believe that the appropriate sanction should be censure and therefore respectfully dissent from the majority's determination that respondent be removed from office.

The sanction of removal is an extreme one and should be reserved for "truly egregious circumstances" and not instances of "poor judgment, or even extremely poor judgment." (Matter of Cunningham v. State Commission on Judicial Conduct, 57 NY2d 270, 275). Respondent asserts that his primary purpose in using his deceased mother's name to get an additional credit card was to conceal his spending from his wife, with whom he had marital problems centered around financial difficulties, and the evidence tends to support that assertion. Indeed, it appears that at the time respondent used the credit card to obtain the $2,000 cash advance, he had borrowing power on other credit cards well in excess of that amount. Significantly, the credit card respondent used to borrow the money was the card issued in his name, and further, it appears he repaid the advance promptly.

Although respondent's conduct constituted, as the majority correctly states, "deception," the deception was designed to receive a credit card without the knowledge of his wife and not to defraud the bank of money. While such behavior shows extremely poor judgment and is inexcusable, it should not be considered as serious as an effort to deprive the bank of funds.

Lastly, and perhaps most importantly, respondent's conduct was entirely removed from his judicial duties. While "a Judge must conduct his everyday affairs in a manner beyond reproach," (Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465, 469), and off-the-bench misconduct by a judge may certainly in some instances provide grounds for removal (see, e.g., Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74), such behavior does not ordinarily call for as serious a sanction as it would if it were related to a judge's official responsibilities.

Respondent has served as a judge with competence for nineteen years; nine in the District Court, ten in the County Court. His misconduct here, while serious, is not so egregious that it requires his removal from office.

Dated: December 23, 1992

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

OLIVER H. McGRAW,

a Justice of the Moravia Town Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Charles A. Marangola for Respondent

The respondent, Oliver H. McGraw, a justice of the Moravia Town Court and the Moravia Village Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer dated May 4, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Moravia Town Court since 1965 and a justice of the Moravia Village Court since 1963.

2. On February 11, 1983, respondent signed a resolution passed by the Cayuga County Magistrates' Association in which he delegated to the county sheriff's department the authority to review and approve bail bonds presented by any certified bondsman at the county jail for defendants committed by respondent. The department was also authorized to release defendants on respondent's behalf.

3. Between August 13, 1983, and May 28, 1989, in accordance with the authorization approved by respondent, Frank Thomas of the sheriff's department released five defendants who had been committed to the jail by respondent, as set forth in Schedule A appended hereto.*

4. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

*Schedule A has not been reproduced for this report.

5. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though the five bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release five defendants on legally insufficient bail bonds, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

State of New York
Commission on Judicial Conduct

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

Determination

JOHN W. McMULLEN,

a Justice of the Brutus Town Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Frederick R. Westphal for Respondent

The respondent, John W. McMullen, a justice of the Brutus Town Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer dated May 5, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Brutus Town Court since 1982.

2. On February 11, 1983, respondent signed a resolution passed by the Cayuga County Magistrates' Association in which he delegated to the county sheriff's department the authority to review and approve bail bonds presented by any certified bondsman at the county jail for defendants committed by respondent. The department was also authorized to release defendants on respondent's behalf.

3. Between February 8, 1988, and March 26, 1989, in accordance with the authorization approved by respondent, Sheriff's Lt. Frank Thomas released 13 defendants who had been committed to the jail by respondent, as set forth in Schedule A appended hereto. *

4. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

5. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though 12 of the bail bonds did not comply with the requirements of CPL 520.20.

*Schedule A has not been reproduced for this report.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release 13 defendants, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

NEIL W. MOYNIHAN,

a Judge of the Surrogate's Court, Schenectady County.

APPEARANCES:

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

Bartlett, Pontiff, Stewart, Rhodes & Judge, P.C. (By Richard J. Bartlett) for Respondent

The respondent, Neil W. Moynihan, a judge of the Surrogate's Court, Schenectady County, was served with a Formal Written Complaint dated January 3, 1991, alleging that, after he became a full-time judge, he continued to act as fiduciary in several estates, continued to perform legal services for former clients, altered documents in an attempt to deceive Commission investigators, failed to file reports of his extra-judicial activities and maintained an improper business and financial relationship with a law firm. Respondent filed an answer dated January 28, 1991.

By order dated February 6, 1991, the Commission designated the Honorable Bertram Harnett as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 1, 2 and 3, 1991, and the referee filed his report with the Commission on September 17, 1991.

By motion dated October 3, 1991, 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 November 27, 1991. The administrator filed a reply dated December 3, 1991.

On December 12, 1991, and February 3, 1992, 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.

Findings of fact:

1. Respondent has been judge of the Schenectady County Surrogate's Court since July 1, 1987. He was a justice of the Niskayuna Town Court from 1980 to 1987.

2. Before he became a full-time surrogate, respondent practiced trusts and estates law in Schenectady for more than 30 years. His office was at 704 Union Street, Schenectady, in a building that he has owned since 1960.

3. Before July 1, 1987, respondent shared office space with Thomas B. Hayner.

4. On July 1, 1987, Mr. Hayner and respondent's son, Edward C. Moynihan, who lived with respondent until 1990, formed a partnership, Hayner & Moynihan, and rented office space from respondent at 704 Union Street. Respondent's legal secretary, Judy M. Nash, went to work for the new partnership.

As to Charge I of the Formal Written Complaint:

5. In eight estates pending in his court, respondent continued to act as fiduciary after he became a full-time judge, as set forth below. Respondent had acted as attorney and fiduciary for the estates before becoming a full-time judge; Hayner & Moynihan represented the estates after respondent became surrogate. None of the decedents in the eight estates was a close relative of respondent.

6. Respondent continued to act as fiduciary in the Estate of Arthur Schlansker, in which the will was executed on July 1, 1975, until July 1, 1989. Subsequent to July 1, 1987, the following transpired:

a) no substitution of attorneys was filed in the Surrogate's Court;

b) by letter dated July 10, 1987, the court clerk notified Hayner & Moynihan that respondent's letters testamentary were suspended for failure to file an inventory of assets;

c) respondent executed a resignation as executor dated April 3, 1989;

d) on July 1, 1989, respondent, as executor, signed an accounting for the period April 30, 1986, through July 1, 1989;

e) the estate's banking records continued to be sent to respondent at 704 Union Street through November 1989.

7. Respondent continued to act as fiduciary in the Estate of Catherine Jessen, in which the will was executed in 1985, until April 24, 1989. Subsequent to July 1, 1987, the following transpired:

a) no substitution of attorneys was filed in the Surrogate's Court;

b) respondent provided information to assist in the preparation of and signed, on September 12, 1988, a petition for a final accounting in the estate; it was filed in court on November 21, 1988;

c) respondent wrote checks and made deposits on the estate bank account until April 24, 1989;

d) on August 6, 1987, an inventory of assets was filed in the court, and the law office copy of the first page of the inventory bears the notation in respondent's handwriting "8-6-87 to Sur. Ct"; the law office copy of a letter from the court calling for the inventory also bears the notation in respondent's handwriting "8-6-87 to Court";

e) respondent signed a 1987 federal Fiduciary Income Tax Return dated July 15, 1988, as executor of the estate; it was also signed by Mr. Hayner as preparer;

f) on October 22, 1987, respondent received a message at court that an employee of the Internal Revenue Service had called concerning the estate; in November 1987, the IRS mailed to respondent at 704 Union Street a form for claiming Ms. Jessen's income tax refund for 1986; respondent filled out and signed the form as executor and dated it August 3, 1988; the law office file contains a note in respondent's handwriting indicating that he had received a telephone message on August 15, 1988, from an IRS employee who said that the refund would be mailed to respondent in four or five weeks;

g) a receipt dated November 21, 1988, for the state transfer and estate tax was sent to respondent at 704 Union Street;

h) a proposed order, which was partially prepared by respondent in June 1987, fixing the estate tax was signed by Clifford T. Harrigan as acting surrogate on November 3, 1988, and lists respondent as attorney for the estate;

i) the decree settling the account of the executor of the estate was signed by Judge Harrigan on November 21, 1988; it shows that respondent's fiduciary commission was $17,288.89; it was paid by an estate check dated December 29, 1988, which was filled out and signed by respondent; a check for $127.34, dated March 6, 1989, was filled out and signed by respondent for payment to him for disbursements in connection with the estate;

j) respondent signed federal and state Fiduciary Income Tax Returns for the estate, dated February 25, 1989, as executor; Mr. Hayner signed as attorney;

k) on December 29, 1988, the law firm paid respondent $12,750 for legal services that he provided to the estate before becoming surrogate.

8. Respondent continued to act as fiduciary in the Estate of Evelyn S. King, in which the will was executed on October 31, 1985, until March 6, 1989. Subsequent to July 1, 1987, the following transpired:

a) respondent and his former secretary, Judy Nash, continued to write checks for disbursements in connection with the estate on respondent's checking account entitled "Neil W. Moynihan, Attorney, Office Account";

b) respondent wrote seven checks pertaining to the estate on his account entitled "Neil W. Moynihan, Attorney At Law"; the checks were to Ms. Nash and respondent's daughter, Margaret M. Howard, in payment for their help with work on the estate and other estates;

c) respondent continued to write checks and make deposits on the estate checking account until March 6, 1989;

d) on August 21, 1987, the court issued certificates of letters testamentary, and respondent wrote a note to this effect on the law office file jacket;

e) in August and September 1987, respondent signed required authorizations for the redemption of various securities held by the estate as co-executor;

f) respondent continued to receive and deposit dividends into the estate's checking account through October 1987;

g) in September 1987, respondent signed checks in payment of medical bills on behalf of the decedent and asked that receipts be sent to "Neil W. Moynihan, Esq., 704 Union Street, Schenectady, New York 12305";

h) in July and October 1987, respondent filled out and signed checks for payment of estate taxes;

i) on March 31, 1988, respondent signed a release of part of mortgaged premises held by the estate;

j) on June 30, 1988, respondent signed an amended federal estate tax return as co-executor; a petition to determine estate tax was signed by respondent as executor and dated July 1, 1988; on August 23, 1988, Judge Harrigan fixed the estate tax in accordance with respondent's petition;

k) an accounting for the period October 9, 1986, through June 15, 1988, containing respondent's signature and those of his co-executors, was filed in court by Mr. Hayner;

l) on July 28, 1988, respondent filled in the amount on a check on the Hayner & Moynihan law office account for a disbursement to Schenectady County in connection with the estate; the check had been signed by Mr. Hayner;

m) on July 26, 1988, respondent wrote a check for $21,744.64 on the estate account in payment of his executor's commission; respondent deposited the check in his "Attorney At Law" account on December 20, 1988;

n) on March 6, 1989, respondent received a check for a state income tax refund and deposited it into the estate checking account.

9. Respondent continued to act as fiduciary for the Estate of Thomas Uniacke, in which the will was executed in 1980, until February 25, 1989. Subsequent to July 1, 1987, the following transpired:

a) respondent continued to write checks and make deposits on the estate checking account through November 1988;

b) on August 17, 1987, respondent noted that he had received a refund check for Mr. Uniacke's federal income tax returns for 1986; the check was deposited the following day;

c) on August 18, 1987, respondent signed a check on the estate account to pay for a grave marker;

d) on August 28, 1987, respondent paid $200 to his daughter for her help on the Uniacke and another estate;

e) respondent signed as executor Mr. Uniacke's 1987 federal and state tax returns on April 15, 1988; respondent entered the name of the Hayner & Moynihan law firm as preparer of the returns;

f) in May 1988, Edward Moynihan used certificates of respondent's appointment as executor of the estate in applying for death benefits;

g) in May 1988, respondent paid a medical bill for the estate;

h) on July 1, 1988, respondent deposited into his "Office Account" checking account $475.37 for disbursements made on behalf of the estate;

i) on July 29, 1988, respondent paid himself his executor's commission of $4,140.20 and deposited the estate's check into his "Attorney At Law" account on August 2, 1988; on November 14, 1988, respondent redeposited this amount into the estate account;

j) on August 29, 1988, the court clerk wrote to Edward Moynihan that respondent's letters testamentary were suspended for failure to file an inventory of assets;

k) on June 10, 1988, respondent signed a Resident Affidavit which was filed by Mr. Hayner with the state Department of Taxation and Finance in October 1988;

l) a petition for an accounting in the estate was signed by respondent and dated June 14, 1988, and was filed in the court on September 20, 1988;

m) on December 29, 1988, respondent withdrew $8,930.63 from the estate checking account in order to close it and turned the money over to Hayner & Moynihan; the same day, the firm paid respondent $7,212.13 for his legal services for work that he had performed before becoming surrogate, for his executor's commission and for disbursements that he had made on behalf of the estate;

n) respondent compiled data, filled out in their entirety and signed as executor the 1988 federal and state Fiduciary Income Tax Returns, dated February 24, 1989; respondent wrote a note on the law office file copy of the returns that they were mailed on February 25, 1989; Mr. Hayner signed as preparer.

10. Respondent continued to act as fiduciary for the Estate of Edith Uniacke, in which the will was executed in 1980, until December 29, 1988. Subsequent to July 1, 1987, the following transpired:

a) respondent filed a petition for administration of the estate on July 1, 1987, the day he became surrogate, and he was handed his certificate of voluntary administration by the court clerk on the first day he presided as a judge;

b) respondent continued to write checks and make deposits on the estate account through December 1988;

c) on July 11, 1987, respondent signed an application for benefits due Ms. Uniacke from the Social Security Administration; Mr. Hayner made the application;

d) respondent compiled information and filled out in their entirety Ms. Uniacke's 1987 federal and state Income Tax Returns, dated April 15, 1988; Hayner & Moynihan was listed as preparer;

e) respondent's handwritten notes on a check for life insurance proceeds paid to the estate by a beneficiary of the Thomas Uniacke estate indicate that these proceeds and other insurance funds were deposited in July 1988;

f) respondent made the distribution of the estate in December 1988;

g) in December 1988, respondent signed a report and account settling the estate, which was filed in court on December 13, 1988, in which he was listed as attorney;

h) on December 9, 1988, respondent signed as voluntary administrator a check on the estate account to the beneficiary of the estate for the balance of the bequest;

i) on December 29, 1988, respondent filled out and signed a check on the estate account payable to Hayner & Moynihan for $525 in legal fees and disbursements.

11. Respondent continued to act as fiduciary in the Estate of Nellie Anderson, in which the will was executed in 1985, until January 29, 1988. Subsequent to July 1, 1987, the following transpired:

a) respondent continued to sign checks on the estate account through January 25, 1988;

b) on October 19, 1987, the court clerk wrote to Edward Moynihan that respondent's letters in the estate were suspended for failure to file an inventory of assets; no substitution of attorneys had been filed;

c) in October 1987, respondent paid the decedent's homeowner's policy bill, which had been sent to him at 704 Union Street;

d) on January 25, 1988, respondent paid a utility bill on estate property;

e) on January 29, 1988, respondent signed a renunciation as executor of the estate which was filed in the court on February 25, 1988;

f) in October 1988, investment fund statements were sent to respondent at 704 Union Street.

12. Respondent continued to act as fiduciary for the Estate of Pauline A. Brown, in which the will was executed on March 14, 1975, until February 8, 1989. Subsequent to July 1, 1987, the following transpired:

a) respondent continued to write checks and make deposits on the estate accounts through February 8, 1989, when he closed out the accounts to make final distributions to the beneficiaries;

b) respondent compiled data, filled out in their entirety and signed as fiduciary the 1987 federal and state Fiduciary Income Tax Returns, dated April 7, 1988; Edward Moynihan signed as preparer;

c) respondent signed a petition and an accounting as executor, dated November 30, 1988, settling his account as executor;

d) respondent also signed a petition and an accounting as trustee, dated November 30, 1988;

e) on November 30 and December 16, 1988, respondent signed waivers relating to the accounting in the estate;

f) no substitution of attorneys was filed in the estate;

g) on January 25, 1989, respondent deposited in his "Attorney At Law" account $9,883.52, which he had withdrawn from various accounts of the estate and related accounts; the money was for payment for services rendered before he became surrogate; respondent also received $3,740.88 in trustee's commissions;

h) respondent compiled data, filled out in its entirety and signed as fiduciary the 1988 federal Fiduciary Income Tax Return for the estate, dated January 30, 1989; Edward Moynihan signed as preparer; the state Fiduciary Return was prepared by Edward Moynihan and signed by respondent;

i) respondent received $6,700 in executor's commissions.

13. Respondent continued to act as fiduciary in the Estate of James Garvin, in which the will was executed on March 21, 1983, until September 19, 1988. Subsequent to July 1, 1987, the following transpired:

a) respondent continued to fill out and co-sign checks and to make deposits in the checking and money market accounts of the estate through March 6, 1989;

b) on September 23, 1987, respondent deposited the proceeds of the sale of property held by the estate into the money market account;

c) no substitution of attorneys was filed in the court;

d) an Inventory of Assets, dated November 27, 1987, entirely in respondent's handwriting but signed by Edward Moynihan, was filed in respondent's court;

e) respondent compiled data and filled out in their entirety Mr. Garvin's 1987 federal and state Individual Income Tax Returns, dated April 4, 1988; Edward Moynihan signed as preparer;

f) respondent also compiled data and filled out in their entirety the 1987 federal and state Fiduciary Income Tax Returns, dated April 4, 1988; these returns were also signed by Edward Moynihan as preparer;

g) respondent signed a resignation as trustee on July 20, 1988, which was filed in his court on September 27, 1988;

h) on July 28, 1988, respondent wrote a check on his office account to Hayner & Moynihan for copies in connection with the Garvin and one other estate;

i) on July 29, 1988, respondent wrote a check on his office account for postage in the same estates, and he wrote a check to Ms. Nash for her help on these estates;

j) on September 14, 1988, respondent filled out a check on the Garvin estate checking account, payable to Hayner & Moynihan, for legal fees and disbursements of $14,211; the check had been signed in advance by the executrix;

k) on September 21, 1988, respondent received a check from Hayner & Moynihan for $11,000 in payment for legal fees performed before he became surrogate;

l) respondent provided information to assist in the preparation of an accounting of the estate which was filed by Hayner & Moynihan in respondent's court on September 27, 1988.

14. The allegations concerning the estates of Garrett R. Jessen, Anita Dixon and Stanley Burton are not sustained and are, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

15. After he became a full-time judge on July 1, 1987, respondent continued to perform business or legal services for 11 individuals and five estates, as set forth below. Respondent had represented these clients before becoming surrogate. Hayner & Moynihan represented them after July 1, 1987, and billed them for legal services, some of which were performed by respondent.

16. After July 1, 1987, respondent performed services for Mary F. B., a client of many years for whom respondent held a general power of attorney, in that:

a) on September 1, 1987, he prepared a check, signed by Mary B. as beneficiary of the Estate of Charles Brown, and on September 2, 1987, he prepared a deposit ticket and deposited the check into Mary B.'s account;

b) in April 1988, respondent obtained a key to Mary B.'s safe deposit box and removed certain stock certificates; he then went to Mary B.'s home and helped her fill out a stock transfer form; respondent then wrote a check, dated April 20, 1988, on his "Office Account" to pay for mailing of the transfer form and the stock certificates;

c) respondent compiled data and filled out in their entirety Mary B.'s federal and state Individual Income Tax Returns for 1987 which Mary B. signed on April 15, 1988, and which Edward Moynihan signed as preparer on April 8, 1988; a note in respondent's handwriting on the law office copies of the returns indicates that they were mailed on April 15, 1988;

d) Hayner & Moynihan billed Mary B. $1,200 for preparation of the returns; on April 15, 1988, respondent transferred funds from Mary B.'s savings to her checking account and filled out a check on her account, which was signed by Mary B., to pay the fee.

17. After July 1, 1987, respondent performed services for Lucie W., whom he had represented as executrix of her husband's estate, in that:

a) respondent compiled data and filled out in their entirety Lucie W.'s 1987 federal and state Individual Income Tax Returns in April 1988; Hayner & Moynihan was listed as preparer; a note in respondent's handwriting on the law office copy of the federal return indicates that it was mailed on April 15, 1988;

b) on June 15, 1988, respondent wrote a check on his "Office Account" for postage and mailed stock that belonged to Lucie W.'s late husband so that the stock could be transferred in her name.

18. After July 1, 1987, respondent performed services for Vivian V., a client of many years for whom he held a general power of attorney, in that:

a) through September 15, 1988, respondent continued to sign checks on Vivian V.'s account, even though his son had also obtained a power of attorney on June 24, 1987;

b) respondent made deposits into Vivian V.'s checking account through May 8, 1989;

c) respondent's name, as well as that of his son, continued to be listed on bank statements for Vivian V.'s account until January 1990;

d) in January 1988, respondent assisted in the surrender of certain of Vivian V.'s stock by obtaining the stock certificates from her safe deposit box and mailing them with a letter of transmittal completed and signed by him; on January 20, 1988, respondent wrote a check on his "Office Account" for the mailing of the stocks; on January 29, 1988, respondent deposited the proceeds of the stock transaction into Vivian V.'s account;

e) respondent compiled data and filled out in their entirety Vivian V.'s 1987 federal and state Individual Income Tax Returns, dated April 15, 1988, and signed them for her; Edward Moynihan signed as preparer; Hayner & Moynihan billed Vivian V. for the service; respondent filled out and signed a check on Vivian V.'s account, dated January 8, 1988, in payment;

f) respondent compiled data and filled out in their entirety Vivian V.'s 1988 federal and state Individual Income Tax Returns, dated April 15, 1989; Edward Moynihan signed as preparer; Hayner & Moynihan billed Vivian V. for these services.

19. After July 1, 1987, respondent performed services for William E.B. V., a client of many years for whom respondent held a general power of attorney, in that:

a) through February 1989, respondent continued to serve as trustee of a bank account for William V.;

b) respondent compiled data and filled out in their entirety the 1987 federal and state Individual Income Tax Returns for William V. and his wife, dated April 9 and 11, 1988, respectively; the returns were signed by Edward Moynihan as preparer; Hayner & Moynihan billed William V. for preparation of the returns and were paid by check dated January 20, 1989, which was filled out and signed by respondent.

20. After July 1, 1987, respondent performed services for Robert V., a client of many years, in that:

a) through December 7, 1988, using a power of attorney, respondent signed checks and made deposits on one of Robert V.'s checking accounts; bank statements continued to be sent to respondent at 704 Union Street through November 1989;

b) respondent compiled data and filled out in their entirety Robert V.'s 1987 federal and state Individual Income Tax Returns, which were signed by Edward Moynihan as preparer on April 11, 1988; a note in respondent's handwriting on the law office copy of the federal return indicates that it was mailed on April 15, 1988;

c) Hayner & Moynihan billed Robert V. for a yearly retainer, including preparation of the 1987 returns and 1988 estimated returns, and respondent signed the check, dated June 10, 1988, on Robert V.'s account in payment.

21. After July 1, 1987, respondent performed services for Mary M., a client of many years for whom respondent had held a power of attorney since 1980, in that:

a) respondent continued to write checks and make deposits on her account through October 12, 1988; respondent's name continued to be listed on bank statements through December 1988, even though Edward Moynihan had been given a general power of attorney on June 24, 1987;

b) respondent compiled data and filled out in their entirety Mary M.'s 1987 and 1988 federal and state Individual Income Tax Returns and signed the 1987 return as power of attorney; Edward Moynihan signed as preparer; Hayner & Moynihan billed for preparation of the returns and were paid by check dated May 2, 1989, which listed respondent's name as power of attorney.

22. After July 1, 1987, respondent performed services for Rose Cook, a client of many years for whom respondent had held a power of attorney since January 10, 1986, in that:

a) respondent continued to sign checks on Ms. Cook's accounts and make deposits until November 11, 1988; through December 1988, bank statements continued to be sent to respondent at 704 Union Street;

b) until Ms. Cook's home was sold on December 16, 1988, respondent signed checks for taxes, heating oil, utilities and insurance;

c) in March 1989, Hayner & Moynihan billed Ms. Cook and were paid for, inter alia, banking matters handled between January 1, 1986, and March 1989.

23. After July 1, 1987, respondent performed services for Inez M. in that he compiled data and filled out in their entirety Inez M.'s 1987 federal and state Individual Income Tax Returns, dated April 9, 1988; Edward Moynihan signed as preparer; a note in respondent's handwriting on the law office copy of the federal return indicates that it was mailed by him on April 15, 1988; Hayner & Moynihan billed and were paid for preparation of the returns.

24. After July 1, 1987, respondent performed services for Betty Lou S. in that he compiled data and filled out in their entirety her 1987 federal and state Individual Income Tax Returns, dated March 19 and 20, 1988, respectively; Hayner & Moynihan was listed as preparer; the law firm billed and was paid for preparation of the returns.

25. After July 1, 1987, respondent performed services for Cynthia R. in that he compiled data and filled out in their entirety her 1987 federal and state Individual Income Tax Returns, dated March 28 and 29, 1988, respectively; Edward Moynihan signed as preparer; Hayner & Moynihan billed and were paid for preparation of the returns.

26. After July 1, 1987, respondent performed services for Stan D., a client of many years, in that respondent compiled data and filled out in their entirety Stan D.'s 1987 federal and state Individual Income Tax Returns, dated March 8, 1988; Edward Moynihan signed as preparer; Hayner & Moynihan billed and were paid for preparation of the returns.

27. After July 1, 1987, respondent performed services for the Estate of James Garvin in that he continued to handle banking matters for the estate through March 6, 1989, even though he had resigned as trustee of the estate on July 20, 1988.

28. After July 1, 1987, respondent performed services for the Estate of Leola T., for which he had served as attorney before becoming surrogate, in that:

a) respondent compiled data and filled out in their entirety the 1987 federal and state Fiduciary Income Tax Returns, dated March 5, 1988, for the executor of the estate; Mr. Hayner signed as preparer; a note in respondent's handwriting on the law office copy of the federal return indicates that the returns were mailed by him for signature on March 5, 1988;

b) respondent handled the estate checking account through February 19, 1988; through July 1990, bank statements were sent to the executor in care of respondent at 704 Union Street;

c) on March 1, 1988, respondent filled out and signed a check on his "Special Account," which had been his client escrow account, payable to the state Department of Taxation and Finance for a late filing fee and interest on the estate tax; respondent deducted the interest amount on his personal income tax return for 1988 as a business expense;

d) Hayner & Moynihan billed the estate for all legal services rendered to it and were paid in May 1990.

29. After July 1, 1987, respondent performed services for the Estate of Wilfred Dufresne, for which he had been attorney since 1976, in that:

a) in April 1988, Edward Moynihan petitioned Judge Harrigan for permission to execute the 1987 Fiduciary Income Tax Returns and the necessary checks for taxes; the returns annexed to the application were entirely in respondent's handwriting except for Edward Moynihan's signature;

b) respondent wrote the name of the payee, the Surrogate's Court, on a check, dated April 15, 1988, and related to the estate, drawn on the account of Hayner & Moynihan; the check was signed by Edward Moynihan;

c) in March 1989, Mr. Hayner obtained an order from Judge Harrigan allowing Mr. Hayner to execute the 1988 Fiduciary Income Tax Returns and the checks to pay the taxes; the returns submitted with Mr. Hayner's application were entirely in respondent's handwriting.

30. After July 1, 1987, respondent performed services for the Estate of Beatrice Hawley, in which the will was witnessed by respondent in 1962 and was prepared by an attorney with whom respondent practiced at the time, in that, on August 3, 1988, respondent filled out and signed a check for $1 on his "Office Account", payable to the estate, and deposited it in the decedent's account to keep it from escheating to the state for lack of activity.

31. After July 1, 1987, respondent performed services for the Estate of Elsie Mader, for which he was attorney before becoming surrogate, in that:

a) respondent continued through September 1989 to receive and make notations on estate bank statements;

b) on April 14, 1988, respondent filled out two checks, which were signed by the executrix of the estate, in payment of the 1987 Fiduciary Income Tax Returns.

As to Charge III of the Formal Written Complaint:

32. On December 11, 1989, respondent furnished to Commission staff certain of his banking records at staff's request. Included were respondent's cancelled checks and check registers for his "Office Account" and his "Attorney At Law" account. At the hearing, respondent testified that changes on the checks and check stubs had been made long before Commission staff requested the records. He denied that any of the changes were made for the purpose of misleading or deceiving the Commission.

33. On his Office Account register, respondent crossed out "Mary F." before the name "B." on check stub 3539, dated April 20, 1988. At the hearing, respondent testified that he could not recall why this deletion was made.

34. On check #3527, dated October 1, 1987, drawn on the Office Account, respondent changed "est. E.S. King" to read "West p.s. Bington". Respondent crossed out "Est. Evelyn S. King" on the stub of this check. At the hearing, respondent testified that he made the changes because he determined that the entire check did not pertain to King, but he could not explain the notation "West p.s. Bington."

35. Check #3543, dated July 28, 1988, drawn on the Office Account, contained the words King and Garvin. Respondent altered those words by superimposing the words Post and Office on top of the words King and Garvin. At the hearing, respondent testified that he did not recall why the change had been made.

36. Attorney At Law account check stubs 7973 and 7974, both dated December 23, 1987, were similarly altered. On check stub 7973, respondent superimposed the word clerks over the word clients and "diets" over "clients" on check stub 7974. Respondent used check 7973, as well as cash, to pay for Christmas gifts to former law clients, including Stan D., Gordon Light and Walter and Charlotte Schlansker. At the hearing, respondent testified that he could give "no specific answer" as to why he changed "clients" to "clerks" and that he changed "clients" to "diets" in order to remind himself to whom he had given diet candies.

37. On his Attorney At Law account, respondent superimposed the word "camping" over "King" on check stub 8055, dated June 17, 1988. The check was a payment to respondent's daughter, Margaret M. Howard, for her help with the final accounting in the Estate of Evelyn S. King. At the hearing, respondent testified that he was disguising a gift to his daughter, who intended to use the money for a camping trip.

38. On his Attorney At Law account, respondent superimposed the words "Peg's King Olds--car reimburse" over "King estate" on check 8063, dated July 29, 1988. The check was a payment to Ms. Howard for her help in July 1988 in connection with the King estate. At the hearing, respondent testified that he did not recall why the change had been made.

39. On his Attorney At Law account, respondent changed the notation "tax help" to read "Extra help-Eester" [sic] on check stub 8028, dated April 8, 1988. The check was a payment to Judy Nash, respondent's former secretary who, at the time, was employed by Hayner & Moynihan. At the hearing, respondent testified that he could not recall why he made the changes but assumed that it was to denote an Easter gift to Ms. Nash for her service prior to 1988 to his former clients.

40. On his Attorney At Law account, respondent changed "Jas" or "Jes" and "work" to "for Jamesway working cabinet" on check stub 8087, dated October 7, 1988. The check was a payment to Ms. Howard for her help in the Jessen estates. At the hearing, respondent testified that he had made the change to reflect that his daughter had used the money to purchase a workbench from a Jamesway store.

As to Charge IV of the Formal Written Complaint:

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

As to Charge V of the Formal Written Complaint:

42. Respondent did not file reports for 1987, 1988 and 1989, stating the date, place and nature of extra-judicial activities for which he had received compensation and the names of payors and amounts of the compensation received.

43. On March 28, 1990, after having been asked by a member of the Commission about his failure to report extra-judicial compensation, respondent prepared and delivered to the clerk of his court a document which did not comply with the reporting requirements in that it set forth only the gross amounts of legal fees, commissions and rental income received in each of the preceding three years.

As to Charge VI of the Formal Written Complaint:

44. After he became a full-time judge on July 1, 1987, respondent maintained a business and financial relationship with his son's law firm in that:

a) he continued as fiduciary for eight estates which were pending in his court and were represented by his son's law firm, as set forth in paragraphs 5 through 13 above;

b) he performed services for clients of his son's law firm and for which his son's law firm billed the clients, as set forth in paragraphs 15 though 31 above;

c) on December 29, 1988, respondent paid his son's law firm $1,000 to complete the Estate of Ray Wilkes; in June 1988, respondent had received a legal fee of $10,000 for services to the estate;

d) on December 29, 1988, respondent paid his son's law firm $1,950 to complete work on the Estate of Earl Paxton, having been paid $13,000 in June 1987 for legal fees in connection with the estate;

e) in January 1989, Mr. Hayner obtained and filed in the Surrogate's Court a Receipt, Release and Waiver in the Estate of Marjorie Van Vorst in connection with the judicial settlement of the estate, for which respondent was executor; Mr. Hayner also obtained the Attorney General's letter of no objection to the accounting;

f) respondent paid Judy Nash, a legal secretary for Hayner & Moynihan, $350 in checks and $100 in cash between December 1987 and December 1988;

g) respondent acted as surrogate in the Estate of Nilsson W. Zeh, which was represented by Hayner & Moynihan.

45. The allegations in paragraph 14(e) of Charge VI of the Formal Written Complaint are not sustained and are, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(c)(1), 100.5(c)(1), 100.5(d) and 100.6(c), and Canons 1, 2A, 3C(1), 5C(1), 5D and 6C of the Code of Judicial Conduct. Charges I, II, III, V and VI of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charge IV is dismissed.

For over two years after he became a full-time judge, respondent continued to perform legal services for many of his former clients. He used the successor to his former law firm to cloak his improper extra-judicial activities, failed to publicly disclose the source of his extra-judicial income and improperly altered records to conceal from the Commission his continuing involvement on behalf of clients.

A full-time judge is prohibited from acting as a fiduciary under an instrument executed after January 1, 1974, except in an estate involving a close relative. (Rules Governing Judicial Conduct, 22 NYCRR 100.5[d]). Respondent ignored this proscription and continued to handle banking, tax, investment and other matters for eight estates pending in the Surrogate's Court, in some instances for as long as two years after becoming a judge.

A judge must also "refrain from financial and business dealings that tend to reflect adversely on impartiality...or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which he or she serves." (22 NYCRR 100.5[c][1]). Respondent's activities as fiduciary for the eight estates involved him in numerous transactions with his son's law firm. Bank and court documents were sent to respondent at the law firm's office. Respondent had access to and made notations on law firm files. He prepared tax and estate documents signed by the members of the firm. He used the firm's secretary to assist him in some cases, and the secretary continued to write checks on respondent's law office bank accounts. There was a steady stream of financial transactions between the firm as attorneys for the estates and respondent as fiduciary.

In addition, respondent continued after he became surrogate to perform banking, investment and tax services for 16 other former clients being represented by his son's law firm. The law firm billed the clients for some of the services performed by respondent. As the successor to respondent's estates and trusts practice, Hayner & Moynihan was an active litigator in the Surrogate's Court. Whether or not respondent's continuing work on behalf of his former clients constituted legal services or the practice of law, he was performing services for clients of his son's law firm for which the firm was being paid. Thus, respondent was involved in transactions with lawyers likely to appear in the court on which he serves, in violation of 22 NYCRR 100.5(c)(1). It does not matter whether respondent's purpose in continuing to provide services for his former clients was for the benefit of the clients, himself or his son's firm.

Since respondent prepared tax returns and court accountings that were signed by members of the law firm, it is evident that he knew that his extra-judicial activities were improper and that he was attempting to shield his involvement. Such conduct cannot be condoned. (See, Matter of Intemann v. State Commission on Judicial Conduct, 73 NY2d 580, 581-82).

Respondent's actions were not isolated efforts to conclude some outstanding ministerial matters in estates left open when he ascended the bench. Rather they reflect a continuing course of involvement in his cases. Respondent simply couldn't let go of them. For example, he filed a petition for voluntary administration in the Estate of Edith Uniacke on July 1, 1987, the same day that he became a judge.

He also failed to conform with the "sunshine" provision of the Rules Governing Judicial Conduct, which requires judges to disclose the source of extra-judicial income and expose potential conflicts of interest. (See, 22 NYCRR 100.6[c]).

These acts alone would justify respondent's removal from office.

Respondent compounded his egregious conduct by altering his banking records. After checks and check stubs were written and the checks had cleared the bank but before they were reviewed by the Commission staff, respondent changed the records in ways that obscured their reference to estates and former clients for whom he had performed services after becoming a full-time judge. As the distinguished referee found, respondent's alterations were "deliberate uses of susceptible words and characters to change their meaning." (Referee's report, p. 69). For example, respondent changed "est. E.S. King" to "West p.s. Bington" and the words "clients" to "clerks" and "diets".

Respondent admits that he made the alterations. That admission, the nature of the changes and the lack of any credible explanation permit the inference that the alterations were made to conceal respondent's involvement in the matters after he became surrogate. Although respondent denies making the changes for the purpose of deceiving the Commission, we find the denial unworthy of belief because respondent testified that he couldn't recall why he made some of the changes and where he did offer an explanation, it was incredible. We therefore conclude that respondent made the changes in an attempt to conceal from the Commission his impermissible services to some of his former clients.

"Such deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth," (Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 554) and "cannot be condoned," (Intemann, supra at 582).

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Mrs. Del Bello, Mr. Goldman, Mr. Sheehy and Judge Thompson concur, except that Mrs. Del Bello dissents as to Charge II only in that she would also find a violation of Canon 5F of the Code of Judicial Conduct.

Judge Ciparick, Mr. Cleary and Judge Salisbury dissent as to Charge III and vote that the charge be dismissed and dissent as to sanction and vote that respondent be censured.

Dated: April 17, 1992

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

RICHARD J. SMITH, SR.,

a Justice of the Montezuma Town Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Michael F. McKeon for Respondent

The respondent, Richard J. Smith, Sr., a justice of the Montezuma Town Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer on June 10, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Montezuma Town Court since 1976.

2. Sometime prior to August 29, 1988, respondent was contacted by Cayuga County Sheriff's Lt. Frank Thomas, who told respondent that it was the policy of many town and village justices to delegate to him the authority to review and approve bail bonds presented at the jail. Respondent authorized Lieutenant Thomas to sign respondent's name to certificates of release and to release defendants committed by respondent without the necessity of respondent first reviewing and approving the bail bonds.

3. Between August 29, 1988, and February 5, 1989, in accordance with the authorization given by respondent, Lieutenant Thomas released defendants who had been committed to the jail by respondent in four cases, as set forth in Schedule A appended hereto.*

4. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

*Schedule A has not been reproduced for this report.

5. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though the four bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release defendants in four cases on legally insufficient bail bonds, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

State of New York
Commission on Judicial Conduct

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

Determination

JOHN L. STEIMLE,

a Justice of the Owasco Town Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Cuddy, Durgala and Timian (By James G. Cuddy)
for Respondent

The respondent, John L. Steimle, a justice of the Owasco Town Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer dated May 12, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Owasco Town Court since 1975.

2. On February 11, 1983, respondent signed a resolution passed by the Cayuga County Magistrates' Association in which he delegated authority to the county sheriff's department to review and approve bail bonds presented by any certified bondsman at the county jail for defendants committed by respondent. The department was also authorized to release defendants on respondent's behalf.

3. Between May 11, 1983, and May 17, 1989, in accordance with the authorization approved by respondent, Frank Thomas of the sheriff's department released four defendants who had been committed to jail from respondent's court, as set forth in Schedule A appended hereto.*

4. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

*Schedule A has not been reproduced for this report.

5. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though the four bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release four defendants on legally insufficient bail bonds, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

HERBERT F. TITUS,

a Justice of the Ira Town Court and an Acting Justice of the Cato Village Court, Cayuga County.

APPEARANCES:

Gerald Stern for the Commission

Raymond S. Sant for Respondent

The respondent, Herbert F. Titus, a justice of the Ira Town Court, Cayuga County, was served with a Formal Written Complaint dated April 21, 1992, alleging that he improperly delegated his authority to review and approve bail bonds. Respondent filed an answer dated May 7, 1992.

On August 18, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 18, 1992, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Ira Town Court since 1964.

2. On February 11, 1983, respondent signed a resolution passed by the Cayuga County Magistrates' Association in which he delegated authority to the county sheriff's department to review and approve bail bonds presented by any certified bondsman at the county jail for defendants committed by respondent. The department was also authorized to release defendants on respondent's behalf.

3. Between October 28, 1983, and February 6, 1990, in accordance with the authorization approved by respondent, Frank Thomas of the sheriff's department released eight defendants who had been committed to the jail by respondent, as set forth in Schedule A appended hereto. *

4. Respondent had not reviewed and approved the bail bonds, as required by CPL 510.40(3).

*Schedule A has not been reproduced for this report.

5. After the defendants were released, respondent received the bail bonds from the sheriff's department. He did not revoke bail, demand the production of justifying affidavits or take any other corrective action, even though seven of the bail bonds did not comply with the requirements of CPL 520.20.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a) and 100.3(b), and Canons 1, 2, 3A and 3B of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The law permits a judge to accept a bond to ensure a criminal defendant's reappearance in court (CPL 520.10) but provides several safeguards to the procedure (CPL 520.20).

Upon posting of bail in any form, a judge must examine it to determine that it complies with the court's order. (CPL 510.40[3]). Bail bonds must be submitted to the court and must contain certain information identifying the person or organization posting the bond on behalf of the defendant and promising to pay the court if the defendant does not appear. (CPL 520.20[1], [2]). The bond application must also include a Justifying Affidavit, containing such information as the amount of the premium paid, security and promises received and any personal and real property pledged as security and its value. (CPL 520.20[4]).

Thus, it is the responsibility of the judge to ensure that a bail bond provides adequate protection that a defendant will return to court. Judicial duties cannot be delegated to jailers or any other non-judicial officers. (See, Matter of Greenfeld v. State Commission on Judicial Conduct, 71 NY2d 389; Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133).

By authorizing the sheriff's department to perform a judicial function and permitting a jailer to release eight defendants, respondent was not faithful to the law and did not diligently perform his judicial duties.

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

Mr. Berger, Judge Altman, Ms. Barnett, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Bellamy and Mr. Sheehy were not present.

Dated: November 4, 1992

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

EDWIN B. WINKWORTH,

a Justice of the Granby Town Court, Oswego County.

APPEARANCES:

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

James K. Eby for Respondent

The respondent, Edwin B. Winkworth, a justice of the Granby Town Court, Oswego County, was served with a Formal Written Complaint dated December 23, 1991, alleging that he drove a vehicle while impaired by alcohol and that, during his subsequent arrest, he referred to his judicial office and threatened the arresting officer. Respondent filed an answer dated January 15, 1992.

On April 30, 1992, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4) and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement by letter dated June 8, 1992.

The administrator and respondent submitted memoranda as to sanction. Oral argument was waived.

On July 23, 1992, the Commission considered the record of the proceeding and made the following determination.

1. Respondent has been a justice of the Granby Town Court since March 1, 1984.

2. On April 9, 1991, at 11:53 P.M., respondent drove a motor vehicle on Route 104 in the City of Oswego while his ability to do so was impaired by alcohol. Respondent was arrested and charged with Driving While Intoxicated and Driving With A Blood Alcohol Content In Excess Of .10 Percent.

3. Respondent told the arresting officer that he is a Granby town justice and that his arrest was unnecessary because "we need each other."

4. Respondent told the officer that he would not cooperate with him because respondent is a judge and warned the officer that he would "regret this." Respondent told the officer to "watch out from here on in."

5. On September 27, 1991, respondent pleaded guilty in the Oswego City Court to Driving While Ability Impaired.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1 and 100.2(a), and Canons 1 and 2A of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

A judge who drives while impaired by alcohol consumption violates the law and endangers public welfare. (Matter of Innes, 1985 Ann Report of NY Commn on Jud Conduct, at 152, 154). Respondent's attempts to invoke the prestige of his judicial office to prevent his own arrest and his threats that the arresting officer would "regret this" and should "watch out" are additional factors which make public sanction appropriate. (See, Matter of Kremenick, 1986 Ann Report of NY Commn on Jud Conduct, at 133, 134).

Such behavior does not comport with the high standards of conduct required of a judge and detracts from the dignity of judicial office. (Matter of Richardson, 1982 Ann Report of NY Commn on Jud Conduct, at 129, 130).

Admonition is appropriate in this case because respondent has recognized the seriousness of his problem and has sought treatment for alcohol abuse (see, Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153, 155; Kremenick, supra).

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

All concur.

Dated: September 23, 1992

ACTION TAKEN IN 1992 INVOLVED JUDGES OF THE FOLLOWING COURTS									
APPROXIMATE NUMBER OF JUDGES IN COURT SYSTEM: 3423[1]	TOWN & VILLAGE JUSTICES 2253	CITY COURT JUDGES 381	COUNTY COURT JUDGES 81	FAMILY COURT JUDGES 127	DISTRICT COURT JUDGES 50	COURT OF CLAIMS JUDGES 63	SURROGATE COURT JUDGES 74	SUPREME COURT JUSTICES 339	COURT OF APPEALS & APP. DIV. 55
COMPLAINTS RECEIVED: 1452 (INCLUDES 338 RE: NON-JUDGES)	354	209	120	121	20	3	27	241	13
COMPLAINTS INVESTIGATED: 180	121	25	6	7	1	0	2	16	2
JUDGES CAUTIONED AFTER INVESTIGATION: 43	30	8	0	3	0	0	0	2	0
FORMAL WRITTEN COMPLAINTS AUTHORIZED: 28	21	3	1	0	0	0	0	3	0
JUDGES CAUTIONED AFTER FORMAL COMPLAINT: 1	1	0	0	0	0	0	0	0	0
JUDGES PUBLICLY DISCIPLINED: 18	13	0	2	1	0	0	1	1	0
FORMAL COMPLAINTS DISMISSED OR CLOSED: 9	9	0	0	0	0	0	0	0	0

[1] *ALL TOWN AND VILLAGE JUSTICES SERVE PART-TIME; ABOUT 400 ARE 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 COMPLAINTS PENDING AS OF DECEMBER 31, 1992

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED*[1]	*ACTION*[2]	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		5	11	7	5	4		**32**
DELAYS			1	1		1		**3**
CONFL/INTEREST		3	7	3	3			**16**
BIAS		1	5		2	1	2	**11**
CORRUPTION		2	1		2	1	1	**7**
INTOXICATION			1	1	1	1		**4**
DISABLE/QUALIF'NS								
POLIT'L ACTIVITY		2	5	1		1		**9**
FIN'L/REC'DS/TR'NG		6	4	5		3		**18**
TICKET-FIXING		1	1			1		**3**
ASSER'N/INFLUENCE		1	4	2	2	1	3	**13**
VIOLATION OF RIGHTS		9	14	11	2	2	1	**39**
MISCELLANEOUS			5	6	2	2	11	**26**
TOTALS		**30**	**59**	**37**	**19**	**18**	**18**	**181**

[1] *MATTERS CLOSED UPON VACANCY OF OFFICE OTHER THAN BY RESIGNATION.*

[2] *INCLUDES DETERMINATIONS OF ADMONITION, CENSURE AND REMOVAL SINCE THE CURRENT COMMISSION'S INCEPTION IN 1978, AS WELL AS SUSPENSIONS AND DISCIPLINARY PROCEEDINGS COMMENCED IN THE COURTS BY FORERUNNER COMMISSIONS FROM 1975-78.*

TABLE OF NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 1992

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED*[1]	*ACTION*[2]	
INCORRECT RULING	457							**457**
NON-JUDGES	338							**338**
DEMEANOR	96	20	23	2		1		**142**
DELAYS	60	4	2					**66**
CONFL/INTEREST	19	8	3					**30**
BIAS	83	10	2					**95**
CORRUPTION	10	6	1		1			**18**
INTOXICATION	1	1						**2**
DISABLE/QUALIF'N	2							**2**
POLIT'L ACTIVITY	9	9	1	1				**20**
FIN'L/REC'DS/TRNG	2	22	9	1	1			**35**
TICKET-FIXING		2	2					**4**
ASSER'N/INFLUENCE	6	3	2					**11**
VIOL'N OF RIGHTS	162	21	11	5		1		**200**
MISCELLANEOUS	27	5						**32**
TOTALS	**1272**	**111**	**56**	**9**	**2**	**2**		**1452**

[1] *MATTERS CLOSED UPON VACANCY OF OFFICE OTHER THAN BY RESIGNATION.*

[2] *INCLUDES DETERMINATIONS OF ADMONITION, CENSURE AND REMOVAL SINCE THE CURRENT COMMISSION'S INCEPTION IN 1978, AS WELL AS SUSPENSIONS AND DISCIPLINARY PROCEEDINGS COMMENCED IN THE COURTS BY FORERUNNER COMMISSIONS FROM 1975-78.*

ALL COMPLAINTS CONSIDERED IN 1992: 1452 NEW COMPLAINTS AND 181 PENDING FROM 1991								
SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED*[1]	*ACTION*[2]	
INCORRECT RULING	457							**457**
NON-JUDGES	338							**338**
DEMEANOR	96	25	34	9	5	5		**174**
DELAYS	60	4	3	1		1		**69**
CONFL/INTEREST	19	11	10	3	3			**46**
BIAS	83	11	7		2	1	2	**106**
CORRUPTION	10	8	2		3	1	1	**25**
INTOXICATION	1	1	1	1	1	1		**6**
DISABLE/QUALIF'N	2							**2**
POLIT'L ACTIVITY	9	11	6	2		1		**29**
FIN'L/REC'DS/TRNG	2	28	13	6	1	3		**53**
TICKET-FIXING		3	3			1		**7**
ASSER'N/INFLUENCE	6	4	6	2	2	1	3	**24**
VIOL'N OF RIGHTS	162	30	25	16	2	3	1	**239**
MISCELLANEOUS	27	5	5	6	2	2	11	**58**
TOTALS	**1272**	**141**	**115**	**46**	**21**	**20**	**18**	**1633**

[1] *MATTERS CLOSED UPON VACANCY OF OFFICE OTHER THAN BY RESIGNATION.*

[2] *INCLUDES DETERMINATIONS OF ADMONITION, CENSURE AND REMOVAL SINCE THE CURRENT COMMISSION'S INCEPTION IN 1978, AS WELL AS SUSPENSIONS AND DISCIPLINARY PROCEEDINGS COMMENCED IN THE COURTS BY FORERUNNER COMMISSIONS FROM 1975-78.*

ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

Subject Of Complaint	Dismissed On First Review	Status of Investigated Complaints						Totals
		Pending	*Dismissed*	*Dismissal & Caution*	*Resigned*	*Closed*[1]	*Action*[2]	
Incorrect Ruling	6136							**6136**
Non-Judges	1499							**1499**
Demeanor	1049	25	623	131	47	51	119	**2045**
Delays	573	4	63	38	7	11	15	**711**
Confl/Interest	267	11	280	86	32	15	87	**778**
Bias	803	11	156	26	17	12	13	**1038**
Corruption	125	8	57	3	17	10	11	**231**
Intoxication	23	1	27	6	4	3	12	**76**
Disable/Qualif'n	31	0	21	2	13	7	6	**80**
Polit'l Activity	126	11	94	91	4	13	10	**349**
Fin'l/Rec'ds/Trng	131	28	109	56	67	62	61	**514**
Ticket-Fixing	19	3	66	150	33	60	158	**489**
Asser'n/Influence	79	4	75	27	8	5	24	**222**
Viol'n of Rights	405	30	84	39	7	6	3	**574**
Miscellaneous	579	5	194	69	19	33	53	**952**
TOTALS	**11,845**	**141**	**1849**	**724**	**275**	**288**	**572**	**15,694**

[1] *Matters closed upon vacancy of office other than by resignation.*

[2] *Includes determinations of admonition, censure and removal since the current Commission's inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by forerunner commissions from 1975-78.*