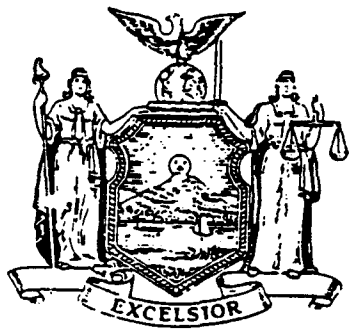
ANNUAL REPORT

1996

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT



NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

* * *

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(Term Ended March 31, 1996)

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(Term Ended March 31, 1995)

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(Appointed February 6, 1996)

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(Term Ended March 31, 1995)

HON. WILLIAM C. THOMPSON

* * *

CLERK OF THE COMMISSION

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Miguel Maisonet

* Denotes staff members who left the Commission's employ during the year.

COMMISSION ON JUDICIAL CONDUCT

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STATE OF NEW YORK

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To Governor of the State of New York,
The Chief Judge of the State of New York 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, covering the period from January 1, 1995, through December 31, 1995.

Respectfully submitted,

Henry T. Berger, Chair
On Behalf of the Commission

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Introduction: Twenty-One Years of Service

The New York State Commission on Judicial Conduct is the disciplinary agency designated by the State Constitution to review complaints of misconduct against judges of the State Unified Court System, which includes approximately 3,300 judges and justices. The Commission's objective is to enforce high standards of conduct for judges. While judges must be free to act independently and in good faith, they must also be held accountable for their misconduct by an independent disciplinary system.

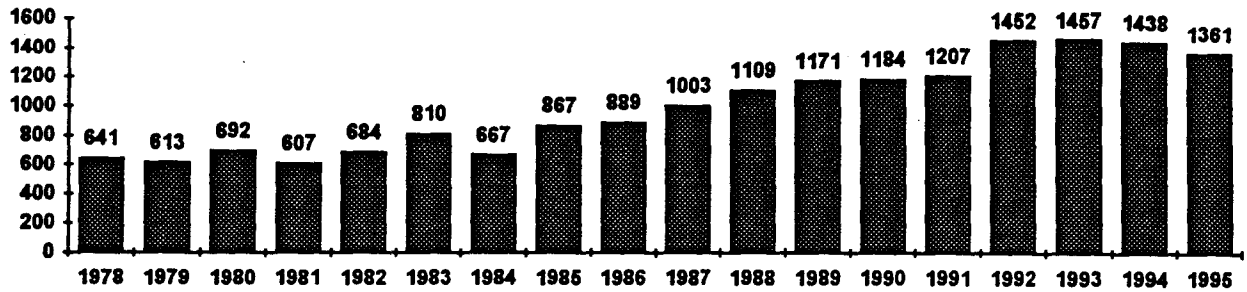
The ethics standards that the Commission enforces are found primarily in the Rules on Judicial Conduct, which is annexed, and the Code of Judicial Conduct. The Rules are promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, pursuant to the State Constitution. The Code was adopted in 1972 by the New York State Bar Association.

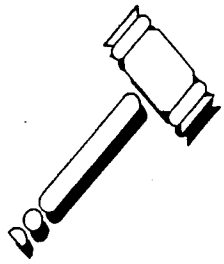
The number of complaints received has steadily increased over the Commission's 21 years of operation. In each of the last four years, the number of incoming complaints has been more than double the number received as recently as 1984, as reflected in the chart below.

Remarkably, in that same period, both the Commission's staff and annual budget have actually decreased to a significant degree, creating some serious operational problems, as discussed more fully in the Budget section of this Report.

Last year, our Annual Report included a special 20-year history of the Commission. This current Report covers the Commission's activities during calendar year 1995.

Complaints Received Since 1978





Action Taken in 1995

Following are summaries of the Commission's actions in 1995, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

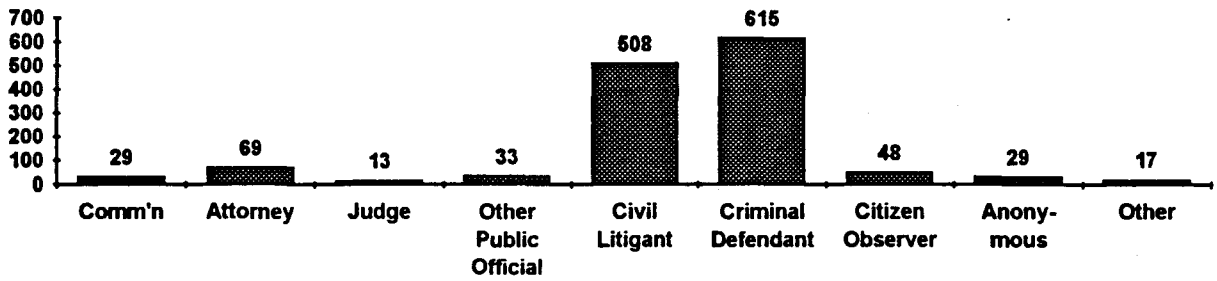
Complaints Received

In 1995, 1361 new complaints were received, marking the fourth consecutive year in which the number of complaints exceeded 1300. Of these, 1185 (87%) were dismissed by the Commission upon initial review, and 176 investigations were authorized and commenced. In addition, 177 investigations and proceedings on formal charges were pending from the prior year.

In 1995, as in previous years, the majority of complaints were received from civil litigants and defendants in criminal cases. Others were received from attorneys, law enforcement officers, civic organizations and concerned citizens not involved in any particular court action. Among the new complaints were 29 initiated by the Commission on its own motion. A breakdown of the source of complaints received in 1995 appears in the following chart.

Many of the new complaints dismissed by the Commission upon initial review were clearly without merit or outside the Commission's jurisdiction, including complaints against judges not within the state unified court system, such as federal judges, administrative law judges and New York City Housing Court judges. Absent any underlying misconduct, such as demonstrated prejudice, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate complaints concerning judicial decisions. The Commission is not an appellate court and cannot reverse or remand trial court decisions.

Sources of Complaints Received in 1995



Investigations

On January 1, 1995, 153 investigations were pending from the previous year. During 1995, the Commission commenced 176 new investigations. Of the combined total of 329 investigations, the Commission made the following dispositions:

- 84 complaints were dismissed outright.
- 38 complaints involving 38 different judges were dismissed with letters of dismissal and caution.
- 8 complaints involving 8 different judges were closed upon the judges' resignation.
- 1 complaint involving 1 judge was closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 41 complaints involving 27 different judges resulted in formal charges being authorized.
- 157 investigations were pending as of December 31, 1995.

Formal Written Complaints

On January 1, 1995, Formal Written Complaints from the previous year were pending in 24 matters, involving 18 different judges. During 1995, Formal Written Complaints were authorized in 41 additional matters, involving 27 different judges. Of the combined total of 65 matters involving 45 judges, the Commission made the following dispositions:

- 20 matters involving 15 different judges resulted in formal discipline (admonition, censure or removal from office).
- 1 matter involving 1 judge was dismissed with a letter of dismissal and caution.
- 12 matters involving 7 different judges were closed upon the judge's resignation.
- 2 matters involving 1 judge 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 different judges were pending as of December 31, 1995.

Summary of All 1995 Dispositions

The Commission's dispositions involved judges at various levels of the state unified court system, as indicated in the ten tables on this and the following pages.

TABLE 1: TOWN & VILLAGE JUSTICES -- 2150,* ALL PART-TIME

	Lawyers	*Non-Lawyers*	*Total*
Complaints Received	114	268	382
Complaints Investigated	34	93	127
Judges Cautioned After Investigation	10	21	31
Formal Written Complaints Authorized	3	20	23
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	0	9	9
Formal Complaints Dismissed or Closed	0	7	7

*Refers to the approximate number of such judges in the state unified court system. Approximately 400 of this total are lawyers.

TABLE 2: CITY COURT JUDGES -- 378, ALL LAWYERS*

	Part-Time	*Full-Time*	*Total*
Complaints Received	49	125	174
Complaints Investigated	7	12	19
Judges Cautioned After Investigation	2	0	2
Formal Written Complaints Authorized	0	0	0
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	1	1	2
Formal Complaints Dismissed or Closed	1	0	1

* Approximately 92 of this total serve part-time.

TABLE 3: COUNTY COURT JUDGES -- 77 FULL-TIME, ALL LAWYERS*

Complaints Received	123
Complaints Investigated	6
Judges Cautioned After Investigation	3
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

* Includes 6 who serve concurrently as County and Family Court Judges.

TABLE 4: FAMILY COURT JUDGES -- 118, FULL-TIME, ALL LAWYERS

Complaints Received	129
Complaints Investigated	4
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 5: DISTRICT COURT JUDGES – 48, FULL-TIME, ALL LAWYERS

Complaints Received	16
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written 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 – 51, FULL-TIME, ALL LAWYERS*

Complaints Received	2
Complaints Investigated	0
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
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	33
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Formal Complaints Dismissed or Closed	0

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

TABLE 8: SUPREME COURT JUSTICES -- 341, FULL-TIME, ALL LAWYERS

Complaints Received	292
Complaints Investigated	18
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

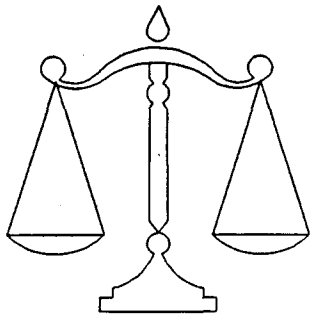
TABLE 9: COURT OF APPEALS JUDGES & APPELLATE DIVISION JUSTICES -- 59, FULL-TIME, ALL LAWYERS

Complaints Received	27
Complaints Investigated	1
Judges Cautioned After Investigation	1
Formal Written 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:	183

*The Commission does not have jurisdiction over non-judges, administrative law judges, housing judges of the New York City Civil Court, or federal judges.



Formal Proceedings

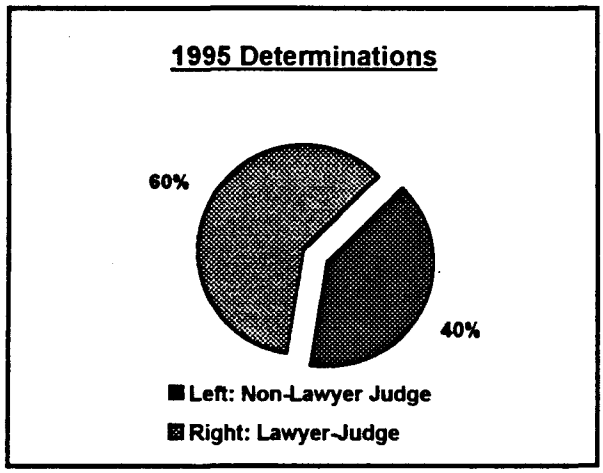
No disciplinary sanction may be imposed by the Commission unless a Formal Written Complaint, containing detailed charges of misconduct, has been served upon the respondent-judge and the respondent has been afforded an opportunity for a formal hearing.

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 related matters, absent a waiver by the judge, until the case has been concluded and a determination of admonition, censure, removal or retirement has been rendered pursuant to law.

Following are summaries of those matters which were completed and made public during 1995. The texts of the determinations are appended to this Report, in alphabetical order.

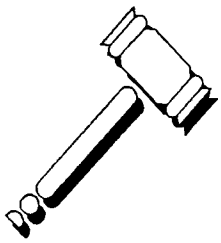
Overview of 1995 Determinations

The Commission rendered 15 formal disciplinary determinations in 1995: four removals, six censures and five admonitions. Nine of the respondents disciplined were non-lawyer judges, and six were lawyer-judges. Nine of the respondents were part-time town or village justices, and six were judges of higher courts.



To put these numbers and percentages in some context, it should be noted that, of the 3,300 judges in the state unified court system, approximately 65% are part-time town or village justices. Approximately 80% of the town and village justices, and about 55% of all judges in the court system, are not lawyers. (While town and village justices may or may not be lawyers, judges of all higher courts must be lawyers.)

Of course, no set of dispositions in a given year will exactly mirror those percentages. However, since 1986, the total of public determinations, when categorized by type of court and judge, has roughly approximated the makeup of the judiciary as a whole: about 70% have involved town and village justices, and about 30% have involved judges of higher courts. Excluding cases involving ticket-fixing – largely a town and village court phenomenon, since traffic matters are typically handled by administrative agencies in larger jurisdictions – the overall percentage of town and village justices disciplined by the Commission (65.5%) is virtually identical to the percentage of town and village justices in the judiciary as a whole (65%).



Determinations of Removal

The Commission completed four disciplinary proceedings in 1995 which resulted in determinations of removal. The cases are summarized below.

Matter of Lorraine Backal

The Commission determined on March 7, 1995, that Lorraine Backal, a judge of the Civil Court of the City of New York, Bronx County, should be removed from office for meeting with a man she believed was involved in illegal drug dealing and money laundering, counseling him on how to hide the money and mislead the FBI, accepting for safekeeping a large sum of that money and thereafter accepting $1500 of it as a gift.

Judge Backal requested review by the Court of Appeals, which accepted the Commission's determination and removed her from office.

Matter of Lester C. Hamel

The Commission determined on November 3, 1995, that Lester C. Hamel, a part-time non-lawyer justice of the Champlain Town Court, Clinton County, should be removed from office for summarily sentencing two individuals to jail -- one for 15 days and the other for 22 days -- without hearings, based on out-of-court *ex parte* communications alleging that they had not paid restitution. Judge Hamel acted notwithstanding the fact that one of the individuals had in fact paid restitution, and the other had made out a *prima facie* case that she could not afford to make payment. In its determination, the Commission noted that Judge Hamel had been censured in 1991 and again in 1992 for other failures to observe the requirements as to depositing and remitting court funds.

Judge Hamel requested review by the Court of Appeals, where the matter was pending at year's end.

Matter of Richard A. Sterling

The Commission determined on September 8, 1995, that Richard A. Sterling, a part-time non-lawyer justice of the Gouverneur Town Court, St. Lawrence County, should be removed from office for (1) converting more than $5,700 in court funds to his personal use by writing out checks to himself and otherwise withdrawing funds from a court account and (2) failing to return $5,000 in bail money to a particular defendant after the conditions for such return had been met.

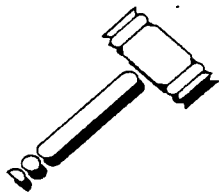
Judge Sterling did not request review by the Court of Appeals.

Matter of Stanley Yusko

The Commission determined on March 7, 1995, that Stanley Yusko, a part-time non-lawyer justice of the Coxsackie Village Court, Greene County, should be removed from office for presiding over numerous cases in 1993 and 1994, even though he had failed to complete constitutional and statutory training requirements and failed to become certified as a judge.

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

Determinations of Censure



The Commission completed six disciplinary proceedings in 1995 which resulted in determinations of censure. The cases are summarized below.

Matter of Anthony G. Austria

The Commission determined on March 10, 1995, that Anthony G. Austria, a judge of the City Court of Newburgh, Orange County, should be censured for *inter alia* (1) making remarks that were sarcastic, presumed guilt and elicited potentially incriminating statements as to a group of defendants being arraigned on charges of patronizing a prostitute, (2) ignoring the legal mandates governing the setting of bail, (3) speaking to a newspaper reporter about the merits of pending cases, (4) failing to advise various defendants of certain rights, such as the right to counsel and the right to have counsel assigned if financially necessary, and (5) failing to take appropriate steps to effect such rights. Judge Austria agreed to enroll in and complete basic and advanced training programs offered by the Office of Court Administration to part-time judges, including those like Judge Austria who are also attorneys.

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

Matter of Bernard M. Bloom

The Commission determined on January 20, 1995, that Bernard M. Bloom, Surrogate of Kings County, should be censured for giving misleading information to a Second Department grievance committee, which was investigating the conduct of the judge's full-time law secretary for, *inter alia*, practicing law without the requisite permission of the Chief Administrator of the Courts.

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

Matter of James R. Bradigan, Sr.

The Commission determined on March 10, 1995, that James R. Bradigan, Sr., a part-time non-lawyer justice of the Villenova Town Court, Chautauqua County, should be censured for (1) presiding over two cases while being intoxicated from the consumption of alcohol and (2) deciding two small claims cases based upon his out-of-court discussions with one of the parties. The Commission noted that Judge Bradigan had abstained from alcohol since taking an in-patient alcohol detoxification program in 1994.

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

Matter of Alana J. Lindell-Cloud

The Commission determined on July 14, 1995, that Alana J. Lindell-Cloud, a part-time non-lawyer justice of the Great Valley Town Court, Cattaraugus County, should be censured for rendering her decision and setting an unusually high fine against the defendant in a motor vehicle speeding case, based upon her desire to retaliate against the defendant, who had previously participated in the decision to fire Judge Lindell-Cloud from her job as a nurse at a health care facility.

Judge Lindell-Cloud did not request review by the Court of Appeals.

Matter of John G. Dier

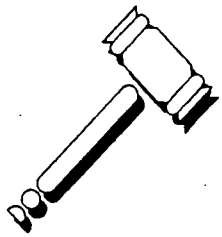
The Commission determined on July 14, 1995, that John G. Dier, a justice of the Supreme Court, Warren County, should be censured for (1) failing to abide by statutory requirements and specific directives from the Appellate Division that he make a record of his findings of fact and the reasoning for his rulings in civil cases, (2) failing to disqualify himself from a case involving a neighbor with whom the judge had engaged in a heated argument in which the police were called and (3) failing to fully disclose his income and liabilities for 1992 on the mandatory financial disclosure statement he filed with the Ethics Commission for the Unified Court System.

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

Matter of Michael Frati

The Commission determined on January 20, 1995, that Michael Frati, a part-time non-lawyer justice of the New Baltimore Town Court, Greene County, should be censured for dismissing a claim *sua sponte* on the basis of out-of-court *ex parte* information pertaining both to the case before him and other unrelated matters involving the same plaintiff.

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



Determinations of Admonition

The Commission completed five disciplinary proceedings in 1995 which resulted in determinations of public admonition. The cases are summarized below.

Matter of John L. Bell

The Commission determined on September 22, 1995, that John L. Bell, a judge of the Court of Claims, should be admonished (1) for serving as an officer and director of two corporations organized for profit, notwithstanding rules prohibiting a full-time judge from such activity, and (2) failing to disclose his interest in the corporations on his mandatory financial disclosure forms.

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

Matter of Anthony J. Cavotta

The Commission determined on May 3, 1995, that Anthony J. Cavotta, a part-time non-lawyer justice of the Stillwater Town and Village Courts, Saratoga County, should be admonished for improperly requiring defendants, who pleaded not guilty by mail in minor traffic cases, to attend unauthorized *ex parte* pre-trial conferences with the judge at which they were pressured to change their pleas. Such coercive "conferences" are not mandated by law and are contrary to the requirement that a trial immediately be scheduled in such cases.

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

Matter of Leo P. Menard

The Commission determined on March 13, 1995, that Leo P. Menard, a part-time non-lawyer justice of the Beekmantown Town Court and Acting Village Justice of the Rouses Point Village Court, Clinton County, should be admonished for approaching a witness during the Commission's investigation of a complaint against him and suggesting that the witness tell a certain version of the events at issue.

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

Matter of Ralph C. More

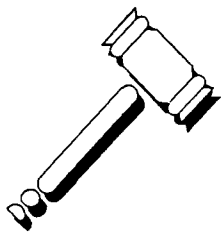
The Commission determined on March 13, 1995, that Ralph C. More, a part-time non-lawyer justice of the Milford Town Court, Otsego County, should be admonished (1) for dismissing charges in certain cases without notice to the prosecutor and (2) for initiating and considering unauthorized *ex parte* communications on the merits in some of those cases.

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

Matter of C. Raymond Radigan

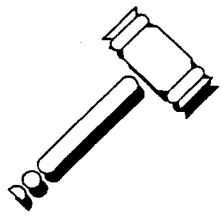
The Commission determined on September 22, 1995, that C. Raymond Radigan, Surrogate of Nassau County, should be admonished (1) for failing to supervise a not-for-profit organization, which he served as president and which was run by employees of his court, with the result that non-minority relatives of court employees were hired with funds that were publicly reported to the government as being for affirmative action, and (2) using funds from that organization to underwrite research expenses on a law book which he co-authored and from which he kept royalties in excess of those expenses.

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



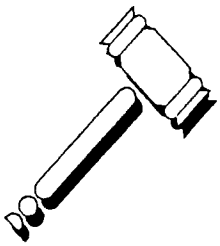
Dismissed or Closed Formal Written Complaints

The Commission disposed of nine Formal Written Complaints in 1995 without rendering public discipline. In seven of these cases, the judges resigned from judicial office before the matter could be completed. In an eighth case, the judge vacated his office by operation of law, also before the matter could be completed. One other was disposed of with a letter of dismissal and caution, upon a finding by the Commission that judicial misconduct was established but that public discipline was unwarranted. (Letters of Dismissal and Caution are discussed on the following pages.)



Matters Closed Upon Resignation

Fifteen judges resigned in 1995 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 from office may be determined 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-period that removal is not warranted.

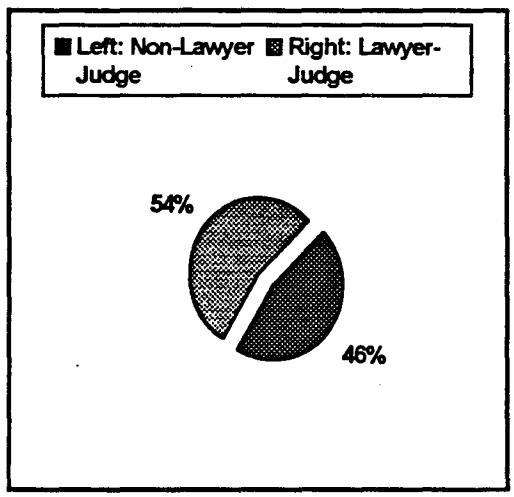


Referrals to Other Agencies

Pursuant to Judiciary Law Section 44(10), the Commission, when appropriate, refers matters to other agencies. In 1995, the Commission referred 10 matters to the Office of Court Administration, typically dealing with relatively isolated instances of delay or other administrative issues. Five matters were referred to attorney disciplinary committees, and three matters were referred to a District Attorney.

Letters of Dismissal and Caution

A *Letter of Dismissal and Caution* constitutes the Commission's written confidential suggestions and recommendations to a judge. It is authorized by Commission rule, 22 NYCRR 7000.1(l). Where the Commission determines that a judge's conduct does not warrant pubic discipline, it will issue a letter of dismissal and caution, privately calling the judge's attention to ethical violations which should be avoided in the future. Such a communication has value not only as an educational tool but also because it is essentially the only method by which the Commission may address a judge's conduct without making the matter public.



In 1995, the Commission issued 39 letters of dismissal and caution. Thirty-eight were issued upon conclusion of an investigation, and one was issued upon disposition of a Formal Written Complaint. Thirty-one town or village justices, 10 of whom are lawyers, were cautioned; two part-time and no full-time city court judges were cautioned; and six other full-time judges were cautioned -- one City Court judge, three County Court judges, one Supreme Court justice and one Appellate Division justice.

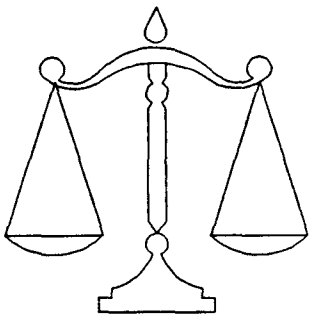
The caution letters addressed various types of conduct. For example, three judges were cautioned for helping to raise funds for charitable organizations, contrary to the prohibition on such activity as set forth in the Rules on Judicial Conduct.

Several judges were cautioned for presiding over cases without disclosing actual or potential conflicts. For example, one part-time town justice permitted his own lawyer to appear in a case before him. Another part-time justice permitted his co-judge, who is an attorney, to appear in a case. A third part-time justice failed to disqualify himself in a case involving a client of his private business.

Three part-time justices were cautioned for conducting sessions of court in private, notwithstanding that the proceedings were, by law public. One of these judges, for example, took pleas in chambers, and another conducted a trial in an office inaccessible to the public.

Eight judges were cautioned for participating in unauthorized *ex parte* communications. For example, one judge signed an eviction order without notice to the evicted party. Another amended a visitation order based upon an *ex parte* conversation with one party. A third judge vacated a civil judgment based upon an *ex parte* conversation with the adverse party.

Should the conduct addressed by a letter of dismissal and caution continue 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.



Commission Determinations Reviewed by the Court of Appeals

Pursuant to statute, Commission determinations are filed with the Chief Judge of the Court of Appeals, who then serves the respondent-judge. The respondent-judge has 30 days to request review of the Commission's determination by the Court of Appeals, or the determination becomes final. In 1995, the Court decided the one matter summarized below (*Matter of Backal*). A second request for review (*Matter of Hamel*), filed in December 1995, is pending.

Matter of Lorraine Backal

On March 7, 1995, the Commission determined that New York City Civil Court Judge Lorraine Backal should be removed from office. The Commission found that Judge Backal had met with a man believed by her to be involved in illegal drug dealing and money laundering and counseled him as to how to safeguard the money and how to mislead FBI investigators. She also accepted from him for safekeeping a large sum of money and accepted $1,500 of it as a gift when the individual returned for the cash. Judge Backal requested review of the Commission's determination by the Court of Appeals.

On November 30, 1995, the Court of Appeals unanimously accepted the Commission's determination and ordered the judge's removal from office. *Matter of Backal*, 87 NY2d 1 (1995).

The Court in its decision specifically upheld the constitutionality of Section 47 of the Judiciary Law, which gives the Commission jurisdiction to remove a judge from office within 120 days after the date of resignation. The petitioner had claimed that the Commission lacked authority to remove her from office after her resignation, arguing that under the State Constitution the Commission's jurisdiction was limited to the discipline of "judges" and did not include judges who had resigned. The Court held that the constitutional grant of authority

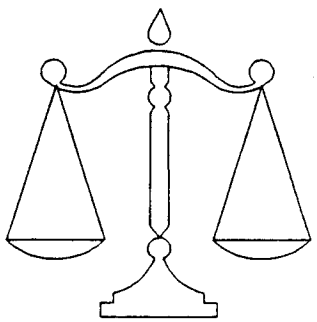
> ...necessarily and logically covers all acts of misconduct undertaken by a judge while serving in office. The fact that a particular judge may no longer hold that office at the time removal is sought or recommended by the Commission, due to the judge's post-misconduct resignation, does not preclude the Commission or this Court from exercising their respective disciplinary powers.

The Court noted that all the allegations were deemed admitted by the judge's failure to file an answer to the complaint. The Court concluded that the judge's behavior "borders on criminal conduct" and is "certainly inconsistent with a judge's pledge to uphold the law." The Court also rejected the judge's contentions that her misconduct was

mitigated because it occurred in the privacy of her home and because her statements were made to a person whom she considered to be a close associate. The Court stated:

> It is an insult to the intelligence of the public to suggest that a judge who places herself and her associates above the law in this manner does not prejudice the administration of justice or at least create "an appearance of impropriety" by her actions.

The Court concluded that "where, as here, a judge privately conveys the message that she is willing to conspire to flout the law," the sanction of removal is appropriate.



Challenges to Commission Procedures

In addition to *Matter of Backal* in the Court of Appeals, the Commission staff litigated several matters in 1995 involving important constitutional and statutory issues and procedures.

Backal v. Commission

In February 1995, former New York City Civil Court Judge Lorraine Backal obtained an order to show cause in Supreme Court, Nassau County, enjoining the Commission from further action in a pending matter, on the grounds that its jurisdiction lapsed upon her resignation. She claimed that Section 47 of the Judiciary Law, which gives the Commission 120 days in which to remove a judge after resignation, is unconstitutional.

In a decision dated March 1, 1995, Supreme Court Justice Joseph A. DeMaro denied the plaintiff's application for a preliminary injunction. Noting that the Commission had scheduled oral argument for the following day on the issue of sanctions, Justice DeMaro held that the plaintiff had not shown a likelihood of ultimate success or irreparable injury. Accordingly, he declined to enjoin the Commission from continuing with its proceedings.

Mogil v. Stern et al.

In September 1995, County Court Judge B. Marc Mogil filed a complaint in District Court in the Eastern District of New York, seeking $60 million in damages against the Commission's Administrator, Deputy Administrator, and an investigator. The

complaint alleged that those individuals violated his civil rights under 42 U.S.C. §1983, by their actions in investigating and bringing disciplinary charges against him, which he characterized as "false" and "moronic".

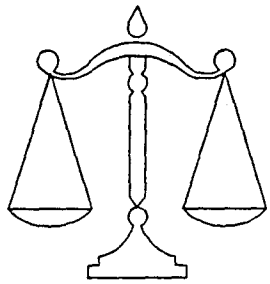
In November 1995, the defendants filed a motion to dismiss on the grounds of absolute immunity and qualified immunity, the doctrine of abstention, lack of subject matter jurisdiction, and failure to assert any colorable constitutional claims.

In January 1996, the plaintiff filed a motion to disqualify the Attorney General's office from representing the defendants, on the grounds that the Attorney General had previously represented the plaintiff in prior (unrelated) matters. The defendants opposed the motion. Both motions are pending before federal District Court Judge Leonard Wexler.

Sassower v. Commission

In April 1995, an individual whose complaints had been dismissed by the Commission filed a petition in Supreme Court, New York County, seeking a declaration that the Commission's rule permitting "summary" dismissal of her complaints is unconstitutional. The Commission moved to dismiss for failure to state a cause of action.

In a decision dated July 13, 1995, Justice Herman Cahn upheld the constitutionality of the Commission's rules and procedures. Justice Cahn held that the term "investigate," as used in the State Constitution and the Judiciary Law, does not require any specific form of inquiry and that the Commission's review of the petitioner's complaints, as attested to in letters sent to the petitioner, meets the constitutional and statutory mandate. Justice Cahn also denied the petitioner's requests for various other forms of relief, including the imposition of fines, an order requesting the Governor to appoint a special prosecutor to investigate her complaints, and an order referring the conduct of Commission members and staff to the district attorney for criminal and disciplinary prosecution.

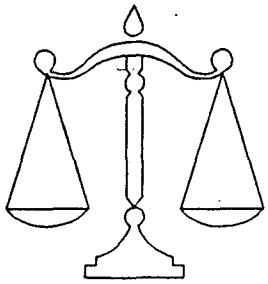


Amendments to the Rules on Judicial Conduct

Effective January 1, 1996, new Rules on Judicial Conduct went into effect, upon approval of the Court of Appeals. In addition to certain substantive changes, the Rules were reorganized and renumbered. The full text is appended to this Report. Among the new provisions are the following.

RULE NUMBER	SUBSTANCE OF NEW PROVISION
100.2(D)	Prohibits membership by a judge in any organization which practices invidious discrimination
100.3(B)(4)	Requires a judge to perform judicial duties without bias or prejudice
100.3(B)(5)	Requires a judge to require lawyers to refrain from manifesting bias or prejudice in the judge's court
100.3(B)(6)(a)-(e)	Authorizes certain *ex parte* communications
100.3(B)(7)	Requires a judge to dispose of all judicial matters "promptly, efficiently and fairly"
100.3(B)(8)	Prohibits a judge from making public comments about a pending or impending matter in any court within the United States
100.3(B)(9)	Prohibits a judge from criticizing or commending jurors for their verdict
100.3(B)(10)	Prohibits a judge from disclosing or using non-public information acquired in a judicial capacity
100.3(C)(1) & (2)	Require a judge and judge's staff to avoid bias or prejudice in the course of discharging administrative responsibilities
100.3(D)(1)&(2)	Require a judge to report misconduct by lawyers and judges when there is evidence of a "substantial likelihood" of a "substantial violation" of a rule

RULE NUMBER	SUBSTANCE OF NEW PROVISION
100.3(E)(1)(f)	Allows a judge to eliminate a personal or family financial conflict of interest that would otherwise require disqualification by disposing of the interest
100.4(C)(3)(b)	Clarifies the limitations on a judge's civic and charitable activities with respect to fund-raising; permits a judge to accept an unadvertised award at an organization's fund-raising event
100.4(D)(2)&(3)(b)	Provides that a judge may hold and manage family investments, including real estate
100.4(D)(5)	Relaxes the restrictions on gifts or loans to judges and increases the threshold on reporting such gifts or loans to $150
100.5(A)	Revises the rules on political activity; requires a judge or candidate for judicial office to maintain certain standards of conduct; prohibits inappropriate campaign pledges; permits comment in response to personal attacks
100.5(C)	Requires a judge to prohibit his or her staff from engaging in certain political activity, such as contributing more than $500 a year to political campaigns



The Commission's Budget

Since 1978, when the present system for disciplining judges was implemented, the Commission has managed its finances with extraordinary care. In periods of relative plenty, we nevertheless kept our budget small; in times of financial crisis, we made difficult sacrifices. Our average annual increase since 1978 was less than one percent.

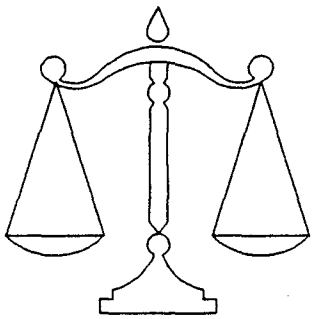
Since 1990, the Commission has been under virtually unrelenting budgetary pressure. From a high of $2.3 million, our funding has been reduced by about 30%. Our funding level is now set at $1,584,100 -- which is less than what we had in 1978. In the same time frame, the number of complaints received and reviewed in a year has more than doubled (to around 1400 per year), and the number of investigations authorized and conducted in a year has increased more than 22%. The number of judges under the Commission's jurisdiction is approximately 3,300. Managing such an increased workload in so large a system, with steadily dwindling resources, has been formidable and not without sacrifices to our efficiency.

A No-Growth Budget

The Commission's total budget for 1978-79 was $1,644,000, or $60,000 more than our budget for 1995-96. In some years, our budget was increased in small increments, primarily to reflect obligations applicable to all state agencies, such as contractually-mandated cost-of-living raises and annual rent increases. *Six times since 1979, we voluntarily requested budgets no greater or even less than the previous year's amount.* We were apprised by the Division of the Budget that we were the only agency to do so, at a time in the 1980s when such sacrifices were not mandated by fiscal emergencies. Moreover, an exhaustive audit in 1989 by the State Comptroller found that the Commission's finances were in order, that our budget practices were all consistent with state policies and rules, and that no changes in our fiscal practices were recommended.

The extraordinary task of maintaining a virtually no-growth budget over 16 years has left no "fat" to be trimmed from our operation. The financial cuts that state agencies have endured in recent years continue to hit hard, and among agencies such as the Commission which have demonstrated austerity in pre-crisis times, the current cuts have a disproportionately greater impact. Steep cuts in both personnel and non-personal services were necessary to accomplish past cutbacks. Over the last ten years, we cut our staff by more than 50%, dramatically reduced our office space and rent, and otherwise reduced expenditures. Our statewide staff has been reduced from 45 in 1990, to 27 in 1994, to 20 this year. Some investigations have already been limited in scope because we do not have adequate financial means to permit staff travel for witness interviews, review of court records, observation of court proceedings and the like, particularly where overnight lodging is required.

Fortunately, for fiscal year 1996-97, the Governor's budget request for the Commission includes a restoration of some of the funds cut in the previous year. This increase would be effective when a state budget is approved. Our overall funding would still be at about the 1978 level.



Conclusion

Public confidence in the high standards, integrity and impartiality of the judiciary, and in an independent disciplinary system which keeps judges accountable for their conduct, is essential to the rule of law. The members of the New York State Commission on Judicial Conduct are proud of the Commission's contributions not only to that ideal, but also to a heightened awareness of the appropriate ethics standards incumbent on all judges, and to the fair and proper administration of justice.

Respectfully submitted,

HENRY T. BERGER, CHAIR

HELAINE M. BARNETT
(Term Ended March 31, 1996)

EVELYN L. BRAUN
(Term Ended March 31, 1995)

E. GARRETT CLEARY

STEPHEN R. COFFEY
(Appointed April 1, 1995)

MARY ANN CROTTY

LAWRENCE S. GOLDMAN

DANIEL F. LUCIANO
(Appointed February 6, 1996)

FREDERICK M. MARSHALL
(Appointed April 1, 1996)

JUANITA BING NEWTON

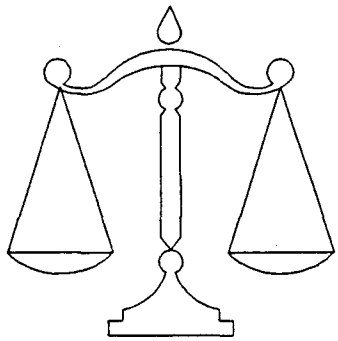
EUGENE W. SALISBURY

BARRY C. SAMPLE

JOHN J. SHEEHY
(Term Ended March 31, 1995)

WILLIAM C. THOMPSON

APPENDIX



Commission Member Biographies
Staff Biographies
Roster of Referees
Text of 1995 Determinations
Statistical Analysis of Complaints

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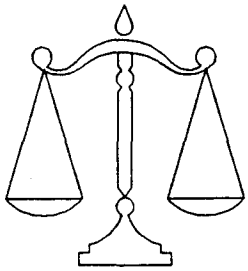

Biographies of Commission Members

There are eleven members of the Commission on Judicial Conduct: four appointed by the Governor, three by the Chief Judge, and one each by the four leaders of the Legislature. Following are biographies of the current Commission members and legal staff, as well as three members (Helaine M. Barnett, Evelyn L. Braun and John J. Sheehy) whose terms on the Commission ended during this past year.

HELAINE M. BARNETT, ESQ., is a graduate of Barnard College and New York University School of Law. She is the 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 Bar Association Board of Governors representing New York State, a member of the American Law Institute, a past member of the Executive Committee of The Association of the Bar of the City of New York, and a past chair of the ABA 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 member of the House of Delegates of the New York State Bar Association, 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.

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 Fisher, Fisher and Berger. He is a member of the Association of the Bar of the City of New York and serves on the Committee on International Human Rights and the Task Force on the Constitutional Convention. Mr. Berger served as a member of the New York City Council in 1977.

HONORABLE EVELYN L. BRAUN is a graduate of Queens College of the City University of New York, and St. John's University Law School. She is a Justice of the Supreme Court, Queens County. Judge Braun served previously as a Judge of the New York City Civil Court and as an Acting Judge of the New York City Criminal Court. She is a member of the Supreme Court Gender Bias Committee and secretary of the Queens County Board of Justices. Judge Braun served previously as Principal Law Clerk to Supreme Court Justice Alan LeVine, and a Law Assistant in the Civil Court. She is a member of the National Association of Women Judges, the New York State Association of Women Judges, the Association of the Bar of the City of New York, the Queens County Women's Bar Association and the Columbian Lawyers Association.

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 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.

MARY ANN CROTTY is a graduate of the State University of New York at Albany, where she earned a Bachelor of Science degree (cum laude) and a Masters in Public Administration. She is Vice President of Parsons Brinkerhoff, Inc., an international engineering consulting firm. Ms. Crotty served previously in the office of Governor Mario M. Cuomo as Director of Policy Management, as Deputy Director of State Operations and Policy Management, and as Assistant Secretary to the Governor for Transportation. She has also served as Deputy Budget Director and Senior Legislative Budget Analyst for the New York State Assembly Ways and Means Committee, and as a Budget Examiner in the New York State Division of the Budget. Ms. Crotty is a recipient of the Governor Nelson A. Rockefeller Distinguished Alumni Award.

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 is a past president of the New York State Association of Criminal Defense Lawyers, and a past president of the New York Criminal Bar Association. 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 DANIEL F. LUCIANO was educated in the public schools of the City of New York and attended Brooklyn College, from which he received a Bachelor of Arts degree. He thereafter attended Brooklyn Law School, earning a Bachelor of Laws degree in 1954. After serving in the United States Army in Europe, he entered the practice of law, specializing in tort litigation, real property tax assessment certiorari and general practice. He was engaged as trial counsel to various law firms in litigated matters. Additionally, he served as an Assistant Town Attorney for the Town of Islip, representing the Assessor in real property tax assessment certiorari from 1970 to 1982, and chaired the Suffolk County Board of Public Disclosure from 1980 to 1982. He was elected a Justice of the Supreme Court in 1982 and presided over a general civil caseload. In May 1991 he was appointed to preside over Conservatorship and Incompetency proceedings, later denominated Guardianship Proceedings in Suffolk County. He was appointed an Associate Justice of the Appellate Term, Ninth and Tenth Judicial Districts, in April of 1993. On May 30, 1996, he was appointed by Governor George E. Pataki as an Associate Justice of the Appellate Division, Second Judicial Department. Justice Luciano is one of the founders of the Alexander Hamilton Inn of Court and served as a Director of the Suffolk Academy of Law. He was the Presiding Member of the New York State Bar Association Judicial Section, and he currently holds the positions of Delegate to the House of Delegates of the new York State Bar Association; director of the Suffolk County Women's Bar Association; Treasurer of the Association of Justices of the Supreme Court of the State of New York; and member of the Advisory Council of the Touro College, Jacob D. Fuchsberg Law center.

HONORABLE FREDERICK M. MARSHALL attended the University of Buffalo and is a graduate of its law school. He is admitted to practice in all courts of the State of New York as well as the Federal Courts. He is Of Counsel to the law firms of Kinney, Buch, Mattrey & Marshall and Kobis & Marshall in Buffalo and East Aurora. He has served as Chief Trial Assistant in the Erie County District Attorney's office, Senior Erie County Court Judge, President of the New York County Judges Association, Supreme Court Justice of the State of New York, and President of the State Association of Supreme Court Justices. Justice Marshall has served as Administrative Judge of the Eighth Judicial District and Administrative Justice of the Narcotics Court in the Fourth Judicial Department. In addition to his 30 year tenure in the judiciary, Justice Marshall has been an instructor in constitutional law at the State College at Buffalo, Chairman of the Advisory Council of the Political Science Program at Erie Community College, Chairman of the New York State Bar Association Judicial Section, and has been designated Outstanding Citizen of the Year by the Buffalo News. In 1989 the Bar Association of Erie County presented Justice Marshall with the Outstanding Jurist Award. The University of Buffalo Alumni Association has conferred upon him its Distinguished Alumni Award. He served as a First Lieutenant in the Infantry in World War II. Justice Marshall and his wife have three sons and live in Orchard Park, New York, and Bradenton, Florida.

HONORABLE JUANITA BING NEWTON is a graduate of Northwestern University and the Columbus Law School of The Catholic University of America. She is a Judge of the Court of Claims and an Acting Justice of the Supreme Court. Judge Newton serves as the Administrative Judge, First Judicial District, Supreme Court, Criminal Branch. Previously, she served as Executive Assistant to the Deputy Chief Administrative Judge for the New York City Courts, as Executive Director and General Counsel to the New York State Sentencing Guidelines Committee, as an Assistant District Attorney in Bronx County and as a high school social studies teacher. She is a member of the National Association of Women Judges, the Judicial Friends and the Association of Court of Claims Judges, which she serves as Treasurer. Judge Newton serves on numerous New York State judicial committees and programs, including the Judicial Committee on Women in the Courts, the Judicial Commission on Minorities, the Advisory Committee on Criminal Practice and Procedure, the Anti-Bias Committee and Panel of the Supreme Court (New York County) and the Drug Policy Task Force of the New York County Lawyers Association. Judge Newton and her husband Eddie have a son, Jason, and reside in New Rochelle.

HONORABLE EUGENE W. SALISBURY is a graduate of the University of Buffalo (cum laude) and the University of Buffalo Law School (cum laude). He is Senior Partner in the law firm of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria 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 Hamburg, New York.

BARRY C. SAMPLE is a graduate of the State University of New York at Albany, where he earned Bachelor of Arts (magna cum laude) and Masters degrees, as well as a Masters in Criminal Justice. He is Director of Program Development and Planning for Instructional Systems, Inc. Mr. Sample served previously as Deputy Director of the New York State Division of the Budget under Governor Mario M. Cuomo. He also served in the New York State Division of Criminal Justice Services as Deputy Director of Criminal Justice, Executive Deputy Commissioner, and Chief of Program Development and Planning. Mr. Sample was also an instructor in the Department of Afro-American Studies at SUNY at Albany, where he also served as Associate Coordinator of the Center on Minorities and Criminal Justice.

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 recently retired as a partner in the New York office of Rogers & Wells. 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 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 NAACP 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. He is Co-Chairman of Blacks and Jews in Conversation, Inc., and Treasurer of Judges and Lawyers Breast Cancer Alert.

Clerk of the Commission

ALBERT B. LAWRENCE 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." He was honored as a distinguished alumnus of Empire State College in 1995.

Commission Attorneys

GERALD STERN, Administrator and Counsel, is a graduate of Brooklyn College, the Syracuse University College of Law and the New York University School of Law, where he earned 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.

ROBERT H. TEMBECKJIAN, Deputy Administrator and Deputy Counsel, is a graduate of Syracuse University, the Fordham University School of Law, and Harvard University's John F. Kennedy School of Government, where he earned a Masters in Public Administration. He previously served as Clerk of the Commission, as publications director for the Council on Municipal Performance, staff director of the Ohio Governor's Cabinet Committee on Public Safety and special assistant to the Deputy Director of the Ohio Department of Economic and Community Development. Mr. Tembeckjian has served on the Committee on Professional and Judicial Ethics and the Committee on Professional Discipline of the Association of the Bar of the City of New York. He was a Fulbright Scholar in Armenia for the spring 1994 semester, teaching courses on constitutional law, public management and ethics at the American University of Armenia.

STEPHEN F. DOWNS, Chief Attorney (Albany), 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.

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CATHLEEN S. CENCI, Staff Attorney, graduated summa cum laude from Potsdam College in 1980. In 1979, she completed the *course superior* at the Institute of Touraine, Tours, France. Ms. Cenci received her JD from Albany Law School in 1984 and joined the Commission as an assistant staff attorney in 1985. Ms. Cenci is a judge of the Albany Law School moot court competitions and a member of Albany County Big Brothers/Big Sisters.

Referees Who Presided Over Commission Hearings in 1995

The following individuals presided over Commission hearings in 1995.

NAME	CITY	COUNTY
Michael A. Cardozo, Esq.	New York	New York
Daniel G. Collins, Esq.	New York	New York
Robert L. Ellis, Esq.	New York	New York
Honorable Matthew J. Jasen	Buffalo	Erie
John T. O'Friel, Esq.	Central Valley	Orange
Shirley A. Siegel, Esq.	New York	New York

PART 100 OF THE RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS GOVERNING JUDICIAL CONDUCT

PREAMBLE

The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The rules are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The rules are designed to provide guidance to judges and candidates for elective judicial office and to provide a structure for regulating conduct through disciplinary agencies. They are not designed or intended as a basis for civil liability or criminal prosecution.

The text of the rules is intended to govern conduct of judges and candidates for elective judicial office and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The rules are not intended as an exhaustive guide for conduct. Judges and judicial candidates also should be governed in their judicial and personal conduct by general ethical standards. The rules are intended, however, to state basic standards which should govern their conduct and to provide guidance to assist them in establishing and maintaining high standards of judicial and personal conduct.

§100.0 Terminology. The following terms used in this Part are defined as follows:

(A) A "candidate" is a person seeking selection for or retention in public office by election. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions.

(B) "Court personnel" does not include the lawyers in a proceeding before a judge.

(C) The "degree of relationship" is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party,

counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

(D) "Economic interest" denotes ownership of a legal or equitable interest, however small, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge's spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(E) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

(F) "Knowingly", "knowledge", "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(G) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(H) "Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(I) "Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(J) "Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(K) "Non-public information" denotes information that, by law, is not available to the public. Non-public information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.

(L) A "part-time judge", including an acting part-time judge, is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment.

(M) "Political organization" denotes a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

(N) "Public election" includes primary and general elections; it includes partisan elections, non-partisan elections and retention elections.

(O) "Require". The rules prescribing that a judge "require" certain conduct of others, like all of the rules in this Part, are rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(P) "Rules"; citation. Unless otherwise made clear by the citation in the text, references to individual components of the rules are cited as follows:

"Part" - refers to Part 100

"section" - refers to a provision consisting of 100 followed by a decimal (100.1)

"subdivision" - refers to a provision designated by a capital letter (A).

"paragraph" - refers to a provision designated by an arabic numeral (1).

"subparagraph" - refers to a provision designated by a lower-case letter (a).

(Q) "Window Period" denotes a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported the judge's or non-judge's candidacy, and ending, if the judge or non-judge is a candidate in the general election for that office, six months after the general election, or if he or she is not a candidate in the general election, six months after the date of the primary election, convention, caucus or meeting.

§100.1 A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective.

§100.2 A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES. (A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

(D) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

§100.3 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY. (A) Judicial duties in general. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative responsibilities. (1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

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

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation or socioeconomic status, or other similar factors are issues in the proceeding.

(6) a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed- upon matters.

(e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This

paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(10) A judge shall not disclose or use, for any purpose unrelated to judicial duties, non-public information acquired in a judicial capacity.

(C) Administrative responsibilities. (1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered. A judge shall not appoint or vote for the appointment of any person as a member of the judge's 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 or the spouse of such a person. A judge shall refrain from recommending a relative within the sixth degree of relationship of either the judge or the judge's spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the appointment of relatives of judges.[1] Nothing in this paragraph shall prohibit appointment of the spouse of the 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 the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(D) Disciplinary responsibilities. (1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.

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[1]A new Part 8 of the Chief Judge's Rules has been proposed that prohibits the appointment of court employees who are relatives of any judge of the same court within the judicial district in which the appointment is to be made.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action.

(3) Acts of a judge in the discharge of disciplinary responsibilities are part of a judge's judicial duties.

(E) Disqualification. (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

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

(b) the judge knows that (1) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding;

(ii) is an officer, director or trustee of a party;

(iii) has an interest that could be substantially affected by the proceeding;

(iv) is likely to be a material witness in the proceeding;

(e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be 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.

(f) Notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as a fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and made a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(F) Remittal of disqualification. A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii) or subparagraph (1)(d)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

§100.4. A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS. (A) Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) detract from the dignity of judicial office; or

(3) interfere with the proper performance of judicial duties and are not incompatible with judicial office.

(B) Avocational activities. A judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Part.

(C) Governmental, civic, or charitable activities. (1) A full-time judge shall not appear at a public hearing before an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2) (a) A full-time judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy in matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(b) A judge shall not accept appointment or employment as a peace officer or police officer as those terms are defined in section 1.20 of the Criminal Procedure Law.

(3) A judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal

system or the administration of justice or of an educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Part.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that ordinarily would come before the judge, or

(ii) if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

(b) A judge as an officer, director, trustee or non-legal advisor, or a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities;

(ii) may not be a speaker or the guest of honor at an organization's fund-raising events, but the judge may attend such events. Nothing in this subparagraph shall prohibit a judge from being a speaker or guest of honor at a bar association or law school function or from accepting at another organization's fund-raising event an unadvertised award ancillary to such event;

(iii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice; and

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such an organization. Use of an organization's regular letterhead for fund-raising or membership solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

(D) Financial activities. (1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position,

(b) involve the judge with any business, organization or activity that ordinarily will come before the judge, or

(c) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge, subject to the requirements of this Part, may hold and manage investments of the judge and members of the judge's family, including real estate.

(3) A full-time judge shall not serve as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity, except that:

(a) the foregoing restriction shall not be applicable to a judge who assumed judicial office prior to July 1, 1965, and maintained such position or activity continuously since that date; and

(b) a judge, subject to the requirements of this Part, may manage and participate in a business entity engaged solely in investment of the financial resources of the judge or members of the judge's family; and

(c) 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 paragraph during the period of such interim or temporary appointment.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under section 100.3(E);

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in section 100.4(H).

(E) Fiduciary activities. (1) A full-time judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, designated by an instrument executed after January 1, 1974, except for the estate, trust or person of a member of the judge's family, or, with the approval of the Chief Administrator of the Courts, a person not a member of the judge's family with whom the judge has maintained a longstanding personal relationship of trust and confidence, and then only if such services will not interfere with the proper performance of judicial duties.

(2) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

(3) 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 paragraphs (1) and (2) during the period of such interim or temporary appointment.

(F) Service as arbitrator or mediator. A full-time judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

(G) Practice of law. A full-time judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to a member of the judge's family.

(H) Compensation, reimbursement and reporting. (1) Compensation and reimbursement. A full-time judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Part, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(a) Compensation shall 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 shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's

spouse or guest. Any payment in excess of such an amount is compensation.

(c) No full-time 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 office or agency thereof; (2) a school, college or university that is financially supported primarily 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 a lecture or 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.

(2) Public reports. A full-time judge shall report the date, place and nature of any activity for which the judge 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. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

(I) Financial disclosure. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this section and in section 100.3(F), or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.

§100.5 A JUDGE OR CANDIDATE FOR ELECTIVE JUDICIAL OFFICE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

(A) Incumbent judges and others running for public election to judicial office. (1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

(a) acting as a leader or holding an office in a political organization;

(b) except as provided in section 100.5(A)(3), being a member of a political organization other than enrollment and membership in a political party;

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

(2) A judge or non-judge who is a candidate for public election to judicial office may participate in his or her own campaign for judicial office as provided in this section and may contribute to his or her own campaign as permitted under the Election Law. During the Window Period as defined in subdivision (Q) of section 100.0 of this Part, a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her candidacy;

(iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

(iv) permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions even where the cost of the ticket to such dinner or other function exceeds the proportionate cost of the dinner or function.

(3) A non-judge who is a candidate for public election to judicial office may also be a member of a political organization and continue to pay ordinary assessments and ordinary contributions to such organization.

(4) A judge or a non-judge who is a candidate for public election to judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the

candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under this Part;

(c) except to the extent permitted by section 100.5(A)(5), shall not authorize or knowingly permit any person to do for the candidate what the candidate is prohibited from doing under this Part;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent; but

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate subparagraphs 100.5(A)(4)(a) and (d).

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees may solicit and accept such contributions and support only during the Window Period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(B) Judge as candidate for nonjudicial office. A judge shall resign from judicial office upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) Judge's staff. A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

(1) holding an elective office in a political organization, except as a delegate to a judicial nominating convention or a member of a county committee other than the executive

committee of a county committee;

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions, except that this $500 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 also shall be made to appropriate sections of the Election Law;

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

(4) political conduct prohibited by section 25.39 of the Rules of the Chief Judge (22 NYCRR 25.39).

§100.6 APPLICATION OF THE RULES OF JUDICIAL CONDUCT. (A) General application. All judges in the unified court system and all other persons to whom by their terms these rules apply, e.g., candidates for elective judicial office, shall comply with these rules of judicial conduct, except as provided below. All other persons, including judicial hearing officers, who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct.

(B) Part-time judge. A part-time judge:

(1) is not required to comply with sections 100.4(C)(1), 100.4(C)(2)(a), 100.4(C)(3)(a)(ii), 100.4(E)(1), 100.4(F), 100.4(G), and 100.4(H);

(2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not 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, but 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;

(4) 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.

(C) Administrative law judges. The provisions of this Part are not applicable to

administrative law judges unless adopted by the rules of the employing agency.

(D) Time for compliance. A person to whom these rules become applicable shall comply immediately with all provisions of this Part, except that, with respect to section 100.4(D)(3) and 100.4(E), such person may make application to the Chief Administrator for additional time to comply, in no event to exceed one year, which the Chief Administrator may grant for good cause shown.

(E) Relationship to Code of Judicial Conduct. To the extent that any provision of the Code of Judicial Conduct as adopted by the New York State Bar Association is inconsistent with any of these rules, these rules shall prevail, except that these rules shall apply to a non-judge candidate for elective judicial office only to the extent that they are adopted by the New York State Bar Association in the Code of Judicial Conduct.

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

Determination

ANTHONY G. AUSTRIA, JR.,

a Judge of the City Court of Newburgh, Orange County.

APPEARANCES:

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

Jeffrey P. Tunick for Respondent

The respondent, Anthony G. Austria, Jr., a judge of the Newburgh City Court, Orange County, was served with a Formal Written Complaint dated October 14, 1994, alleging that, at the arraignments of a number of criminal defendants, he failed to advise defendants of their rights, elicited potentially incriminating statements, made remarks that presumed guilt and made sarcastic and inappropriate statements. Respondent did not answer the Formal Written Complaint.

On January 9, 1995, 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 by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On January 12, 1995, the Commission approved the agreed statement and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Newburgh City Court since January 1990.

2. On December 2, 1993, respondent arraigned Ahmed A. Ahmed, Benjamin L. Booth, David M. Day, Michael T. Lawrence, Carlton O'Hearn, Pelham P. Pointer and Bruce J. Rode on misdemeanor charges of Patronizing A Prostitute, Fourth Degree.

3. Contrary to CPL 170.10(3) and 170.10(4), respondent failed to advise properly the defendants of their right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and failed to accord the defendants the opportunity to exercise the right to counsel, the right to an adjournment to obtain counsel, the right to communicate for the purpose of obtaining counsel and the right to have counsel assigned by the court if they were unable to afford a lawyer, and respondent failed to take affirmative steps to effectuate such rights.

4. Contrary to CPL 510.30(2), respondent:

a) announced in advance that bail would be set at $750 in each case;

b) set bail at that amount in all but one of the cases as a "deterrence" and a warning to potential defendants; and,

c) made his decision to set bail instead of releasing the defendants and his decision as to the amount of bail on factors other than the kind and degree of restriction necessary to secure the defendants' attendance in court.

5. Respondent engaged the defendants in conversation about their arrests and elicited potentially incriminating statements from them, in that:

a) he asked Mr. Day why he was in Newburgh and, when the defendant replied that he worked there, respondent asked what time he finishes work; and,

b) he asked Mr. O'Hearn why he was in Newburgh and, when the defendant replied that he was visiting his brother, respondent asked where the brother lived.

6. Respondent made statements that presumed the guilt of the defendants. In arraigning Mr. Ahmed, respondent announced:

> I see the police officers here. Get word out in the street, gentlemen, that we mean business. This is the third such sweep. Bail started out at $250, went up to $500 for the johns on the second sweep. This is the third sweep. Bail will be set at $750. The next time $1,000 and, if we continue on it, it will be one weekend to jail to two weekends in jail, and the community service will escalate proportionately. That is my position on this. There has to be a stop. There has got to be a stop in making Newburgh the sewer of Orange County and the Northeast....

7. Respondent made sarcastic and otherwise inappropriate remarks to and about the defendants, in that:

a) when Mr. Lawrence said that he lived on John Street in New Windsor, respondent said, "That is appropriate;"

b) respondent asked Mr. O'Hearn whether he was lost when he was arrested since he was far from the home of the brother that the defendant said that he was visiting;

c) respondent asked Mr. O'Hearn whether he had forgotten doing jail time on previous convictions;

d) when Mr. Pointer said that he was 73 years old and retired, respondent replied, "I am not going to comment on that one with a ten-foot pole;" and,

e) after ascertaining that Mr. Rode was married and that his wife was in the courtroom, respondent asked, "Do you want to come up and stand by your husband?"

As to Charge II of the Formal Written Complaint:

8. On December 2, 1993, respondent granted an interview to a reporter from the Middletown Times Herald-Record in which he commented on the merits of the seven cases cited above and made statements that presumed the defendants' guilt.

As to Charge III of the Formal Written Complaint:

9. On December 7, 1993, respondent disqualified himself from Ahmed, Day, Lawrence, O'Hearn, Pointer and Rodes after the attorney for one of the defendants moved for recusal "in light of the recent publicity" concerning the arrest and arraignment of the seven defendants.

10. In recusing himself, respondent made statements that presumed the guilt of the defendants and cast doubt on his ability to impartially decide similar cases in the future.

As to Charge IV of the Formal Written Complaint:

11. On April 21, 1994, respondent arraigned Benedicto M. Diaz on a charge of Possession Of An Open Container, a city code violation punishable by a term of incarceration.

12. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to counsel, the right to an adjournment to obtain counsel, the right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and the right to have counsel assigned by the court if the defendant could not afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise such rights, although he did ask a friend of the defendant who was acting as interpreter whether the defendant wished to speak with an attorney.

As to Charge V of the Formal Written Complaint:

13. On May 10, 1994, respondent arraigned Alberto L. Grieve on a charge of Loud Musical Device, a violation of the city code which is punishable by a term of incarceration.

14. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and of his right to have counsel assigned by the court if he could not afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise his rights to counsel, to an adjournment to obtain counsel, to communicate for the purpose of obtaining counsel and to have counsel assigned if necessary.

As to Charge VI of the Formal Written Complaint:

15. On July 19, 1994, respondent arraigned Kevin M. Halvorsen on a charge of Possession Of An Open Container, a violation of the city code punishable by a term of incarceration.

16. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and his right to have counsel assigned by the court if he was unable to afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise his rights to counsel, to an adjournment to obtain counsel, to communicate for the purpose of obtaining counsel and to have counsel assigned if necessary.

As to Charge VII of the Formal Written Complaint:

17. On August 9, 1994, respondent arraigned Angel Delgado, Jr., on a charge of Unnecessary and Unusual Noise, a city code violation punishable by a term of incarceration.

18. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and his right to have counsel assigned by the court if he was unable to afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise his rights to counsel, to an adjournment to obtain counsel, to communicate for the purpose of obtaining counsel and to have counsel assigned if necessary.

As to Charge VIII of the Formal Written Complaint:

19. On August 16, 1994, respondent arraigned Everett W. Cain on a charge of Unnecessary and Unusual Noise, a violation of the city code punishable by a term of incarceration.

20. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and of his right to have counsel assigned by the court if he was unable to afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise his rights to counsel, to an adjournment to obtain counsel, to communicate for the purpose of obtaining counsel and to have counsel assigned if necessary.

Supplemental finding:

21. Respondent has agreed to enroll in and complete the next available basic training program and, thereafter, the next available advanced training program offered by the Office of Court Administration for part-time judges.

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), 100.3(a)(2), 100.3(a)(3) and 100.3(a)(6), and Canons 1, 2A, 3A(1), 3A(2), 3A(3) and 3A(6) of the Code of Judicial Conduct. Charges I, II, III, IV, V, VI, VII and VIII of the Formal Written Complaint are

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

A judge has an obligation at the arraignment of a criminal defendant to inform the defendant of his or her rights concerning counsel and to take steps to safeguard those rights. (CPL 170.10[3] and 170.10[4]; Matter of Winegard, 1992 Ann Report of NY Commn on Jud Conduct, at 70, 75). In a series of cases, respondent ignored this duty and, thus, violated his ethical obligation to be faithful to the law.

In the seven cases involving charges of Patronizing A Prostitute, respondent also abandoned his proper role as a neutral and detached magistrate (see, Matter of Wood, 1991 Ann Report of NY Commn on Jud Conduct, at 82, 86) by making remarks that were sarcastic, presumed guilt and elicited potentially incriminating statements from the defendants. He compounded this wrongdoing in a newspaper interview and a subsequent court proceeding, necessitating his recusal.

He also ignored the requirements of the law for setting bail (see, CPL 510.30[2]) and made it clear that he was using bail to punish the defendants for failing to respond to earlier police "sweeps" and to deter similar conduct in the future. The only legitimate concern in setting bail is "whether any bail or the amount of bail fixed was necessary to insure the defendant's future appearances in court;" punitive use of bail is improper. (Matter of Sardino v State Commission on Judicial Conduct, 58 NY2d 286, 289).

It was also wrong for respondent to speak to a newspaper reporter concerning the merits of pending cases (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][6]; Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135, 137) and, especially, to make statements during that interview that presumed the defendants' guilt.

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample, Mr. Sheehy and Judge Thompson concur.

Ms. Crotty was not present.

Dated: March 10, 1995

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

LORRAINE BACKAL,

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

APPEARANCES:

Gerald Stern for the Commission

Michael Kennedy for Respondent

This proceeding was initiated by a letter of complaint dated September 2, 1994, from the Chief of the Criminal Division of the Office of the U.S. Attorney for the Southern District of New York. Respondent was served with a Formal Written Complaint dated October 24, 1994. She did not answer the charges.

By motion dated November 28, 1994, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be deemed established. Respondent opposed the motion by cross motion on December 13, 1994. The administrator filed a reply on December 20, 1994. Respondent filed a sur-reply dated December 21, 1994. By determination and order dated January 13, 1995, the Commission granted the administrator's motion.

Both sides submitted papers as to sanction.

On March 2, 1995, the Commission heard oral argument, at which respondent and her counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent was a judge of the New York City Civil Court from January 1, 1989, until November 21, 1994.

2. In the early Fall of 1990, respondent spoke with Selwyn Wilson. Mr. Wilson said that he planned to do "another" drug deal and planned to launder money for unnamed drug dealers.

3. On November 10, 1990, respondent met with Mr. Wilson at her home. Respondent told Mr. Wilson that:

a) he was being sought by the F.B.I.;

b) when the F.B.I. asks her for information about him, she will advise the F.B.I. that she knows nothing about his whereabouts and that she sees him only occasionally when he comes to visit her;

c) she would "never" tell the F.B.I. where he is and will not give the F.B.I. exact dates as to when she has seen him; and,

d) she will destroy her telephone book records that contain his address or telephone number.

4. She then destroyed the records.

5. Respondent told Mr. Wilson to give vague and untruthful answers to F.B.I. questions concerning information that he had obtained from his employment as respondent's driver. Respondent told Mr. Wilson:

a) to tell the F.B.I. that he is unable to recall the identities of certain passengers whom he drove as respondent's chauffeur;

b) not to mention that he drove certain persons, including a certain judge, to the "Inner Circle" and to tell the F.B.I. only that it was "possible" that that certain judge was a passenger, even though Mr. Wilson indicated that he clearly recalled having driven that certain judge; and,

c) to "keep it very loose without pinpointing dates."

6. After Mr. Wilson told respondent that he had been involved in illegal drug and money laundering activities and that he and an associate named "Lance" recently had "brought in...300 kilos" of cocaine, respondent said to "make sure [Lance] lays low," and that Mr. Wilson had a "duty to tell Lance" about news articles concerning a pending F.B.I. investigation.

7. Mr. Wilson asked respondent how she was "set for money" and whether she was "O.K. for now." When she replied affirmatively, he said, "I'll take care of you next weekend anyway."

As to Charge II of the Formal Written Complaint:

8. On November 29, 1990, respondent met with Mr. Wilson at her home. Respondent accepted for safekeeping from Mr. Wilson a large sum of cash which he told her was $10,000. A week or two later, respondent returned the money to him. From that sum, respondent accepted $1,500.

9. Mr. Wilson told respondent that he had plans to go to Vermont "to do the money thing...the money laundering thing," and that he needed her assistance and advice in handling $700,000.

10. Respondent failed to report the $1,500 that she received from Mr. Wilson:

a) to the clerk of her court, as required by the Rules Governing Judicial Conduct, 22 NYCRR 100.5(c)(3)(iii) and 100.6(c), and by Canons 5C(4)(c) and 6C of the Code of Judicial Conduct; and,

b) on her financial disclosure statement for 1990, as required by Judiciary Law §211 and the Rules of the Chief Judge, 22 NYCRR 40.2.

As to Charge III of the Formal Written Complaint:

11. On December 5, 1990, respondent met with Mr. Wilson at her home. When Mr. Wilson said that he and certain associates were about to obtain 300 kilos of cocaine, respondent replied that he should "wait" and "lay low" because of a pending F.B.I. investigation.

12. Mr. Wilson told respondent that persons from Rhode Island were considering placing $3 million "into the money laundering thing."

13. When Mr. Wilson said that he had replaced one of his associates in the money-laundering scheme, respondent replied, "I'm not saying don't trust him. It's not the right time to do it now. I'd rather you stuck it in a tin box and buried it somewhere." She added, "Don't do it now. I'd rather see you with the cash than with nothing."

14. Respondent reminded Mr. Wilson of the financial "beatings" that he had taken in certain dealings with two financial institutions.

15. Respondent said that she was "worried" about the $700,000: "We gotta think of something else."

16. Respondent told Mr. Wilson not to keep the funds in a "box" in his neighborhood because "they'll check every single bank, every box." She said that he should not place the funds in "the corporate box" and should not bury the funds in his mother's yard because "it's hot."

17. Respondent asked Mr. Wilson whether "the Reverend's place" had ever been searched. When he replied that it was safe, respondent warned that authorities might "start ripping paneling."

18. Mr. Wilson reminded respondent that she had previously warned him that rats eat money. She replied that rats do eat money and, "You gotta put it in tin." When Mr. Wilson assured her that he had followed her advice, respondent said, "Good. O.K.," and repeated that, if money is in tin, "the rats don't get to it then."

19. Several times, Mr. Wilson asked respondent to help him plan what to do with the $700,000. Respondent asked whether one of Mr. Wilson's associates had any ideas.

20. When Mr. Wilson said that he would put the money in a Samsonite suitcase, respondent replied, "O.K.," and again warned that he should be "careful with that money."

21. Respondent advised Mr. Wilson to be careful in making telephone calls, particularly on his car phone, and, when using a public telephone, not to "put it on a credit card."

22. Respondent told Mr. Wilson to destroy a list that she had given him.

23. Respondent told Mr. Wilson that, if asked where he had obtained so much cash, he should tell the F.B.I. that he had always saved money in a shoe box, that his mother had given him money when he was in school and he had saved it, that he saved from "odd jobs" and that he always saved cash "for a rainy day."

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

Respondent met with a man known by her to be involved in illegal drug dealing and money laundering and counselled him as to how to safeguard the money and how to mislead F.B.I. investigators. She also accepted for safekeeping a large sum of money and accepted $1,500 of it when Mr. Wilson returned for the cash.

Such venal conduct is inconsistent with the role of a judge and the proper administration of justice. A judge may be removed for cause, including "conduct, on or off the bench, prejudicial to the administration of justice...." (NY Const, art VI, §22[a]; see also, Matter of Mazzei v State Commission on Judicial Conduct, 81 NY2d 568, 572). "Cause" has also been defined as including "corruption, general neglect of duty, delinquency affecting general character and fitness for office, acts violative of law inspired by interest, oppressive and arbitrary conduct, reckless disregard of litigants' rights, and acts justifying 'the finding that his [or her] future retention in office is inconsistent with the fair and proper administration of justice,' [citations omitted]." (Kane v Rudich, 256 AD 586, 587 [2d Dept]). Respondent has clearly departed from the high standards of conduct required of a judge and has damaged public confidence in the integrity of the judiciary.

Respondent's constitutional arguments concerning the basis for the Commission's investigation and the admissibility of her tape-recorded statements are not properly before us at this time. Nor is her argument that Judiciary Law §47 is unconstitutional, since an "administrative agency lack[s] both the power and competence to pass on the constitutionality of its own actions and procedures," (Hurlbut v Whalen, 58 AD2d 311, 317 [4th Dept]; accord, Finnerty v Cowen, 508 F2d 979, 982 [2d Cir]). Only when the constitutional issue hinges on factual determinations must it first be reviewed by an administrative agency in order to establish a record. (Corcella v Seifert, 181 AD2d 677 [2d Dept]; Roberts v Coughlin, 165 AD2d 964 [3d Dept]). Otherwise, the constitutionality of legislative acts must be raised in the courts. (See, Y.M.C.A. v Rochester Pure Waters District, 37 NY2d 371, 375; Lyons & Co. v Corsi, 3 NY2d 60, 67).

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

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sheehy and Judge Thompson concur.

Mr. Sample was not present.

Dated: March 7, 1995

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. BELL,

a Judge of the Court of Claims.

APPEARANCES:

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

DeGraff, Foy, Holt-Harris & Mealey (By Kirk M. Lewis) and Hancock & Estabrook (By Stewart F. Hancock, Jr.) for Respondent

The respondent, John L. Bell, a judge of the Court of Claims, was served with a Formal Written Complaint dated March 23, 1994, alleging that he served as an officer and director of two corporations organized for profit while sitting as a full-time judge and that he failed to disclose his interest in the corporations on ethics forms. Respondent filed an answer dated August 16, 1994.

On June 23, 1995, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On June 29, 1995, the Commission considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Court of Claims since July 15, 1991. Before becoming a full-time judge, he practiced law in Plattsburgh and was a judge of the Plattsburgh City Court for 12 years.

2. In 1975, respondent became a shareholder in Norpco Restaurant, Inc., a close corporation which owned and operated the Butcher Block Restaurant in Plattsburgh. Respondent, Gerald Everleth and Roy Clark each owned 20% of the shares, and David White owned 40%. Mr. White was to operate the restaurant. Respondent was to perform any legal work. The four stockholders of the corporation were its directors. Mr. White was president; Mr. Everleth was vice president; Mr. Clark was treasurer, and respondent was secretary.

3. Beginning in the late 1970s and continuing through early 1992, respondent received

payments of $1,000 per month which were denominated as salary as secretary of the corporation. In addition, he received year-end bonuses in varying amounts, depending on profits. Respondent's total payments bore no relationship to his services to the corporation. Norpco never declared a dividend.

4. In 1982, Mr. White decided to build another Butcher Block restaurant outside of Albany and invited respondent to participate. Respondent prepared the incorporation papers for Butcher Block of Albany, Inc., and was issued approximately 7% of its stock. Mr. White received the majority of the stock, and Mr. Everleth and Mr. Clark were issued the remaining shares.

5. Respondent was to perform the legal work for Butcher Block of Albany and was elected a director and secretary. This corporation never declared a dividend; annual distributions were made in the form of bonuses.

6. In 1989, Mr. White purchased the Norpco stock of Mr. Everleth and Mr. Clark, leaving Mr. White and respondent as the remaining shareholders, officers and directors. In 1990, Mr. White bought the other shareholders' interests in Butcher Block of Albany, again leaving him and respondent as the only shareholders, officers and directors.

7. In the Fall of 1990, respondent applied for a position as a judge of the Court of Claims. On June 25, 1991, he was nominated by the governor and was sworn in on July 15, 1991.

8. After he became a full-time judge, respondent failed to resign from either corporation and continued to collect his monthly salary as secretary of Norpco. He had no involvement in the operation of the restaurants, however, and he performed no services for either corporation except as secretary at a shareholders' meeting in March 1992. He continued to receive monthly profit-and-loss statements for both corporations after he became a full-time judge.

9. In late Summer or early Fall of 1991, Mr. White offered to purchase respondent's stock in the two corporations. He presented an offer based on an accounting firm's appraisal of Norpco. Respondent replied that it was inadequate.

10. By letter dated January 27, 1992, to Mr. White, respondent asked for meetings of both corporations. He suggested that a new accounting firm be retained, and he stated that he did not wish to be an officer or director of any corporation with Mr. White.

11. Mr. White then called meetings of both corporations for the purposes of amending the by-laws to eliminate the requirement that directors be shareholders and of accepting respondent's resignation as officer and director.

12. On March 7, 1992, special meetings of both corporations were held. At the Norpco meeting, respondent acted as secretary. He opposed the motion to amend the by-laws but was outvoted by Mr. White. Mr. White acknowledged receipt of respondent's "resignation." Respondent insisted that his letter of January 27 did not constitute a resignation and that he would only resign if he and Mr. White could agree upon a successor. Mr. White then nominated himself and Roy Clark as directors; respondent nominated two persons other than himself. Mr. White's motion carried.

13. The special meeting of Butcher Block of Albany was then convened. Mr. White made the motion to amend its by-laws; respondent declared that he would not oppose it but would not take any "affirmative steps." Mr. White nominated himself and Mr. Clark as directors. Respondent did not oppose the motion, stating, "You will be doing what you wish to do, anyhow."

14. After respondent received notice of special meetings to vote on a plan to merge the corporations, he brought an Order to Show Cause on March 13, 1992, and sought to enjoin the meetings and the merger. The meetings were temporarily enjoined but were conducted on August 3, 1992. The merger was purportedly approved on the strength of Mr. White's voting shares.

15. Respondent then brought a second lawsuit against Mr. White and the corporation. He claimed several million dollars in damages for alleged fraud by Mr. White, and he demanded that the merger be annulled. The filing of the lawsuit attracted publicity, in which respondent's status as a judge was mentioned.

16. Respondent received a total of $24,000 from Norpco in 1991, consisting of $1,000 per month in salary and a $12,000 bonus paid in the Fall of 1991.

17. Although respondent was aware that the Rules Governing Judicial Conduct prohibit a full-time judge from being a managing or active participant in a business enterprise organized for profit, he did not resign from the corporations after he took the bench because he believed that, inasmuch as he was not active in either corporation and was not performing any service as secretary, he was not in violation.

As to Charge II of the Formal Written Complaint:

18. On April 14, 1992, respondent filed with the Chief Clerk of the Court of Claims a letter purporting to disclose non-judicial compensation for 1991. The letter does not clearly disclose that he was an officer of Norpco Restaurant, Inc., at the same time that he served as a full-time judge. It conveyed the impression that his $24,000 in compensation from Norpco was earned prior to his becoming a judge in July 1991.

19. On May 8, 1992, respondent filed with the Ethics Commission for the Unified Court System a financial disclosure statement for 1991, as required by law. Respondent disclosed that he was secretary of Norpco and of Butcher Block of Albany, Inc., but failed to state that he was also a director of the corporations. When the disclosure form was returned to him for clarification of another item, he clarified that item but did not correct the form to indicate that he was a corporate director.

20. On May 11, 1993, respondent filed a financial disclosure statement for 1992. He failed to disclose that, from January 1 to May 7, 1992, he was an officer and director of the two corporations and that he had received payments from Norpco from January through April 1992. On August 5, 1993, respondent filed a corrected financial disclosure statement for 1992; he listed his status as secretary and director of the corporations but did not disclose his compensation.

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), 100.5(c)(2) and 100.6(c), and Canons 1, 2A and 5C(2) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

"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...." (Rules Governing Judicial Conduct, 22 NYCRR 100.5[c][2]).

This language explicitly prohibited respondent from serving as secretary and a director of Norpco Restaurant, Inc., and Butcher Block of Albany, Inc., after he became a full-time judge. The prohibitions against business activity are "straightforward and unequivocal...." (Matter of Bayger, 1984 Ann Report of NY Commn on Jud Conduct, at 62, 66; see also, Matter of Intemann v State Commission on Judicial Conduct, 73 NY2d 580, 581).

A judge must report annually the nature and amount of extra-judicial compensation to the clerk of the court (Rules Governing Judicial Conduct, 22 NYCRR 100.6[c]) and to the Ethics Commission for the Unified Court System (Judiciary Law §211[4]; Rules of the Chief Judge, 22 NYCRR 40.2). Respondent's failure to accurately and fully disclose his role in the corporations and his receipt of substantial income during 1991 and 1992 violated the law and constituted judicial misconduct. (See, Matter of Moynihan v State Commission on Judicial Conduct, 80 NY2d 322, 325; Matter of Katz, 1985 Ann Report of NY Commn on Jud Conduct, at 157, 160-61, 165; Matter of Dier, unreported [Commn on Jud Conduct, July 14, 1995]).

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

Mr. Berger, Mr. Cleary, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample and Judge Thompson concur.

Mr. Coffey did not participate.

Ms. Barnett was not present.

Dated: September 22, 1995

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

BERNARD M. BLOOM,

Surrogate, Kings County.

APPEARANCES:

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

Jerome Karp for Respondent

The respondent, Bernard M. Bloom, judge of the Surrogate's Court, Kings County, was served with a Formal Written Complaint dated January 11, 1994, alleging that he knowingly gave inaccurate testimony in an attorney disciplinary proceeding involving a court employee. Respondent did not answer the Formal Written Complaint.

On June 9, 1994, 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 by Judiciary Law §44(4) and stipulating that the Commission make its determination based on the Formal Written Complaint and the agreed upon facts. The Commission approved the agreed statement by letter dated June 10, 1994.

Both parties submitted memoranda as to sanction. By letter dated July 25, 1994, the Commission offered the parties the opportunity to supplement their memoranda. The administrator submitted additional papers on August 5, 1994, and respondent supplemented his papers in a memorandum dated August 23, 1994, and a letter dated September 9, 1994.

On November 22, 1994, 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 judge of the Surrogate's Court, Kings County, since January 1, 1977.

2. Respondent has known Irwin Rosenberg for more than 25 years. Respondent and Mr. Rosenberg were employed simultaneously at one time in the law firm of respondent's late brother. Mr. Rosenberg became a full-time employee of the Surrogate's Court, Kings County, in 1966. From 1979 to 1983, he served as respondent's principal law assistant, and, from 1983 to May 10, 1993, he was chief law assistant.

3. On December 19, 1990, the Grievance Committee for the Second and Eleventh Judicial Districts began a disciplinary proceeding against Mr. Rosenberg for practicing law in state courts without applying for and receiving prior approval from the Chief Administrator of the Courts, as required by the Rules of the Chief Judge, 22 NYCRR 25.40. Mr. Rosenberg was also accused of concealing his involvement in cases in which he acted as a private attorney and other acts of misconduct.

4. On June 17, 1992, respondent testified, pursuant to subpoena, in the disciplinary proceeding as a witness for Mr. Rosenberg. As well as giving favorable character testimony on behalf of Mr. Rosenberg, respondent testified that:

a) he had given Mr. Rosenberg and other court employees permission from "time to time" to appear in uncontested matters in Surrogate's Court;

b) respondent had the sole authority to give his court employees permission to practice in the courts;

c) it was a common practice for employees of respondent's court to practice in the courts in uncontested matters without seeking the permission of the Chief Administrator; and,

d) in granting such permission, respondent is not subject to the Rules of the Chief Judge.

5. At the time that he gave such testimony, respondent:

a) knew that he had never given Mr. Rosenberg permission to practice law in any court;

b) knew that he had never given Mr. Rosenberg explicit permission to act as executor in an estate;

c) knew that he had given permission to only one court employee to act as executor in an estate more than 17 years earlier;

d) had no knowledge that Mr. Rosenberg had handled any case in any court other than as executor in two cases in respondent's court;

e) knew that the Rules of the Chief Judge applied to respondent's court;

f) knew that 22 NYCRR 25.40 bars the practice of law by Surrogate's Court employees unless they have permission of the Chief Administrator of the Courts;

g) knew that he had no authority to give such permission; and,

h) did not know of any instances in which employees of the court had practiced law.

6. Respondent knew at the time that he testified that his statements were inaccurate. Nevertheless, he reiterated these inaccurate statements numerous times during his testimony and failed to correct them.

7. Respondent testified that he would continue to give lawyer-employees of the court permission to handle cases, even though he knew that he had no authority to do so.

8. Respondent gave inaccurate testimony to the grievance committee for the purpose of assisting Mr. Rosenberg's defense of the charges against him.

Supplemental findings:

9. On September 13, 1993, respondent testified during the investigation of his conduct by the Commission. He testified truthfully during this proceeding and acknowledged that his testimony before the grievance committee was, in part, wrong.

10. Respondent must retire from the bench on December 31, 1996, because he will reach the age of 70 in 1996.

11. Respondent apologizes for his actions during the grievance committee hearing.

12. Respondent has contributed his time and efforts to numerous worthy causes during his career.

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 is sustained, and respondent's misconduct is established.

Respondent was clearly attempting to assist his associate of longstanding by giving the grievance committee inaccurate information that would tend to mitigate Mr. Rosenberg's conduct. Under oath, respondent stated that Mr. Rosenberg, a full-time court employee, had respondent's permission to practice law and that respondent was legally authorized to give such permission in his court, even though he knew that Mr. Rosenberg had never sought or been given such permission and that, in any event, only the Chief Administrator of the Courts was empowered to grant it.

"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).

A review of the law of judicial discipline in this state shows that the courts and this Commission have imposed a variety of sanctions in cases concerning deception by judges, depending on the circumstances and other conduct involved. For example, a judge's testimony in defense of other conduct has been held to necessitate removal when it is not believed, even though the underlying conduct would have resulted in a less severe sanction. (See, e.g., Matter of Perry, 53 AD2d 882 [2d Dept]; Matter of Mossman, 1992 Ann Report of NY Commn on Jud Conduct, at 59, 62). In other cases, judges were censured or admonished, even though they were found to have given testimony lacking in candor. (See, e.g., Matter of MacAffer, 2 Commission Determinations 347; Matter of McGee, 1985 Ann Report of NY Commn on Jud Conduct, at 176). In some cases, judges have been removed on findings of deception that significantly compounded other misconduct, even though they had not engaged in false swearing. (See, Matter of Greenfeld v State Commission on Judicial Conduct, 71 NY2d 389; Matter of Myers, supra; Matter of White, 1987 Ann Report of NY Commn on Jud Conduct, at 153). However, in a recent case, a judge was censured on a charge that he made a false statement under oath in a grievance committee proceeding. (Matter of Barlaam, 1995 Ann Report of NY Commn on Jud Conduct, at 105).

In this case, there are a number of mitigating circumstances which support a sanction less than removal. While obviously misleading and designed to aid Mr. Rosenberg's defense, respondent's statements were largely exaggerations of his own authority. He had expected to give only character testimony when called on Mr. Rosenberg's behalf; his remarks, he now admits, were made from pique and arrogance but were not the result of careful and considered calculation. (See, contra, Matter of Heburn v State Commission on Judicial Conduct, 84 NY2d 168, 171; Matter of Mazzei v State Commission on Judicial Conduct, 81 NY2d 568, 572).

Respondent's action, though clearly serious misconduct, was not motivated by selfish interests. (See, contra, Matter of Heburn, supra; Matter of Mazzei, supra; Matter of Bailey v State Commission on Judicial Conduct, 67 NY2d 61; Matter of Sashin, 1980 Ann Report of NY Commn on Jud Conduct, at 131).

We also note that respondent has been forthcoming, cooperative and contrite in the proceeding before this Commission. (See, Matter of LaBelle v State Commission on Judicial Conduct, 79 NY2d 350, 363; Matter of Rath, 1990 Ann Report of NY Commn on Jud Conduct, at 150, 152). His age and experience on the bench must be taken into account. (See, Matter of Edwards v State Commission on Judicial Conduct, 67 NY2d 153, 155; Matter of Agresta, 1985 Ann Report of NY Commn on Jud Conduct, at 109, 111, accepted, 64 NY2d 327; see also, Matter of Quinn v State Commission on Judicial Conduct, 54 NY2d 386, 395).

"Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances. Indeed, we have indicated that removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment. [Citations omitted]." (Matter of Cunningham v State Commission on Judicial Conduct, 57 NY2d 270, 275). Respondent exhibited extremely poor judgment in attempting to assist Mr. Rosenberg by giving misleading testimony to the grievance committee. In the absence of mitigating circumstances, removal would be appropriate for such conduct. (Matter of Heburn, supra). But, as we recently decided in a markedly similar case (Matter of Barlaam, supra), in the presence of mitigating circumstances, censure is adequate.

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

Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Berger and Judge Newton dissent as to sanction only and vote that respondent be removed from office.

Mr. Sheehy was not present.

Ms. Crotty and Mr. Sample were not members of the Commission when the vote in this matter was taken.

Dated: January 20, 1995

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

BERNARD M. BLOOM,

Surrogate, Kings County.

DISSENTING OPINION
BY MR. BERGER,
IN WHICH
JUDGE NEWTON JOINS

In the case law of this state, deception by judges most commonly involves a lack of candor in responding to accusations of other misconduct. The courts and this Commission have treated testimony that "lacks the ring of truth" as an aggravating circumstance, usually resulting in removal or censure. (See, e.g., Matter of Gelfand v State Commission on Judicial Conduct, 70 NY2d 211, 215; Matter of Loper, 1985 Ann Report of NY Commn on Jud Conduct, at 172, 174). The Court of Appeals has cautioned that lack of candor should not be considered aggravating if it "unfairly deprives an investigated Judge of the opportunity to advance a legitimate defense." The Court noted that the severe sanction of removal is reserved for cases in which a judge "gave patently false explanations...despitecontrary objective proof." (Matter of Kiley v State Commission on Judicial Conduct, 74 NY2d 364, 370).

In some cases, judges have been charged, as a separate act of misconduct, with giving misleading information under oath. Where sustained, only two such cases have resulted in a sanction less than removal. In Matter of Garvey (1982 Ann Report of NY Commn on Jud Conduct, at 103), a judge signed his wife's name to an application for a racing license, which he then had notarized by a court employee and filed with a state agency. He was censured on the basis of this and other conduct. In the recent Matter of Barlaam (1995 Ann Report of NY Commn on Jud Conduct, at 105), we censured a judge who misled a grievance committee investigating his conduct as a lawyer. Judge Barlaam had told the committee that he had advised the executor of an estate that the decedent's will had not been admitted to probate, when, in fact, he had said that the matter had been admitted to probate. The determination noted that Judge Barlaam had already been censured by the grievance committee, so there was no reason for the public to perceive that he was going unpunished or that the matter had been suppressed.

Barlaam is one of only five cases in which false swearing by a judge constituted the primary basis for discipline. The other four resulted in the removal of the judges involved. In Matter of Sashin (1980 Ann Report of NY Commn on Jud Conduct, at 131), a judge testified falsely before a grand jury on two occasions. Although he was subsequently convicted of perjury, the Commission found that he should be removed on the basis of the false testimony alone, irrespective of the convictions. "The very essence of judicial office in the administration of justice is corrupted by a judge who lies under oath. The consequent ebb of public confidence in the integrity of the judicial system is immeasurable." (Matter of Sashin, supra, at 134). In Matter of Bailey v State Commission on Judicial Conduct (67 NY2d 61), a judge was removed after he falsely certified applications for hunting licenses in the names of other people as part of a scheme to increase the number of deer beyond the legal limit that his hunting party could kill. He had been convicted of a misdemeanor. In Matter of Mazzei v State Commission on Judicial Conduct (81 NY2d 568), a judge signed his deceased mother's name to applications for a credit card and requested a user's card in his own name, used the card and then misled investigating bank officials by implying that his mother was alive. Judge Mazzei was removed. "Falsification of documents is inimical to the character

required of a Judge." (Matter of Mazzei, supra, at 572). The Court also removed a judge who falsely swore on designating petitions that he had personally witnessed signatures nominating him for re-election, when, in fact, others had collected the signatures. (Matter of Heburn v State Commission on Judicial Conduct, 84 NY2d 168).

I believe that respondent's false testimony more closely resembles the deception of the judges in the Sashin, Bailey, Mazzei and Heburn cases than it does that of Judge Barlaam or Judge Garvey or those whose testimony in their own defense was disbelieved by the Commission or the courts. Respondent intentionally and repeatedly told a series of untruths calculated to mislead the grievance committee and to obstruct its proceeding against Mr. Rosenberg. Unlike Judge Barlaam, respondent testified falsely as to a number of facts, reiterated the misstatements several times and has not already been disciplined for his improper conduct.

"A judicial officer who has so little regard for...the obligations of a witness...is not a fit person to administer oaths and cannot be trusted to faithfully uphold the laws." (Matter of Heburn, supra, at 171).

There are significant aggravating circumstances in this case. Respondent acknowledges that he knew that he was making inaccurate statements of law and fact. (See, Matter of Heburn, supra). As an experienced lawyer and judge, he should have been especially sensitive to the seriousness of giving false testimony. (Compare, Matter of Bruhn, 1991 Ann Report of NY Commn on Judicial Conduct, at 47, 49). There can be no doubt that he "was conscious of the potential legal ramifications of his actions and...made a concerted effort to conceal the true facts...." (See, Matter of Steinberg v State Commission on Judicial Conduct, 51 NY2d 74, 78[fn]).

Although there are mitigating circumstances, as well, the law of New York has long held that "the giving of false testimony, particularly by a member of the judiciary, is inexcusable. Such conduct on the part of a judicial officer, whose responsibility is to seek out the truth and evaluate the credibility of those who appear before him is not conducive to the efficacy of our judicial process and is destructive of his usefulness on the bench," (Matter of Perry, 53 AD2d 882 [2d Dept]).

I respectfully dissent and vote that the appropriate sanction is removal.

Dated: January 20, 1995

State of New York
Commission on Judicial Conduct

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

Determination

JAMES R. BRADIGAN, SR.,

a Justice of the Villenova Town Court, Chautauqua County.

APPEARANCES:

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

Honorable James R. Bradigan, Sr., pro se

The respondent, James R. Bradigan, Sr., a justice of the Villenova Town Court, Chautauqua County, was served with a Formal Written Complaint dated April 25, 1994, alleging that he presided in court while intoxicated and that he engaged in ex parte communications. Respondent filed an answer dated June 9, 1994.

On August 10, 1994, the administrator of the Commission and respondent entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4) and stipulating that the Commission make its determination based on the Formal Written Complaint and the agreed upon facts. The Commission approved the agreed statement by letter dated September 26, 1994.

The administrator submitted a memorandum as to sanction. Respondent neither submitted a memorandum nor requested oral argument. By letters dated November 28 and December 16, 1994, the Commission solicited further information from respondent. He responded on December 12 and 27, 1994. The administrator replied by letter dated January 4, 1995.

On January 12, 1995, the Commission considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Villenova Town Court since January 1, 1990.

2. On March 11, 1991, Christopher A. Mekus appeared before respondent for a bench trial on charges of Driving While Intoxicated, Driving With Blood Alcohol Content In Excess of .10 Percent, Failure To Keep Right and Criminal Possession Of A Weapon, Fourth Degree.

3. Respondent presided over the bench trial, even though he was intoxicated from the consumption of alcohol.

4. Respondent questioned the defendant, who was seated at counsel table, about the circumstances of his arrest, even though the defendant had not been called as a witness and had not been sworn.

5. Respondent then dismissed the charge of Criminal Possession Of A Weapon, Fourth Degree, and convicted the defendant of the charges of Driving While Intoxicated, Driving With Blood Alcohol Content In Excess of .10 Percent and Failure To Keep Right. He precluded the defendant's attorney from concluding his case.

As to Charge II of the Formal Written Complaint:

6. On July 8, 1993, Mark A. Schindler appeared before respondent on charges of Driving While Intoxicated and Unsafe Turn.

7. Respondent presided over the proceeding, even though he was intoxicated from the consumption of alcohol.

As to Charge III of the Formal Written Complaint:

8. On January 4, 1992, Raymond J. Ortel brought a small claims action for $148 against Robert Stetler in respondent's court. Respondent spoke with Mr. Ortel outside of court concerning the basis for the claim. On January 25, 1992, Mr. Stetler appeared for trial; Mr. Ortel did not appear. Based on his out-of-court discussion with the plaintiff and without holding a trial or swearing or questioning witnesses, respondent awarded Mr. Ortel $148.

9. On May 9, 1992, Karen Cave brought a small claims action for $20 against Andrea Partyka in respondent's court. Respondent spoke with Ms. Partyka outside of court; she presented a defense to the claim and disputed the amount of damages. Respondent also spoke about the substance of the claim with Ms. Partyka's daughter. On May 30, 1992, Ms. Cave appeared for trial; Ms. Partyka was not present. Respondent awarded Ms. Cave $10 and told her that he had assured Ms. Partyka that he would do so, based on his out-of-court discussion with her.

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)(2), 100.3(a)(3) and 100.3(a)(4), and Canons 1, 2A, 3A(2), 3A(3) and 3A(4) of the Code of Judicial Conduct. Charges I, II and III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

While he was intoxicated, respondent presided over two drunk-driving cases on different days. Such gross conduct seriously undermines confidence in the judiciary. Litigants and the public can have little faith in the decisions and judgment of a judge who is under the influence of alcohol. (See, Matter of Aldrich v State Commission on Judicial Conduct, 58 NY2d 279, 282).

Respondent compounded this wrongdoing in one of the cases by eliciting information from a criminal defendant who was not sworn and had not taken the witness stand and by rendering a verdict without according the defendant his full right to be heard. (See, Matter of VonderHeide v State Commission on Judicial Conduct, 72 NY2d 658; Matter of McGee v State Commission on Judicial Conduct, 59 NY2d 870; Matter of Sardino v State Commission on Judicial Conduct, 58 NY2d 286, 290).

It was also improper for respondent to base his decisions in two small claims cases on unsworn, ex parte communications. (See, Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][4]; Matter of Spiehs, 1988 Ann Report of NY Commn on Jud Conduct, at 222; see also, Matter of Loper, 1985 Ann Report of NY Commn on Jud Conduct, at 172).

Despite the gravity of respondent's presiding while intoxicated, we are not convinced that his removal is warranted. His conduct is not as egregious as that of the only other two judges in this state found to have been intoxicated in the courtroom. (Compare, Matter of Aldrich, supra, in which the conduct included vulgar, racial and sexist remarks and the threatening display of a knife; Matter of Wangler, 1985 Ann Report of NY Commn on Jud Conduct, at 241, which included conduct involving persistent financial irregularities in the court).

Furthermore, respondent has submitted documentation that indicates that his conduct may have been the result of alcoholism, a condition which "has had an irregular history in the law and [to which] the proper legal response is still subject to debate and adjustment," (Matter of Quinn v State Commission on Judicial Conduct, 54 NY2d 386, 393). Alcoholism is sometimes considered as an illness which must be treated as a public health problem; in federal employment law, it is recognized as a disability. (See, Matter of Quinn, supra, at 394). The Court of Appeals has suggested that, in judicial disciplinary cases, "When misconduct is the result of alcoholism, retirement for disability may be most appropriate in cases where discretion is called for." (Matter of Quinn, supra, at 393). On the other hand, when the conduct is so egregious as to result in the irretrievable loss of public confidence in a judge, removal is appropriate. (Matter of Aldrich, supra, at 283).

Respondent avers that he has undertaken an in-patient alcohol detoxification program in March 1994 and has abstained from alcohol since that time.

In view of all of the circumstances, we conclude that censure is the appropriate sanction. However, staff is hereby authorized to observe periodically respondent's public court sessions after a three-month interval from the date of this decision, and the Commission will consider authorization of a new investigation and additional charges upon any observation that suggests that respondent is presiding while under the influence of alcohol. This does not constitute "a contingent or probationary penalty conditioned on treatment...." (Contra, Matter of Aldrich, supra, at 282).

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample and Judge Thompson concur.

Mr. Sheehy concurs as to the sanction of censure but dissents insofar as periodic court observation is authorized.

Ms. Crotty was not present.

Dated: March 10, 1995

State of New York
Commission on Judicial Conduct

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

Determination

ANTHONY J. CAVOTTA,

a Justice of the Stillwater Town and Village Courts, Saratoga County.

APPEARANCES:

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

Cade & Saunders, P.C. (By Daniel J. Persing) for Respondent

The respondent, Anthony J. Cavotta, a justice of the Stillwater Town and Village Courts, Saratoga County, was served with a Formal Written Complaint dated February 24, 1994, and an Amended Formal Written Complaint dated June 27, 1994, alleging that he improperly required traffic defendants to attend pre-trial, ex parte conferences. Respondent filed an answer to the Formal Written Complaint on March 14, 1994, and answered the Amended Formal Written Complaint on July 19, 1994.

By order dated April 12, 1994, the Commission designated Vincent D. Farrell, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 2, 1994, and the referee filed his report with the Commission on October 18, 1994.

By motion dated December 14, 1994, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion by cross motion dated February 6, 1995. The administrator filed a reply dated February 15, 1995.

On March 2, 1995, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Amended Formal Written Complaint:

1. Respondent has been a justice of the Stillwater Village Court since 1977. He has been a justice of the Stillwater Town Court since 1983.

2. Until March 1994, respondent routinely required all defendants who had pleaded not guilty by mail to traffic infractions to appear before him for pre-trial "conferences."

3. Vehicle and Traffic Law §1806 requires that a judge set a trial date upon receipt of a not-guilty plea by mail.

4. No prosecuting authority was notified of the pre-trial conferences, and none participated in the proceedings.

5. At the conferences, respondent routinely advised defendants to read the red portion of their traffic tickets which informs them that a guilty plea is the equivalent of a conviction after trial. He again asked them how they wished to plead. Only when they pleaded not guilty would he tell them that they had a right to a trial and that they would have to retain an attorney to represent them if they wished to plea bargain with the District Attorney's Office. Defendants who pleaded guilty were not advised that they had a right to a trial and an attorney.

6. On November 4, 1992, Andrew P. Chouffi was charged with Speeding in the Village of Stillwater. He pleaded not guilty by mail. By letter dated November 27, 1992, respondent directed Mr. Chouffi to appear in court on December 21, 1992. Respondent did not set a trial date, as required by Vehicle and Traffic Law §1806.

7. On December 21, 1992, Mr. Chouffi appeared before respondent without counsel. Neither the arresting officer nor a prosecutor participated in the proceeding. Mr. Chouffi asked to speak to a prosecutor. Respondent said that he could not and suggested that he "get an attorney" if he sought a charge reduction. Respondent adjourned the matter.

8. Mr. Chouffi subsequently hired an attorney who negotiated a plea bargain with the prosecutor.

9. On December 19, 1991, Edmund G. Kapper was charged with Speeding in the Village of Stillwater. He pleaded not guilty by mail. By letter dated December 23, 1991, respondent directed Mr. Kapper to appear in court on January 20, 1992. Respondent did not set a trial date, as required by Vehicle and Traffic Law §1806.

10. On January 20, 1992, Mr. Kapper appeared before respondent without counsel. Neither the arresting officer nor a prosecutor participated in the proceeding.

11. Respondent asked Mr. Kapper how he pleaded. When he said, "Not guilty," respondent asked him why he was pleading not guilty.

12. Mr. Kapper asked whether he needed an attorney. Respondent replied that, if he planned to plea bargain, he would probably need a lawyer.

13. The case was adjourned to March 16, 1992, for trial. On the trial date, Mr. Kapper again appeared without counsel. Respondent again asked Mr. Kapper how he pleaded, and Mr. Kapper repeated his not-guilty plea. Mr. Kapper pointed out a discrepancy between his ticket and the police officer's supporting deposition as to the posted speed limit. Respondent said that he would allow Mr. Kapper to plead guilty to Speeding 13 miles over the limit instead of 23 miles over the limit, as alleged in the supporting deposition. Mr. Kapper refused, and the case was tried. Respondent found him guilty of Speeding 23 miles over the limit.

14. On January 22, 1992, Timothy W. Loftin was charged with Speeding in the Village of Stillwater. He pleaded not guilty by mail. By letter dated March 13, 1992, respondent directed Mr. Loftin to appear in court on April 20, 1992. Respondent did not set a trial date, as required by Vehicle and Traffic Law §1806.

15. On April 20, 1992, Mr. Loftin appeared before respondent without counsel. Neither the arresting officer nor a prosecutor participated in the proceeding.

16. Respondent asked Mr. Loftin how he pleaded. The defendant asked respondent to dismiss the charge because he had not received a supporting deposition within 30 days. Respondent rejected the request.

17. Respondent told Mr. Loftin that he had two choices: to get a lawyer, which would cost "all kinds" of money, or to pay a fine. Mr. Loftin asked respondent again to dismiss the charge. Respondent replied, "That's not one of your choices. You can either get a lawyer and try to plea bargain with the lawyer and have it reduced, or I'll drop the fine."

18. Mr. Loftin decided to plead guilty and pay a fine.

19. On March 18, 1993, Michael V. McKeel was charged with Failure To Stop For A Stop Sign in the Village of Stillwater. He pleaded not guilty by mail. By letter dated May 28, 1993, respondent directed Mr. McKeel to appear in court on June 21, 1993. Respondent did not set a trial date, as required by Vehicle and Traffic Law §1806.

20. On June 21, 1993, Mr. McKeel appeared before respondent without counsel. Neither the arresting officer nor a prosecutor participated in the proceeding.

21. Respondent asked Mr. McKeel what his "problem" was, and Mr. McKeel explained that, because of an ice storm, stopping was difficult on the day that he was charged. Respondent offered to adjourn the charge in contemplation of dismissal, and Mr. McKeel accepted.

22. On December 18, 1992, Lance R. Plunkett was charged with Speeding in the Village of Stillwater. He pleaded not guilty by mail. By letter dated January 15, 1993, respondent directed Mr. Plunkett to appear in court on March 15, 1993. Respondent did not set a trial date, as required by Vehicle and Traffic Law §1806.

23. On March 15, 1993, Mr. Plunkett appeared before respondent without counsel. Mr. Plunkett is a lawyer but never informed anyone at the court of that fact. Neither the arresting officer nor a prosecutor participated in the proceeding.

24. Respondent asked Mr. Plunkett whether there was anything that he wanted to say and inquired as to whether the arresting officer had pursued him. Respondent said that he would have to obtain the officer's version and adjourned the case for trial.

25. On the adjourned date, Mr. Plunkett and a prosecutor negotiated a plea.

26. Respondent abandoned his practice of requiring pre-trial "conferences" in March 1994, after the Commission commenced this proceeding.

As to Charge II of the Amended Formal Written Complaint:

27. On March 15, 1993, Karen A. Rauch appeared before respondent in the Stillwater Village Court on a charge of Failure To Stop For A School Bus. Ms. Rauch pleaded not guilty and told respondent that she did not intend to retain an attorney.

28. Respondent asked her to explain what had happened. Without being sworn, Ms. Rauch explained the circumstances. Neither the arresting officer nor a prosecutor was present, and no witnesses gave testimony.

29. Respondent then declared that the fine was $50 and Ms. Rauch had 30 days to pay it. He marked the court's copy of the ticket, "4/19/93 to pay fine $50.00."

30. Ms. Rauch complained to the Office of Court Administration, and the case was subsequently transferred to 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(a), 100.3(a)(1) and 100.3(a)(4), and Canons 1, 2A, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charges I and II of the Amended Formal Written Complaint are sustained, and respondent's misconduct is established.

Instead of immediately scheduling a trial as the law requires when a defendant in a traffic case pleads not guilty by mail (see, Vehicle and Traffic Law §1806), respondent routinely required defendants to appear for unauthorized, ex parte "conferences."

The coercive nature of these proceedings is illustrated by the five specifications of Charge I. No prosecuting authority appeared, and unrepresented defendants were told that they would have to hire attorneys at their expense in order to negotiate a plea or return to court at their inconvenience in order to obtain a trial. The defendants were repeatedly asked to restate their pleas and, on occasion, were asked to explain why they were pleading not guilty. In two of the cases, respondent offered to reduce the charge or grant an adjournment in contemplation of dismissal in order to dispose of the matter. In these circumstances, the defendants could have had little doubt that respondent wanted the matter concluded without a trial.

Even if, as he contends, he did not intend to coerce pleas by these measures, respondent should have known that defendants charged with minor infractions, carrying the likelihood of only small fines, would often choose to plead guilty rather than go to the expense of hiring an attorney or the inconvenience of returning to court.

Requiring such proceedings on a regular basis constitutes judicial misconduct (Matter of Masner, 1990 Ann Report of NY Commn on Jud Conduct, at 133, 134), and the Commission has warned that such a requirement is contrary to law, an unnecessary burden on defendants and per se coercive (see, "Coercion of Pleas in Traffic Cases," 1990 Ann Report of NY Commn on Jud Conduct, at 43-44).

Respondent's misconduct is compounded by his handling of Rauch, in which he convicted the defendant without a plea or trial. (See, Matter of McGee v State Commission on Judicial Conduct, 59 NY2d 870; Matter of Curcio, 1984 Ann Report of NY Commn on Jud Conduct, at 80).

In determining sanction, we have taken into consideration that respondent has discontinued requiring his improper pre-trial conferences. (See, Matter of LaBelle v State Commission on Judicial Conduct, 79 NY2d 350, 363; Matter of Wood, 1991 Ann Report of NY Commn on Jud Conduct, at 82, 87).

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sheehy and Judge Thompson concur.

Mr. Sample was not present.

Dated: May 3, 1995

State of New York
Commission on Judicial Conduct

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

Determination

JOHN G. DIER,

a Justice of the Supreme Court, 4th Judicial District, Warren County.

APPEARANCES:

Gerald Stern for the Commission

Sise & Sise (By Robert J. Sise) for Respondent

The respondent, John G. Dier, a justice of the Supreme Court, 4th Judicial District, was served with a Formal Written Complaint dated November 14, 1994, alleging that he defied appellate authority and created the appearance that he is biased and arbitrary, that he refused to disqualify himself in a case in which he had had a personal dispute with one of the parties and that he failed to fully disclose his income and liabilities on ethics forms. Respondent filed an answer dated December 2, 1994.

On April 12, 1995, 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 by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On April 27, 1995, the Commission considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Supreme Court since January 1980. He has been a judge since 1957, first in the Lake George town and village courts and later in the Warren County family, county and surrogate's courts.

2. Since 1985, respondent has repeatedly issued dispositive orders without making findings of fact or setting forth his reasoning, contrary to CPLR 4213(b) and even though the Appellate Division, Third Department, in Niagara Mohawk v Peryea on October 10, 1985, criticized respondent's decision in the lower court, stating, "The statement of essential facts may not be waived or dispensed with since it is necessary to insure a proper adjudication in the trial court and adequate appellate review [citation omitted]." The case was remitted to respondent for "detailed findings as to how the damages were calculated [citation omitted]."

3. The Appellate Division further criticized respondent for similar omissions in Buchwald v Waldron on June 13, 1991; Ireland v Queensbury Zoning Board on June 27, 1991; C.R. Drywall, Inc. v Wade Lupe Construction Corp. on November 21, 1991; Beverina v West on July 29, 1993; Dupell v Levesque on November 18, 1993; and, Brender v Brender on December 9, 1993. On April 2, 1992, in Schulz v Warren County Board of Supervisors, the Appellate Division noted that respondent "gave no rationale for [his] determination, either in written form or on the record, a practice this court has discouraged in the past [citation omitted] and one which we are disturbed to see reoccur, especially in a factually and procedurally complex case such as the one at bar." The court advised respondent, "Such a practice not only deprives this court of the benefit of Supreme Court's rationale, but also conveys, especially to pro se litigants, the impression that their efforts to studiously prepare their case were not worthy of comment. Moreover...it can also give the impression of bias." On December 9, 1993, in New York TRW Title Insurance v Wade's Canadian Inn and Cocktail Lounge, Inc., the court wrote, "We note, again, our displeasure with Supreme Court's continued disregard of our comments regarding the issuance of written decisions." On December 30, 1993, in Flynn v Timms, the Appellate Division remarked that respondent had denied motions without a written decision and said, "We cannot emphasize too strenuously our displeasure with Supreme Court Justices who, despite admonitions, continue to decide cases without written decisions."

4. In testimony during the Commission's investigation of this matter on March 2, 1994, respondent stated that he intends to continue writing decisions only in "complicated" matters in which he reserves decision. In other cases, he intends to continue to rule from the bench without making written findings or setting forth his reasoning, respondent testified.

5. On March 23, 1989, in W.I.L.D. W.A.T.E.R.S., Ltd. v Martinez, the Appellate Division, Third Department, reversed respondent's decision in the lower court, in part because respondent had refused to accept and consider answering papers of one of the defendants, even though the papers had been timely served. The court stated, "Had Supreme Court considered the opposing papers...a preliminary injunction would undoubtedly have been found inappropriate inasmuch as plaintiff is unlikely to succeed on the merits [citation omitted]."

6. Since the Martinez decision in 1989, respondent has repeatedly refused and says that he will continue to refuse to accept reply papers on the day of oral argument with respect to contested motions, even though the papers were served within the permissible time period.

As to Charge II of the Formal Written Complaint:

7. In March 1986, respondent was involved in a heated verbal confrontation with Robert D. Leombruno, Sr., who lived near respondent. Respondent was questioned by the police in connection with the incident.

8. Thereafter, a matrimonial action in which Mr. Leombruno was a party was assigned to respondent for trial. Mr. Leombruno's attorney asked respondent to recuse himself from the case. On July 1, 1988, respondent denied the motion. Mr. Leombruno appealed, and the Appellate Division, Third Department, reversed, ruling, "Defendant's allegations and documentary evidence raise serious questions as to the relationship between Justice Dier and defendant which could easily be interpreted by some as affecting the Justice's impartiality. Accordingly, Justice Dier should have disqualified himself...."

As to Charge III of the Formal Written Complaint:

9. On February 19, 1993, respondent filed with the Ethics Commission for the Unified Court System a financial disclosure statement required by Judiciary Law §211(4) and the Rules of the Chief Judge, 22 NYCRR 40.2. Respondent failed to fully disclose his income and liabilities for 1992, in that he:

a) failed to disclose that he was co-mortgagor of another individual's property and that his own property was collateral security on the mortgage; and,

b) failed to disclose income from rental property that he owned.

10. After he was questioned by the Ethics Commission, respondent disclosed his 1992 income and liabilities on an amended financial disclosure statement filed on August 18, 1993.

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), 100.3(a)(4) and 100.3(c)(1), and Canons 1, 2A, 3A(1), 3A(4) and 3C(1) of the Code of Judicial Conduct. Charges I, II and III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

In the performance of adjudicative responsibilities, a judge must "be faithful to the law and maintain professional competence in it." (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][1]). For a trial judge, the law is comprised of both statutes and appellate directives.

Statutory law (CPLR 4213[b]) and numerous decisions of the Appellate Division, Third Department, required respondent to make a record of his findings of fact and the reasoning for his rulings in civil cases. Notwithstanding the repeated and numerous directives of the appellate court in appeals of respondent's cases, he refused to comply with this requirement. The willful refusal to abide by appellate authority is sanctionable misconduct (Matter of Bolte, 97 AD 551, 574-75 [1st Dept]; see generally, Matter of Jutkofsky, 1986 Ann Report of NY Commn on Jud Conduct, at 111, 126-27; Matter of Leff, 1983 Ann Report of NY Commn on Jud Conduct, at 119).

By his continued refusal to state his reasons for his decisions, respondent has created the appearance that he is biased and arbitrary, has impaired appellate review and has wasted the resources of the judiciary and the litigants.

Even in light of the Appellate Division's rebukes and its clear explanations of the importance of making such findings and even in the face of an investigation by this Commission, respondent has insisted that he will persist in his refusal to make a proper record. This compounds his wrongdoing. (See, Matter of Sims v State Commission on Judicial Conduct, 61 NY2d 349, 357; Matter of Shilling v State Commission on Judicial Conduct, 51 NY2d 397, 404). Continued defiance of appellate authority and of the law he is sworn to administer may lead us to determine that respondent is not fit to be a judge.

At this time, we conclude that censure is an adequate sanction, even in view of respondent's prior record of misconduct (see, Matter of Dier v State Commission on Judicial Conduct, 48 NY2d 874; Matter of Dier, 1994 Ann Report of NY Commn on Jud Conduct, at 60) and of the other misconduct established in this record (findings 5 through 10, supra).

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury and Mr. Sample concur.

Mr. Coffey and Judge Thompson were not present.

Dated: July 14, 1995

State of New York
Commission on Judicial Conduct

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

MICHAEL FRATI,

Determination

a Justice of the New Baltimore Town Court, Greene County.

APPEARANCES:

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

McNamee, Lochner, Titus & Williams, P.C. (By David J. Wukitsch) for Respondent

The respondent, Michael Frati, a justice of the New Baltimore Town Court, Greene County, was served with a Formal Written Complaint dated August 4, 1994, alleging that he made certain statements indicating bias and prejudgment in a civil case. Respondent filed an answer dated August 31, 1994.

On November 22, 1994, 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 by 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 censured and waiving further submissions and oral argument.

On January 12, 1995, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the New Baltimore Town Court since 1989.

2. On December 29, 1993, respondent conducted a pre-trial conference in Lee Adler v Kevin Kemnah, in which the plaintiff claimed damages for breach of contract and negligence based on the defendant's alleged release of the plaintiff's cattle.

3. Based on ex parte information, respondent dismissed Mr. Adler's claim, sua sponte, without hearing any witnesses or conducting a trial.

4. Respondent stated:

a) that he had been observing the situation in the agricultural community and had done "research" on other, unrelated legal actions by Mr. Adler;

b) that a "cry was raised up in the community" with respect to Mr. Adler and his cattle and that respondent had heard the "cry" and could not ignore it;

c) that, based on his knowledge of other, unrelated court matters involving Mr. Adler and his cattle, respondent believed that the claim against Mr. Kemnah was an attempt by the plaintiff to use the court as an "instrument of oppression and harassment" against his neighbors;

d) that, because of unwritten "codes of honor" in New Baltimore of more than 100 years standing, no one had ever brought an action against a neighbor concerning cattle; and,

e) that respondent felt that Mr. Adler's claim was not in the "spirit" of these unwritten codes.

5. Respondent suggested that Mr. Adler was a "negligent" farmer.

6. Pursuant to UJCA 1810, respondent ordered that Mr. Adler was not permitted to file any court action, civil or criminal, in respondent's court without a review of the merits and approval of the court, even thought UJCA 1810 applies only to small claims cases and even though respondent had no basis for such an order.

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)(1) and 100.3(a)(4), and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

The ability to be impartial and to appear impartial is an indispensable requirement for a judge. (Matter of Sardino v State Commission on Judicial Conduct, 58 NY2d 286, 290). In Adler v Kemnah, respondent abandoned his proper role as a neutral and detached magistrate (see, Matter of Wood, 1991 Ann Report of NY Commn on Jud Conduct, at 82, 86) and conveyed the impression that he was biased and had prejudged the case.

He also made it appear that he was influenced by community hostility toward Mr. Adler. "A judge shall be unswayed by partisan interests, public clamor, or fear of criticism." (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][1]).

Based on ex parte information and what he perceived as the "cry" of the community, respondent denied Mr. Adler the opportunity to be heard and dismissed his claim without hearing any evidence at all. (See, Matter of Loper, 1985 Ann Report of NY Commn on Jud Conduct, at 172; Matter of Wilkins, 1986 Ann Report of NY Commn on Jud Conduct, at 173; Matter of Edwards, 1987 Ann Report of NY Commn on Jud Conduct, at 85).

Respondent furthered this impression of bias and failed to follow the law by misapplying a procedure applicable only to small claims cases and telling Mr. Adler that he could not file any future civil or criminal actions without the permission of the court. (Compare, Matter of Zapf, 1988 Ann Report of NY Commn on Jud Conduct, at 251).

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample and Mr. Sheehy did not participate.

Ms. Crotty was not present.

Dated: January 20, 1995

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

LESTER C. HAMEL,

a Justice of the Champlain Town Court, Clinton County.

APPEARANCES:

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

Niles & Cardany (By John F. Niles) for Respondent

The respondent, Lester C. Hamel, a justice of the Champlain Town Court, Clinton County, was served with a Formal Written Complaint dated September 8, 1994, alleging that he improperly jailed two defendants for failure to pay restitution and that he improperly sentenced to jail defendants charged with marijuana violations. Respondent filed an answer dated October 13, 1994.

By order dated October 24, 1994, the Commission designated the Honorable C. Benn Forsyth as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 28, 1994, and the referee filed his report with the Commission on February 8, 1995.

By motion dated March 31, 1995, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent had engaged in judicial misconduct. Respondent did not file any papers in response thereto.

By determination and order dated July 14, 1995, the Commission made the findings of fact enumerated below. The administrator and respondent then filed memoranda as to sanction. Oral argument was waived.

On August 31, 1995, the Commission considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Champlain Town Court for more than 30 years. He has also served in the past as a justice of the Champlain Village Court and as acting justice of the Rouses Point Village Court.

2. On September 11, 1989, Dale R. Ashline appeared before respondent on a charge of Unauthorized Use Of A Motor Vehicle. He pleaded guilty, and respondent fined him $100 plus a $67 surcharge. Respondent told Mr. Ashline that he would have to pay the complaining witness, Stephen Buskey, restitution for damages to Mr. Buskey's vehicle. Respondent did not give Mr. Ashline any written record of the restitution obligation. Respondent made no court record of the restitution, contrary to UJCA 2019-a and the Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23.

3. Mr. Ashline's mother, Thelma Garber, paid the fine and surcharge in three installments in October 1989 and received court receipts from respondent.

4. After her son was arraigned, Ms. Garber received an estimate, indicating that Mr. Ashline's restitution was $271.12.

5. Ms. Garber made four restitution payments to respondent in cash: two payments of $50 each; a third of $71.12, and a final payment of $100 on March 14, 1990. Respondent gave Ms. Garber a handwritten receipt for each payment on a small piece of yellow paper. He made no court record of the receipt of the restitution, contrary to Town Law §31(1)(a) and the Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23(3). He did not deposit the money in his court account, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a); he turned the cash over to Mr. Buskey.

6. Subsequently, outside of court, Mr. Buskey told respondent that he had not received any restitution. Based on this claim, respondent issued, on August 30, 1993, a bench warrant for Mr. Ashline's arrest on the purported basis that Mr. Ashline had failed to appear in court on September 25, 1989, even though respondent's court docket shows that no court appearance was ever scheduled for September 25.

7. Mr. Ashline was arrested on the bench warrant on September 12, 1993, and brought before respondent. Respondent told Mr. Ashline that he had failed to pay the fine and restitution four years earlier and that he was going to jail. Respondent did not advise Mr. Ashline of his right to be resentenced if he could not afford to pay the fine or the restitution, as required by CPL 420.10(3).

8. Mr. Ashline and his mother, who was also present, maintained that the money had been paid. Relying solely on Mr. Buskey's representations, respondent insisted that the money had not been paid and summarily sentenced Mr. Ashline to 15 days in jail for Contempt of Court.

9. Mr. Ashline indicated that he wanted to retain an attorney. Respondent did not offer him an opportunity to make a telephone call or grant an adjournment of the proceeding.

10. Respondent told Mr. Ashline that if he did not pay the restitution, he would face another jail term. Respondent acknowledges that he intended at the time to continue incarcerating Mr. Ashline until the restitution was paid.

11. Ms. Garber returned to her home and found respondent's handwritten receipt for her final restitution payment on March 14, 1990. She called respondent, but he refused to release Mr. Ashline because the receipt had not been marked "paid in full."

12. On September 13, 1993, Ms. Garber and her daughter, Penny Ashline, met with respondent. Ms. Ashline asked whether her brother would be released if she paid his restitution. Respondent refused to do so.

13. After Mr. Ashline was released, he received a letter from respondent, dated September 30, 1993, indicating that he had until October 18, 1993, to pay $171.12 to Mr. Buskey and that, if he failed to do so, he would again be charged with Contempt of Court.

14. Mr. Ashline retained a lawyer, Timothy J. Lawliss, who, by letter to respondent dated October 6, 1993, demanded an evidentiary hearing with regard to the issue of whether restitution had been paid. Respondent ignored the letter and did not schedule a hearing.

15. By decision dated May 3, 1994, Clinton County Court Judge Patrick R. McGill vacated Mr. Ashline's contempt conviction, finding that the bench warrant for his arrest had been improperly issued and that his commitment had been "entered without a hearing and without giving the defendant an opportunity to obtain counsel...."

As to Charge II of the Formal Written Complaint:

16. On July 30, 1990, Monica Gamache pleaded guilty before respondent to a charge of Speeding. Respondent imposed a $100 fine and a $25 surcharge. Ms. Gamache said that she did not have the money and asked whether she could perform community service. Respondent insisted that she pay the fine. He did not advise Ms. Gamache that she could apply to be resentenced if she could not pay the fine and did not make a determination as to whether she could pay the fine, as required by CPL 420.10(3) and (5).

17. On August 27, 1990, Ms. Gamache appeared before respondent on a charge of Issuing A Bad Check. Respondent did not ask her to plead; he merely informed her that she had to pay restitution of $52 for a $40 check, including a bank charge and $2 for a certified letter ordering her to appear in court.

18. Ms. Gamache again asked whether she could do community service instead; respondent refused. He did not advise her that she could apply to be resentenced if she could not afford to pay the restitution and did not determine whether she was able to pay, as required by CPL 420.10(3) and (5). Respondent permitted Ms. Gamache to make installment payments.

19. Respondent did not tell Ms. Gamache that she had to pay a fine. In his docket, he noted a fine of $50.

20. Ms. Gamache went to court periodically and reported that she was looking for a job and intended to pay respondent. At one point, respondent became upset that she had not paid. Ms. Gamache then asked for a lawyer; respondent told her that she had already waived that right. He did not ask whether she could afford an attorney.

21. After he had spoken outside of court to Ms. Gamache's father and had been told that the defendant was drinking in bars "every night," respondent, on June 10, 1991, issued a bench warrant for her arrest on the alleged basis that she had failed to appear in court on May 27, 1991, even though his court docket shows no court appearance scheduled for that date.

22. Ms. Gamache was arrested on June 10, 1991, and was brought before respondent. She told respondent that she had just found a job and would be able to pay what she owed by the following Friday, but respondent said that she was going to jail. He summarily sentenced her to 22 days for Contempt Of Court, apparently for failure to pay the fine. He did not advise her that she could apply to be resentenced if she was unable to pay, as required by CPL 420.10(3).

23. Ms. Gamache contacted friends, who raised more than $200 and took it to respondent. He said that it was "too late" and that Ms. Gamache had to remain in jail.

24. After she was released from jail, Ms. Gamache was notified to appear again before respondent. In court, respondent told her that she still had to pay the Speeding fine and restitution for the bad check. She again said that she did not have the money and asked whether she could perform community service or return to jail instead. Respondent said that he would keep putting her in jail until she paid.

25. Ms. Gamache then began making a series of small payments to respondent. She paid $20 on July 22, 1991; $5 on August 12, 1991; $15 on September 9, 1991, and $10 on October 7, 1991. Respondent issued receipts which do not indicate to which charge the payments were being applied.

26. Ms. Gamache borrowed money, collected bottles and "went without" in order to make the payments. She repeatedly told respondent that she did not have a job and was supporting children.

27. On February 3, 1992, after obtaining a job and an advance on her salary, Ms. Gamache paid respondent $167.25, the amount which respondent told her constituted the balance of the money that she owed. Respondent issued a receipt which did not indicate to which charge the money was being applied.

28. On November 15, 1993, respondent advised Ms. Gamache by letter that he had not received the fine on the Speeding charge. She appeared in court on November 29, 1993. Respondent told her that the receipts that he had given her were not for the Speeding fine. She said that she did not have the money and asked for more time. Respondent told her that her driver's license was suspended.

29. On January 10, 1994, Ms. Gamache paid respondent $125.

30. Respondent did not make any court record of the restitution in connection with the Bad Check charge, as required by UJCA 2019-a and the Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23.

As to Charge III of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1) and 100.3(a)(4), and Canons 1, 2A, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charge III is dismissed.

Because of respondent's inadequate recordkeeping and inattention to proper criminal procedure, two defendants were denied their liberty without due process of law. Respondent's mistakes in connection with these cases were so numerous and so serious as to demonstrate a lack of understanding of his obligations as a judge and to bring into question his fitness for judicial office.

When a judge imposes restitution in connection with a criminal case, he or she must order that it be paid to a designated "official or organization other than the district attorney." (CPL 420.10[1], [8]). A record of the disposition must be kept by the court. (Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23[13]).

If the judge imposes a condition of imprisonment in the event that a fine or restitution is not paid, it must be done in the presence of the defendant, and the judge must advise the defendant that he or she has the right to apply to be resentenced should the defendant be unable to pay. (CPL 420.10[3]).

If the designated collection agency subsequently reports that restitution has not been paid, a judge may order the arrest of a defendant. (CPL 420.10[3]). The defendant must be allowed to apply to be resentenced if unable to pay and, after notice to the collection agency and the victim, the judge must conduct a hearing. If the judge determines that the defendant is, in fact, unable to pay, the judge may adjust the terms of payment, lower the restitution or revoke it. (CPL 420.10[5]).

A judge may not summarily sentence to jail a defendant who does not pay a fine or restitution. "[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the [defendant] willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may...sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the [defendant] could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative methods of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a [defendant] who has made sufficient bona fide efforts to pay. To do otherwise would deprive the [defendant] of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." (Bearden v Georgia, 461 US 660, 672-73; see also, People v Montero, 124 Misc2d 1020 ([App Term, 2d Dept]).

The power of summary contempt for willful failure to pay is not available to the judge as a remedy since such a contempt must be "committed in the immediate view and presence of the court...." (Judiciary Law §751[1]).

A defendant is entitled to representation by counsel at each and every stage of a criminal proceeding (CPL 170.10[3], 180.10[3]; People v Ross, 67 NY2d 321), especially when incarceration is contemplated (see, Scott v Illinois, 440 US 367).

Respondent completely ignored these procedures in Ashline and Gamache in favor of his own summary method of presuming guilt and incarcerating the defendants until they paid amounts that they had had no opportunity to contest and that respondent had no proof was owed. In both cases, he acted on out-of-court, ex parte communications. As a result, Mr. Ashline was sentenced to 15 days in jail and Ms. Gamache to 22 days without hearings, even though Mr. Ashline had protested--correctly-- that he had paid and Ms. Gamache had pleaded that she was unable to pay.

After 30 years on the bench, respondent should have known that he cannot incarcerate defendants based on information that he hears on the street and without offering the defendants the opportunity to contest the accusations. (See, Matter of Earl, 1990 Ann Report of NY Commn on Jud Conduct, at 95, 98).

His conduct is particularly egregious since one of the defendants had actually paid the restitution, a fact which respondent would have known had he kept proper records. In the other case, the defendant had made out a prima facie case that she could not afford to pay but was denied the opportunity to prove it.

Respondent's conduct in this case and in those resulting in two prior censures (Matter of Hamel, 1991 Ann Report of NY Commn on Jud Conduct, at 61; Matter of Hamel, 1992 Ann Report of NY Commn on Jud Conduct, at 49) demonstrates a long pattern of failure to follow the law and further indicates that he is not fit to be a judge (see, Matter of Maney v State Commission on Judicial Conduct, 70 NY2d 27, 31; Matter of Rater v State Commission on Judicial Conduct, 69 NY2d 208, 209).

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

Mr. Berger, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample and Judge Thompson concur.

Ms. Barnett was not present.

Dated: November 3, 1995

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

ALANA J. LINDELL-CLOUD,

a Justice of the Great Valley Town Court, Cattaraugus County.

APPEARANCES:

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

Jerry A. Fowler for Respondent

The respondent, Alana J. Lindell-Cloud, a justice of the Great Valley Town Court, Cattaraugus County, was served with a Formal Written Complaint dated July 7, 1994, alleging that she based a fine in a traffic case on the fact that the defendant had been responsible for terminating respondent's private employment. Respondent filed an answer dated August 18, 1994.

By order dated August 31, 1994, the Commission designated Patrick J. Berrigan, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 7, 1994, and the referee filed his report with the Commission on January 13, 1995.

By motion dated February 15, 1995, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent neither filed any papers in response thereto nor requested oral argument.

On April 27, 1995, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Great Valley Town Court during the time herein noted.

2. In May 1992, respondent, a part-time judge, was also employed as a registered nurse at the Salamanca Health Care Complex. Karen A. Gross was her supervisor.

3. Ms. Gross participated in the decision to fire respondent from her job at the health care facility and was present when respondent was told of the decision.

4. On June 11, 1993, Ms. Gross was charged with Speeding in the Town of Great Valley. The ticket was returnable before respondent.

5. On June 23, 1993, Ms. Gross pleaded guilty by mail.

6. Respondent received the plea and considered disqualifying herself because of her prior relationship with the defendant. Instead, respondent decided to impose sentence in the case in order to retaliate against Ms. Gross for her role in respondent's firing.

7. Respondent fined Ms. Gross $150 plus a $25 mandatory state surcharge, twice the highest fine that respondent had previously imposed for Speeding. She had no knowledge of the defendant's prior driving record.

8. On August 1, 1993, respondent sent Ms. Gross notice of the fine and ordered her to pay it by August 5, 1993, even though her practice was to allow defendants 30 days in which to pay their fines.

9. Respondent's decisions as to the amount of the fine and the four-day deadline to pay it were motivated by a desire to retaliate against Ms. Gross for her role in respondent's firing.

10. After Ms. Gross spoke to the prosecutor in respondent's court and he requested that respondent disqualify herself, she transferred the case to another judge.

11. During the investigation of this matter, respondent candidly admitted that she based her decisions in Gross on a desire to retaliate against the defendant for her role in respondent's firing from the health care facility.

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), 100.2(b), 100.3(a)(3) and 100.3(c)(1), and Canons 1, 2A, 2B, 3A(3) and 3C(1)(a) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

Respondent used her power as a judge to satisfy a personal vendetta rather than disqualifying herself as she knew was appropriate. (See, Matter of Hopeck, 54 AD2d 35 [3d Dept]). She admits that she imposed a high fine and gave Ms. Gross only four days to pay it as a means of retaliating for the defendant's role in respondent's firing from her nursing job. Neither justice nor public confidence in the integrity of the judiciary is served when a judge acts from personal irritation with one of the parties. (Matter of Miller, 1981 Ann Report of NY Commn on Jud Conduct, at 121, 122; see also, Matter of Dier, 1994 Ann Report of NY Commn on Jud Conduct, at 60). Even creating the appearance of using judicial office for retaliation is serious misconduct. (Matter of Schiff v State Commission on Judicial Conduct, 83 NY2d 689, 693-94).

Although respondent's misuse of her office is extremely serious, respondent's conduct represents an isolated incidence of wrongdoing (see, Matter of Ain, 1993 Ann Report of NY Commn on Jud Conduct, at 51, 53), and she has candidly acknowledged her improper motivation (see, Matter of Kelso v State Commission on Judicial Conduct, 61 NY2d 82, 87). We conclude that her removal is not necessary.

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury and Mr. Sample concur.

Mr. Coffey and Judge Thompson were not present.

Dated: July 14, 1995

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

LEO P. MENARD,

a Justice of the Beekmantown Town Court and Acting Justice of the Rouses Point Village Court, Clinton County.

APPEARANCES:

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

Carter, Conboy, Case, Blackmore, Napierski & Maloney, P.C. (By Gregory S. Mills) for Respondent

The respondent, Leo P. Menard, a justice of the Beekmantown Town Court and the Rouses Point Village Court, Clinton County, was served with a Formal Written Complaint dated June 25, 1993, containing five charges of misconduct. Respondent filed an answer dated August 17, 1993.

By order dated August 31, 1993, the Commission designated Maureen J.M. Ely, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 17 and 18, 1993, and January 14 and February 15, and 16, 1994, and the referee filed her report with the Commission on October 17, 1994.

By motion dated October 26, 1994, 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 28, 1994. The administrator filed a reply on December 2, 1994.

On January 12, 1995, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Beekmantown Town Court since 1982. He also sits as acting justice of the Rouses Point Village Court.

2. In January 1993, respondent received an inquiry from Commission staff concerning his handling of a case in 1990 involving John P. Weightman, Jr. Respondent called Mr. Weightman by telephone and asked him to come to respondent's home.

3. After Mr. Weightman arrived, respondent told him that his secretary had "turned him in."

4. Respondent told Mr. Weightman that, if questioned, he should tell the Commission that he had pleaded guilty to Driving While Intoxicated and Speeding and that he had been represented by counsel. This would "save both our asses," respondent told Mr. Weightman.

5. Mr. Weightman had no lawyer when his case was disposed of before respondent in 1990.

6. Mr. Weightman pointed out to respondent that the computer records of the Department of Motor Vehicles showed a conviction of Driving While Ability Impaired, rather than Driving While Intoxicated. "They don't look in the computers," respondent replied.

7. The allegations in Paragraphs 4 and 5 of Charge I are not sustained and are, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

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

As to Charge III of the Formal Written Complaint:

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

As to Charge IV of the Formal Written Complaint:

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

As to Charge V of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1 and 100.2(a), and Canons 1 and 2A of the Code of Judicial Conduct. Paragraphs 6 and 7 of Charge I are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Paragraphs 4 and 5 of Charge I and Charges II, III, IV and V are dismissed.

Knowing that Commission staff was investigating his handling of the Weightman case, respondent approached the defendant and suggested a version of the events that he should give if questioned. Such conduct was clearly intended to obstruct the Commission's discharge of its lawful mandate and does not promote public confidence in the integrity of the judiciary. (Matter of Myers v State Commission on Judicial Conduct, 67 NY2d 550, 554; Matter of Mossman, 1992 Ann Report of NY Commn on Jud Conduct, at 59, 62-63; Matter of Mahar, 1983 Ann Report of NY Commn on Jud Conduct, at 139).

Having concluded that this is the only misconduct established in this record, we determine that a warning that it not be repeated is sufficient. (Contra, Matter of Myers, supra, which included the involvement as a judge in a case in which personal and family interests were at stake, as well as the threatening of a Commission witness; Matter of Mossman, supra, which also involved the handling of a case in which family members had an interest and false testimony by the judge; Matter of Mahar, supra, which included a threat of reprisal against a Commission witness, encouraging a witness to make a false statement in a criminal proceeding and a drunken and vulgar verbal attack in a bar against a Commission witness).

With respect to misconduct, the Commission records the following votes:

Paragraphs 4 and 5 of Charge I are dismissed by a vote of 9 to 1. Judge Braun dissents.

Paragraphs 6 and 7 of Charge I are sustained by a vote of 7 to 3. Mr. Cleary, Mr. Sheehy and Judge Thompson dissent.

Paragraphs 8, 9 and 10 of Charge II are dismissed by a vote of 8 to 2. Mr. Berger and Judge Braun dissent.

Paragraphs 11 and 12 of Charge II are dismissed by a vote of 6 to 4. Mr. Berger, Ms. Barnett, Judge Braun and Judge Newton dissent.

Charges III and IV are dismissed by unanimous vote.

Charge V is dismissed by a vote of 8 to 2. Judge Braun and Mr. Goldman dissent.

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

Ms. Barnett, Judge Braun, Mr. Goldman, Judge Newton, Judge Salisbury and Mr. Sample concur as to sanction.

Mr. Berger dissents and votes that the appropriate sanction is removal.

Mr. Cleary, Mr. Sheehy and Judge Thompson, having found that no misconduct is established, dissent and vote that the Formal Written Complaint be dismissed.

Ms. Crotty was not present.

Dated: March 13, 1995

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

LEO P. MENARD,

a Justice of the Beekmantown Town Court and Acting Justice of the Rouses Point Village Court, Clinton County.

DISSENTING OPINION BY MR. BERGER

I concur with the majority's determination to sustain Paragraphs 6 and 7 of Charge I and to dismiss the remaining allegations of that charge. I also concur with the dismissal of Charges III, IV and V. I respectfully dissent and vote to sustain Charge II, and I would vote that respondent be removed from office.

With respect to Charge II, the record establishes and the referee found that respondent falsely reported the disposition of a case involving Laurieanne Prue because the fine money had been lost and that he coached Ms. Prue concerning what she should tell Commission investigators. Specifically, the referee found that respondent collected $95 in cash from Ms. Prue at her home after she pleaded guilty to Disorderly Conduct on June 20, 1992. The money was lost, and respondent instructed his court clerk to report to the state comptroller that he had revoked the fine because of the defendant's indigence. The clerk marked the record "indigent," and respondent reviewed and signed it. When respondent learned that Commission staff was investigating his conduct in Prue, he called the defendant by telephone, advised her that his secretary had "turned him in," urged her to tell investigators that he had come to her house because she was unable to get to court to pay her fine and told her not to reveal that he had called.

In making these findings, the referee credited the testimony of Ms. Prue over respondent's contrary version, found supporting testimony by other, disinterested witnesses and noted the similarity in the testimony of Ms. Prue and Mr. Weightman, who independently swore that respondent had remarked that his secretary had "turned him in."

Conflicts in testimony present questions for the referee who hears the witnesses, observes their demeanor on the stand and weighs their explanations. "It was for the Referee to choose which evidence was to be credited, and when the evidence conflicted, which version was to be believed." (Matter of Jones, 47 NY2d mmm, qqq [Ct on the Judiciary]). Except in unusual circumstances, the Commission should not overturn credibility findings of the referee based on its reading of the cold record out of context.

Respondent's repeated acts of deception in connection with Weightman and Prue demonstrate that he is not fit to be a judge. 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). Indeed, we have held that it is egregious misconduct for a judge who, knowing that witnesses will give evidence before the Commission, encourages them to change their stories to match his. (Matter of Mossman, 1992 Ann Report of NY Commn on Jud Conduct, at 59). Such conduct may constitute the crime of perjury. (See, Penal Law art. 210 and Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, "Subornation of perjury", at 525). The deliberate falsification of court records submitted to state agencies also constitutes a significant breach of judicial ethics (Matter of Reeves v State Commission on Judicial Conduct, 63 NY2d 105) and suggests the crime of Offering A False Instrument For Filing (see, Penal Law §§ 175.30 and 175.35).

Admonition is far too lenient a sanction for such egregious misconduct by a judge. "A judicial officer who has so little regard for...the obligations of a witness...is not a fit person to administer oaths and cannot be trusted to faithfully uphold the laws." (Matter of Heburn v State Commission on Judicial Conduct, 84 NY2d 168, 171). By his actions, respondent has clearly demonstrated that he is not fit for judicial office.

Accordingly, I would accept the referee's recommendation that Charge II be sustained, and I vote that respondent be removed from office.

Dated: March 13, 1995

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

RALPH C. MORE,

a Justice of the Milford Town Court,
Otsego County.

APPEARANCES:

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

Joseph A. Ermeti for Respondent

The respondent, Ralph C. More, a justice of the Milford Town Court, Otsego County, was served with a Formal Written Complaint dated September 28, 1993, alleging that, in a series of criminal cases, he dismissed charges without notice to the prosecutor and initiated and considered improper ex parte communications. Respondent filed an answer dated November 2, 1993.

By order dated November 12, 1993, the Commission designated Thomas F. Gleason, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 24, 1994, and the referee filed his report with the Commission on August 23, 1994.

By motion dated October 25, 1994, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings and conclusions and for a determination that respondent be censured. Respondent opposed the motion by cross motion on November 17, 1994. The administrator filed a reply dated November 21, 1994. Oral argument was waived.

On January 12, 1995, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Milford Town Court during the time herein noted.

2. Without notice and without offering an opportunity to be heard to a prosecuting authority, respondent dismissed:

a) a charge of Failure To Obey A Stop Sign against Janet H. Castro on July 31, 1991;

b) a charge of Trespass against Karen Lambright on February 19, 1992; and,

c) a charge of No Inspection against Gregory Meadows on July 7, 1992.

3. The allegations concerning the cases of Gary Eichler, Claude Ellsworth and Gerard Fritts are not sustained and are, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

4. On July 7, 1992, respondent heard argument in People v Emery L. Labertrandie on the defendant's motion to dismiss. Assistant Public Defender David K. Taylor and Assistant District Attorney Brian Burns argued the motion. About two weeks later, respondent called Mr. Burns by telephone and asked how respondent should rule on the motion. Mr. Burns told respondent that he should grant the motion, based on further research that the prosecutor had done after the argument. Respondent also called upon Mr. Taylor and asked how he should rule. Mr. Taylor suggested that respondent must make that decision. On July 23, 1992, respondent issued a handwritten decision stating, "Dismissed, insufficient evidence."

5. While the Trespass charge against Karen Lambright was pending before him, respondent, on February 11, 1992, called an Otsego County Department of Social Services caseworker, Cindy S. Macomber, and discussed the facts concerning the case that were relayed to her by the complaining witnesses. Ms. Macomber also discussed with respondent the merits of the complaining witnesses' request for an Order of Protection in their favor against Ms. Lambright. Respondent dismissed the case on February 19, 1992.

6. While a charge of Public Lewdness against Richard Stokes was pending in respondent's court, he discussed the merits of the case with someone from the Upstate Home for Children, where the alleged incident occurred, and spoke outside of court with Mr. Taylor, who was representing the defendant. Respondent told Mr. Taylor that he had spoken to someone at the home and did not feel that the case was very strong. With the consent of Mr. Burns, respondent, on November 4, 1992, adjourned the case in contemplation of dismissal.

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) and 100.3(a)(4), and Canons 1, 2A and 3A(4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

A judge should rule based only on evidence duly presented in court upon which both parties have had an opportunity to be heard; the judge should neither initiate nor consider ex parte communications concerning any pending or impending matter. (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][4]; Matter of Curcio, 1984 Ann Report of NY Commn on Jud Conduct, at 80, 82; Matter of Racicot, 1982 Ann Report of NY Commn on Jud Conduct, at 99, 101; Matter of McCormick, 1994 Ann Report of NY Commn on Jud Conduct, at 84, 85).

Respondent improperly dismissed three cases without according the prosecutor the opportunity to be heard. (See, Matter of Conti v State Commission on Judicial Conduct, 70 NY2d 416; Matter of Reyome, 1988 Ann Report of NY Commn on Jud Conduct, at 207, 209). In one of these and in two additional cases, respondent also initiated and considered ex parte communications on the merits of the issues before him. Even speaking to each attorney separately, as he did in Labertrandie, was improper. (See, Matter of Manning, 1987 Ann Report of NY Commn on Jud Conduct, at 115, 117).

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample, Mr. Sheehy and Judge Thompson concur as to sanction.

Mr. Berger and Judge Braun dissent only as to the allegation in Charge I concerning the case of Gary Eichler and vote that that allegation be sustained.

Ms. Crotty was not present.

Dated: March 13, 1995

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

C. RAYMOND RADIGAN,

Surrogate of Nassau County.

APPEARANCES:

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

Nathan R. Sobel and Joseph W. Ryan, Jr. (M. Elisabeth Bergeron, Of Counsel) for Respondent

The respondent, C. Raymond Radigan, a judge of the Surrogate's Court, Nassau County, was served with a Formal Written Complaint dated August 18, 1994, alleging, inter alia, certain improprieties in connection with a not-for-profit corporation connected to the court. Respondent filed an answer dated September 2, 1994.

By order dated September 27, 1994, the Commission designated the Honorable Leon B. Polsky as referee to hear and report proposed findings of fact and conclusions of law.

By motion dated October 31, 1994, respondent moved to dismiss the Formal Written Complaint. By motion dated November 4, 1994, the administrator of the Commission opposed respondent's motion and cross moved for summary determination and a finding that respondent had engaged in judicial misconduct. Respondent replied in papers dated November 7, 1994, and the administrator filed additional papers on November 17, 1994. By determination and order dated November 23, 1994, the Commission granted respondent's motion with respect to Charge III only and denied the motion in all other respects and denied the administrator's motion in all respects.

A hearing was held on December 21, 1994, and the referee filed his report with the Commission on April 12, 1995.

By motion dated May 17, 1995, the administrator moved to confirm in part and to disaffirm in part the referee's report and for a determination that respondent be censured. Respondent opposed the motion by cross motion on June 15, 1995. The administrator filed a reply on June 20, 1995.

On June 29, 1995, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Nassau County Surrogate's Court since 1981. He is the only judge of the court.

2. In 1983, respondent and other court officials incorporated the Nassau Surrogate's Development Corporation pursuant to the Not-for-Profit Corporation Law §102. The corporation was designed to pursue goals of research, the development of sound administration of the court, education in trusts and estates law and the training of non-judicial personnel, interns and students interested in law and public administration. Respondent served as chairman of the corporation. It was funded by foundation grants and donations from banks and law firms.

3. A student internship program that was established in the court in the 1970s was subsequently subsumed within the corporation.

4. Respondent and other administrators of the Surrogate's Court served as officers and directors of the corporation. The corporate address of the Nassau Surrogate's Development Corporation was the courthouse. Interns hired with corporate funds worked in the court and were supervised by court administrators. No meetings of the corporation's directors were ever held. Respondent acknowledges that his roles as judge and as chairman of the corporation are "indistinguishable."

5. On June 7, 1983, respondent and Margaret V. Turano, a professor at the Law School of St. John's University, entered into a contract with West Publishing Company to produce a hornbook on New York estates administration. Respondent and Professor Turano agreed between them that they would share equally the cost of any research in connection with the book, as well as any royalties received from its sale.

6. In 1985, Professor Turano advised respondent that she had hired law students from St. John's to research portions of the book which she had drafted. By the end of 1985, Professor Turano had paid $8,769.75 to law students for research on the book.

7. From funds of the Nassau Surrogate's Development Corporation, respondent authorized reimbursement in full to Professor Turano for her research costs. The law students employed by Professor Turano were not employed by the Nassau Surrogate's Development Corporation or its student internship program, and respondent played no role in their selection or supervision.

8. Between 1987 and 1992, respondent and Professor Turano received and kept $22,584 in royalties, which they shared equally.

9. After charges were filed and the hearing conducted in this matter, respondent, by personal check dated May 12, 1995, returned $9,000 to the Nassau Surrogate's Development Corporation.

As to Charge II of the Formal Written Complaint:

10. Annual returns filed with the Internal Revenue Service for the fiscal years ending March 31, 1985, 1986, 1987, 1988, 1989, 1991 and 1992 list, as among the "program services" of the Nassau Surrogate's Development Corporation, job training for "unemployed minorities [and] women returning to the labor force." Each of these returns was signed by the corporation's secretary-treasurer, who was also the chief clerk of the Surrogate's Court at the time.

11. On January 25, 1991, the corporation filed a Charities Registration Statement with the state Department of State and the state attorney general. Among the "programs for which contributions are solicited," the statement lists, "job training for hard-to-employ persons."

12. Between 1984 and 1992, the corporation paid between 40 and 50 persons to work on an hourly basis in the courthouse. Twenty of them were related to regular employees of the court. None was known to be Latino or African-American.

13. The positions were filled solely by "word-of-mouth," and respondent was aware of the use of this method. Respondent did not participate in the selection of interns but was aware that the son of the court clerk at the time, who was also secretary-treasurer of the corporation, was working in the program in the 1980s.

As to Charge III of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(b)(1), 100.3(b)(2), 100.3(b)(4), and 100.5(c)(1), and Canons 1, 2, 3B(1), 3B(2), 3B(4) and 5C(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established. Charge III is dismissed.

Respondent enriched himself by diverting Nassau Surrogate's Development Corporation funds to Professor Turano for research expenses that they had agreed to share in their private authorship of a hornbook. The hornbook was not a project of the corporation, and the student researchers were not interns employed by the corporation. By transferring corporate monies to Professor Turano, respondent eliminated his share of more than $4,000 for the research expenses, then accepted $11,292 in royalties for the book, enhancing his profit at the expense of the not-for-profit corporation of which he was chairman.

A not-for-profit corporation is issued a charter by the state if it is formed "not for pecuniary profit or financial gain" and "no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers...." (Not-for-Profit Corporation Law §102[5]).

The charter of the Nassau Surrogate's Development Corporation lists as its purposes research, development of sound administration and improvement of the Surrogate's Court, as well as training for students. Respondent argues that this legitimizes his use of corporate monies for research on his hornbook, which he maintains was of valuable assistance to the court. Assuming, arguendo, that this is true, as an official of the corporation, he should not have profited from his own, unilateral decision to transfer the money. A contract or transaction involving a not-for-profit corporation that enures to the benefit of one of its officers or directors can only be undertaken if the interested director discloses all material facts to the other members of the board and the board authorizes the transaction by majority vote without participation by the interested director or without counting the interested director's vote. (Not-for-Profit Corporation Law §715[a]). This respondent did not do. He acknowledges that he made the decision to transfer the funds and that no meetings of the board of directors for the corporation has ever been held.

"It is...the inflexible rule that [corporate executives] cannot exercise the corporate powers for their private or personal advantage or gain. The law stringently and rigorously forbids them to use or dispos[e] of the funds or assets of the corporation for their individual enterprises or acquisition.... These principles, based upon a sound public policy and morality, are so firmly fixed in our jurisprudence that they are not open to discussion and so familiar that authorities declaring them need not be cited." (Pollitz v Wabash Railroad Co., 207 NY 113, at 124).

Although it was an improper act which reflects upon his role as a judge, respondent's diversion of the funds does not require a more severe sanction than admonition. We accept his statements that he did not consider at the time the implications of his receipt of future royalties to him. In addition, he has repaid the money.

We also conclude that respondent's failure to supervise the hiring of interns who worked in the court and were paid by corporate funds led to a patronage system for the relatives of full-time court employees. Notwithstanding that documents filed with the state and federal governments boasted laudatory affirmative-action goals, more than 40% of the persons hired were relatives of other court employees, and none can be identified as members of disadvantaged minority groups.

For all intents and purposes, the interns were employees of the court. They worked on court business in the courthouse and were supervised by court administrators. By failing to assure that the jobs were fairly awarded without regard to favoritism, respondent, as chairman of the corporation and the only judge of the court, failed to meet his ethical obligations. "A judge shall exercise the power of appointment only on the basis of merit, avoiding favoritism," (Rules Governing Judicial Conduct, 22 NYCRR 100.3[b][4]) and must "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," (22 NYCRR 100.3[b][2]). These are among the administrative duties of a judge and are not, as respondent argues, limited to the appointment of fiduciaries. "Nepotism has long been condemned in the judiciary, as it should be..." (Matter of Kane v State Commission on Judicial Conduct, 50 NY2d 360, 363), and "an appearance of such impropriety is no less to be condemned than is the impropriety itself," (Matter of Spector v State Commission on Judicial Conduct, 47 NY2d 462, 466).

Charge I is sustained by a vote of 7 to 3. Mr. Goldman, Judge Salisbury and Judge Thompson dissent and vote that the charge be dismissed.

Charge II is sustained by a vote of 8 to 2. Mr. Cleary and Judge Thompson dissent and vote that the charge be dismissed.

By a vote of 7 to 3, the Commission determines that the appropriate sanction is admonition.

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Mr. Goldman, Judge Newton and Judge Salisbury concur as to sanction.

Ms. Crotty and Mr. Sample dissent as to sanction only and vote that respondent be censured.

Judge Thompson, having concluded that no misconduct is established, dissents and votes that the Formal Written Complaint be dismissed.

Dated: September 22, 1995

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

C. RAYMOND RADIGAN,

DISSENTING OPINION BY MR. CLEARY

Surrogate of Nassau County.

I concur that Charge I is sustained and that respondent should be admonished. However, I part company with the majority as to Charge II and conclude that that allegation should be dismissed.

The Nassau Surrogate's Development Corporation was funded by private monies obtained from foundations, banks and law firms. The record contains no indication that the funds were solicited with any representations as to who would be paid with them or that any stipulations were placed by the contributors on who could be hired. Nothing in the corporate charter states that its purpose was to employee minorities or women returning to the work force. The erroneous statements to that effect on Internal Revenue Service and Charities Registration forms in no way compromised the corporation's tax-exempt status. Thus, they were not binding and are irrelevant. Therefore, respondent could have hired anyone that he chose to work as student interns, including the relatives of other court employees. That he did not himself do the hiring or supervise the students further attenuates any suggestion of wrongdoing.

The Rules Governing Judicial Conduct that prohibit favoritism by a judge in court appointments and the cases which speak against nepotism in the judiciary are intended to protect the public from the use of taxpayer dollars to reward the judge's family, friends or political supporters. They are not meant to proscribe the use of private funds in any way. It is the responsibility of the other corporate directors to determine that this is inappropriate or of the contributors to say that this is not the purpose for which the funds were donated. The Commission has no role. It makes no difference that the interns worked in the court on court business. The significant factor in this unique situation is that they were paid with private monies.

I vote that Charge II be dismissed.

Dated: September 22, 1995

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

C. RAYMOND RADIGAN,

Surrogate of Nassau County.

DISSENTING OPINION BY
MR. GOLDMAN
IN WHICH
JUDGE SALISBURY JOINS

I dissent from the Commission's finding of misconduct as to Charge I only, and believe that the charge should be dismissed.

The Rules Governing Judicial Conduct permit a judge to "speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice," (22 NYCRR 100.4[a]), and to "receive compensation and reimbursement of expenses for the quasi-judicial...activities," (22 NYCRR 100.6). Thus, respondent was not, as a general matter, prohibited from receiving, either directly or indirectly, compensation and reimbursement of expenses for his authorship of a hornbook on estate practice.

The Nassau Surrogate's Development Corporation ("NSDC") was, according to its certificate of incorporation, designed in part:

> (a) to conduct research and advance knowledge of the laws affecting administration of estates, powers and trusts and Surrogate's Court practice;
>
> ...
>
> (g) to make donations, gifts, contributions, grants and loans out of its earnings or from the principal of its funds or both, or of its property, for the use and benefit of any organization or individual for the purpose of promoting the purposes of this corporation as heretofore set forth.

A clearly proper purpose of the NSDC was to compensate and reimburse expenses to an author of a hornbook on estate practice. Therefore, the NSDC funds could have properly been used to reimburse the expenses incurred by Professor Turano had she been the sole author of the book in question. The question before the Commission is whether respondent, as the chairman of NSDC, could properly direct that its funds be used to reimburse Professor Turano for those purposes if he were a beneficiary of their use.

The majority bases its finding of misconduct largely upon the contention that respondent "enriched himself" by reimbursing Professor Turano for the student research expenses that she had incurred and for which he had agreed to share equally so that his royalties were pure profit undiminished by the expenses. I agree with the majority that the net effect of respondent's use of NSDC funds to reimburse Professor Turano was that he was able to profit to the full extent of the royalties he received some years later. I do not agree, however, that the use of the funds in this manner was improper.

The NSDC funds could properly have been used to pay the expenses of law students providing research assistance for the book. Payment of research expenses for the hornbook, even if written for compensation, was clearly compatible with the goal of NSDC "to make donations, gifts or contributions" in order "to conduct research and advance knowledge of the laws affecting administration of estates, powers and trusts and Surrogate's Court practice." I do not believe it determinative that respondent ultimately benefited from the reimbursement. The provisions of the NSDC's certificate of incorporation permit even direct payment to an author of a textbook on estate practice.

Similarly, I do not believe it determinative that respondent was receiving compensation from the publisher of the hornbook. Certainly, it would not have been improper for respondent to contract with the publisher to receive as compensation reimbursement of expenses in addition to royalties. That the NSDC, in effect, supplemented respondent's earnings for authorship of the book was within its province.*

The majority also bases its finding of misconduct on a purported violation of the Not-for-Profit Corporation Law. Whether respondent's conduct violated the Not-for-Profit Corporation Law was not part of the charges in the complaint, not considered in the Referee's Report, not briefed by either party and not mentioned at oral argument. Indeed, there is no mention of that law in any of the papers in this proceeding. I do not believe it comports with the fairness and due process to which judges are entitled for the Commission to base a finding of misconduct, even in part, on a purported violation of a statute without adequate notice, and I believe that respondent did not receive such notice.

Although I do not find judicial misconduct, I do not condone respondent's conduct, which I believe was an error in judgment and, at the least, unseemly. Respondent has apparently recognized--with the benefit of hindsight--that the reimbursement of expenses created at least a potential appearance of impropriety and has repaid the money. Not everything that a judge does wrong, however, is judicial misconduct. While it may have been wiser for respondent to have thought as clearly as the majority thinks he should have, and it may have been more prudent for him not to have reimbursed Professor Turano or to have repaid NSDC once he had received the royalties, I do not believe his exercise of poor judgment in this situation constitutes a breach of judicial ethics.

Charge I, therefore, should be dismissed.

With respect to Charge II, I concur with the majority and find that judicial misconduct is established. Had this charge been the sole one sustained by the Commission, I would not have voted for a public sanction. However, since the Commission has sustained both charges and since I feel that my decision as to the appropriate sanction must be based on that determination, I agree with the majority that respondent should be admonished.

Dated: September 22, 1995

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*Respondent's earnings from the book were not unreasonably high. His share of the royalties, received between 1987 and 1992, was $11,292. The total expense for student research was $8,769.75; his share was half that amount, $4,384.87.

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 A. STERLING,

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

APPEARANCES:

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

The respondent, Richard A. Sterling, a justice of the Gouverneur Town Court, St. Lawrence County, was served with a Formal Written Complaint dated January 25, 1995, alleging that he converted court funds to his personal use. Respondent did not answer the Formal Written Complaint.

By motion dated June 6, 1995, the administrator of the Commission moved for summary determination and a finding that respondent has engaged in judicial misconduct. Respondent did not oppose the motion or file any papers in response thereto. By determination and order dated June 30, 1995, the Commission granted the motion.

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

On August 31, 1995, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Gouverneur Town Court since January 1, 1994.

2. On January 3, 1994, respondent's predecessor, William E. Mashaw, transferred $5,200 to respondent, representing bail for two defendants with cases pending in the court. Gail Lang had posted $5,000 of the money on July 19, 1993, as bail for Rodger H. Ingram. Respondent deposited the money in his court account.

3. Between February 11, 1994, and July 19, 1994, respondent converted the money to his personal use by issuing six checks to himself from his court account. Respondent paid himself $950 on February 11, 1994; $1,050 on March 5, 1994; $970 on April 7, 1994; $970 on May 20, 1994; $660 on June 13, 1994; and, $400 on July 19, 1994.

4. As of the date of the charges, January 25, 1995, respondent had not replaced the funds and had not returned the $5,000 in bail to Ms. Lang, even though the charge against Mr. Ingram had been disposed of in October 1994 and Ms. Lang had made repeated requests to have the money returned.

5. During the investigation of this matter, respondent admitted, by letter dated January 10, 1995, "Due to many problems in my personal life (health, financial, etc.) I used this money for my own use."

As to Charge II of the Formal Written Complaint:

6. On December 15 and 20, 1994, respondent converted to his personal use $715 in court funds by withdrawing the balance of his court account and failing to replace the money.

7. Respondent closed the account and failed to notify the Chief Administrator of the Courts that he had done so, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(c).

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

The conversion of court funds to a judge's personal use is "intolerable," (Matter of Lew, 1983 Ann Report of NY Commn on Jud Conduct, at 135, 137), "shocks the conscience," (Matter of Burrell, 1990 Ann Report of NY Commn on Jud Conduct, at 82, 84) and requires removal (Matter of Montaneli, 1987 Ann Report of NY Commn on Jud Conduct, at 121, 126; Matter of Lemon, 1983 Ann Report of NY Commn on Jud Conduct, at 131, 133).

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

Mr. Berger, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample and Judge Thompson concur.

Ms. Barnett was not present.

Dated: September 8, 1995

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

STANLEY YUSKO,

a Justice of the Coxsackie Village Court, Greene County.

APPEARANCES:

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

Dennis B. Schlenker and Mark D. Sanza for Respondent

The respondent, Stanley Yusko, a justice of the Coxsackie Village Court, Greene County, was served with a Formal Written Complaint and an Amended Formal Written Complaint dated August 4, 1994, alleging that he presided over numerous cases in 1993 and 1994, even though he had failed to complete training requirements and become certified as a judge. Respondent filed an answer on August 15, 1994.

By order dated July 27, 1994, the Commission designated H. Wayne Judge, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 11, 1994, and the referee filed his report with the Commission on November 11, 1994.

By motion dated December 7, 1994, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent did not file any papers in response thereto. Oral argument was waived.

On January 12, 1995, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Coxsackie Village Court since July 1, 1989. He is not a lawyer. He has submitted what purports to be a resignation effective December 31, 1994. There is no evidence that he has notified the Chief Administrator of the Courts that he has resigned.

2. On May 2, 1992, respondent attended a session of the advanced training program of the Office of Court Administration but did not pass an examination, as required by the Rules of the Chief Judge, 22 NYCRR 17.2.

3. Respondent did not attend a second advanced training session in 1992, as required by the Rules of the Chief Judge.

4. By letters dated May 18, 1992, and July 1, 1992, the director of Education and Training for the Office of Court Administration, Helen A. Johnson, reminded respondent that he must attend two training sessions in 1992 and pass examinations in order to comply with the law.

5. On February 22, 1993, Deputy Chief Administrative Judge Joseph J. Traficanti, Jr., issued respondent a temporary certification valid until June 30, 1993, but warned that, unless he successfully completed advanced training, he would not be authorized to perform the functions of his office beyond that date. On July 8, 1993, Judge Traficanti extended the temporary certification to July 31, 1993.

6. Respondent did not attend any advanced training program in 1993, and his certification to sit as a judge lapsed, pursuant to law, on July 31, 1993. He has been uncertified since that time.

7. Respondent attended a training session on April 16, 1994, but never attended a second session that year.

As to Charge II of the Formal Written Complaint:

8. Notwithstanding his failure to obtain certification to act as a judge pursuant to law, respondent handled 365 cases between August 1, 1993, and August 31, 1994, and committed defendants to jail in 36 cases during that period, as set forth in Exhibits 34 and 35 received in evidence at the hearing.

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

Non-lawyer judges must successfully complete a training course before they may assume the functions of office. (NY Const, art VI, §20[c]; UJCA 105[a]). A basic training course after a judge's initial selection and advanced courses every year thereafter are required. Successful completion means attendance at at least 80 percent of the required sessions and a passing grade on a written examination. (Rules of the Chief Judge, 22 NYCRR 17.2).

Respondent failed to meet these requirements in 1992, resulting in the loss of his certification to perform the duties of his office on August 1, 1993. Notwithstanding that he was barred by law from acting as a judge after that date, he continued to handle hundreds of cases over the next year. There can be no doubt that he knew that he was not permitted to do so; the Office of Court Administration warned him in several letters that he would not be certified to sit as a judge if he did not attend training sessions and pass the required examinations.

A judge who "continued to hear cases and exercise the functions of his office even though he knew he lacked authority to do so" because he was not certified deliberately and repeatedly flouted the law, rendering him "unfit for judicial office," even though he had subsequently achieved certification. (Matter of Lobdell v State Commission on Judicial Conduct, 59 NY2d 338, 342). Similarly, respondent has shown disdain for the law and has prejudiced the proper administration of justice, and, as of the date of the hearing, he had not yet earned certification.

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample, Mr. Sheehy and Judge Thompson concur.

Ms. Crotty was not present.

Dated: March 7, 1995

COMPLAINTS PENDING AS OF DECEMBER 31, 1994

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		17	15	14	4	1	2	53
DELAYS			3		1			4
CONFLICT OF INTEREST		3	2	5			2	12
BIAS		1	5		1			7
CORRUPTION		2	4		1		3	10
INTOXICATION		2					1	3
DISABILITY/QUALIFICATIONS			1		1			2
POLITICAL ACTIVITY			9					9
FINANCES/RECORDS/TRAINING		3	4	3	1		5	16
TICKET-FIXING							1	1
ASSERTION OF INFLUENCE			3					3
VIOLATION OF RIGHTS		11	17	12	7		5	52
MISCELLANEOUS		2	1			1	1	5
TOTALS		41	64	34	16	2	20	177

*Matters are "closed" upon vacancy of office for reasons other than resignation. "Action" includes determinations of admoniton, censure and removal from office by the Commission since its inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by the temporary and former commissions on judicial conduct operating from 1975 to 1978.

NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 1995

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	490							490
NON-JUDGES	183							183
DEMEANOR	127	39	4	1				171
DELAYS	54	6	3		1			64
CONFLICT OF INTEREST	21	11	3					35
BIAS	64	5	1					70
CORRUPTION	22	5	1		1			29
INTOXICATION	3	2						5
DISABILITY/QUALIFICATIONS	1	2						3
POLITICAL ACTIVITY	5	16				1		22
FINANCES/RECORDS/TRAINING	7	15	1	1	1			25
TICKET-FIXING		3						3
ASSERTION OF INFLUENCE	6	6	1	3				16
VIOLATION OF RIGHTS	194	32	6		1			233
MISCELLANEOUS	8	4						12
TOTALS	1185	146	20	5	4	1		1361

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ALL COMPLAINTS CONSIDERED IN 1995: 1361 NEW & 177 PENDING FROM 1994

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	490							490
NON-JUDGES	183							183
DEMEANOR	127	56	19	15	4	1	2	224
DELAYS	54	6	6		2			68
CONFLICT OF INTEREST	21	14	5	5			2	47
BIAS	64	6	6		1			77
CORRUPTION	22	7	5		2		3	39
INTOXICATION	3	4					1	8
DISABILITY/QUALIFICATIONS	1	2	1		1			5
POLITICAL ACTIVITY	5	16	9			1		31
FINANCES/RECORDS/TRAINING	7	18	5	4	2		5	41
TICKET-FIXING		3					1	4
ASSERTION OF INFLUENCE	6	6	4	3				19
VIOLATION OF RIGHTS	194	43	23	12	8		5	285
MISCELLANEOUS	8	6	1			1	1	17
TOTALS	1185	187	84	39	20	3	20	1538

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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**	*ACTION**	
INCORRECT RULING	7657							7657
NON-JUDGES	2015							2015
DEMEANOR	1461	56	692	162	54	53	127	2605
DELAYS	746	6	75	40	9	11	16	903
CONFLICT OF INTEREST	334	14	301	100	39	17	92	897
BIAS	981	6	171	30	18	13	15	1234
CORRUPTION	199	7	67	6	21	10	15	325
INTOXICATION	33	4	27	7	4	3	14	92
DISABILITY/QUALIFICATIONS	36	2	24	2	15	7	6	92
POLITICAL ACTIVITY	152	16	115	101	5	14	14	417
FINANCES/RECORDS/TRAINING	148	18	124	73	82	66	74	585
TICKET-FIXING	20	3	69	153	35	60	159	499
ASSERTION OF INFLUENCE	98	6	86	37	8	5	26	266
VIOLATION OF RIGHTS	1039	43	151	66	25	9	14	1347
MISCELLANEOUS	616	6	213	71	21	34	55	1016
TOTALS	15,535	187	2115	848	336	302	627	19,950

*Matters are "closed" upon vacancy of office for reasons other than resignation. "Action" includes determinations of admoniton, censure and removal from office by the Commission since its inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by the temporary and former commissions on judicial conduct operating from 1975 to 1978.