ANNUAL REPORT

1998

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

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COMMISSION ON JUDICIAL CONDUCT

* * *

COMMISSION MEMBERS

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STEPHEN R. COFFEY, ESQ.

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HON. FREDERICK M. MARSHALL

HON. JUANITA BING NEWTON

ALAN J. POPE, ESQ.

HON. EUGENE W. SALISBURY

HON. WILLIAM C. THOMPSON

* * *

CLERK OF THE COMMISSION

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March 1, 1998

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, 1997, through December 31, 1997.

Respectfully submitted,

Henry T. Berger, Chair
On Behalf of the Commission

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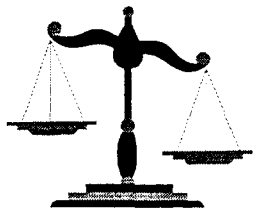
Introduction

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, who must be free to act independently and in good faith, but also must be held accountable for their misconduct by an independent disciplinary system.



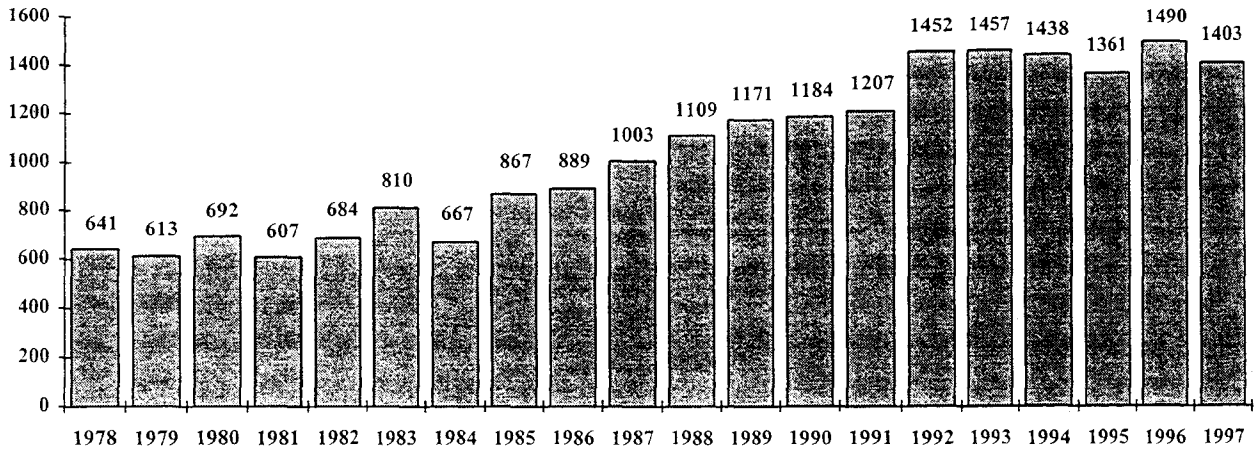
Judicial ethics standards are found primarily in the Rules on Judicial Conduct. The Rules, which are promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, were most recently amended as of January 1, 1996. (The text of the Rules is annexed to this Report.)

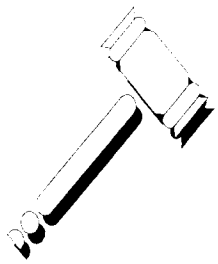
The number of complaints received by the Commission has steadily increased over the 23 years of our operation. In the last six years, the Commission has averaged just over 1433 complaints per year.

Indeed, in each of the last six years, the number of incoming complaints has been more than double the number received as recently as 1984, as noted 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 obstacles which we have worked hard to overcome, as reflected in the Budget section of this Report.

This current Annual Report covers the Commission's activities during calendar year 1997.

Complaints Received Since 1978





Action Taken in 1997

Following are summaries of the Commission's actions in 1997, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

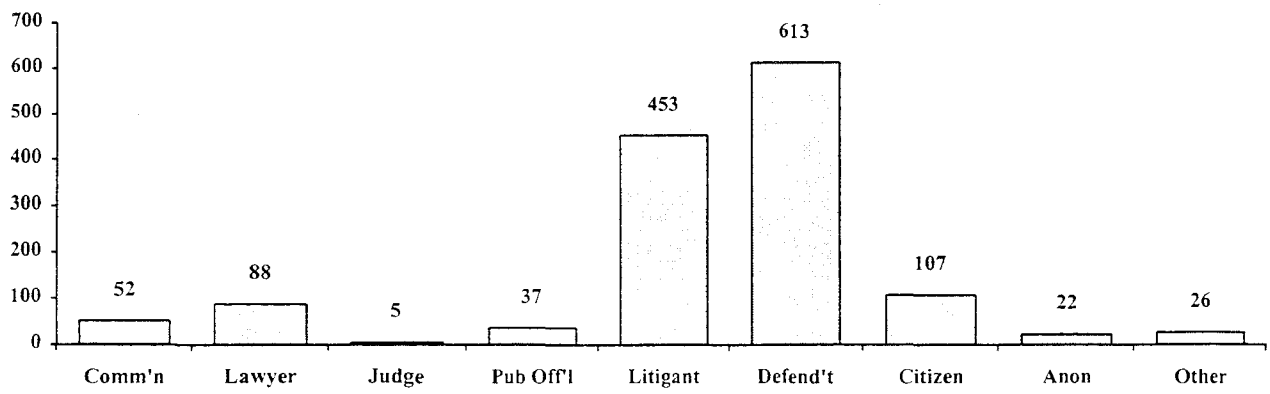
Complaints Received

In 1997, 1403 new complaints were received, marking the sixth consecutive year in which the number of complaints exceeded 1300. Of these, 1231 (88%) were dismissed by the Commission upon initial review, and 172 investigations were authorized and commenced. In addition, 142 investigations and 28 proceedings on formal charges were pending from the prior year.

In 1997, 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 52 initiated by the Commission on its own motion. A breakdown of the source of complaints received in 1997 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 1997



Investigations

On January 1, 1997, 142 investigations were pending from the previous year. During 1997, the Commission commenced 172 new investigations. Of the combined total of 314 investigations, the Commission made the following dispositions:

- 82 complaints were dismissed outright.
- 52 complaints involving 48 different judges were dismissed with letters of dismissal and caution.
- 13 complaints involving 11 different judges were closed upon the judges' resignation.
- 4 complaints involving 4 judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 47 complaints involving 34 different judges resulted in formal charges being authorized.
- 116 investigations were pending as of December 31, 1997.

Formal Written Complaints

On January 1, 1997, Formal Written Complaints from the previous year were pending in 28 matters, involving 27 different judges. During 1997, Formal Written Complaints were authorized in 47 additional matters, involving 34 different judges. Of the combined total of 75 matters involving 61 judges, the Commission made the following dispositions:

- 21 matters involving 20 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, upon a finding that the judge engaged in misconduct.
- 9 matters involving 7 judges were closed upon the judge's resignation.
- 2 matters involving 2 different judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 4 matters involving 2 judges were closed after charges were withdrawn upon recommendation of the Commission's Administrator.
- 4 matters involving 2 judges were dismissed outright.
- 34 matters involving 27 different judges were pending as of December 31, 1997.

Summary of All 1997 Dispositions

The Commission's investigations, hearings and dispositions in the past year involved judges at various levels of the state unified court system, as indicated in the following ten tables.

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

	Lawyers	*Non-Lawyers*	*Total*
Complaints Received	128	284	412
Complaints Investigated	43	96	139
Judges Cautioned After Investigation	11	26	37
Formal Written Complaints Authorized	4	18	22
Judges Cautioned After Formal Complaint	1	0	1
Judges Publicly Disciplined	1	12	13
Formal Complaints Dismissed or Closed	1	6	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	53	119	172
Complaints Investigated	5	7	12
Judges Cautioned After Investigation	6	2	8
Formal Written Complaints Authorized	0	3	3
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	0	2	2
Formal Complaints Dismissed or Closed	1	0	1

* Approximately 100 of this total serve part-time.

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

Complaints Received	140
Complaints Investigated	8
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
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	154
Complaints Investigated	3
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Formal Complaints Dismissed or Closed	0

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

Complaints Received	14
Complaints Investigated	0
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	12
Complaints Investigated	0
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
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	304
Complaints Investigated	10
Judges Cautioned After Investigation	3
Formal Written Complaints Authorized	5
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	3

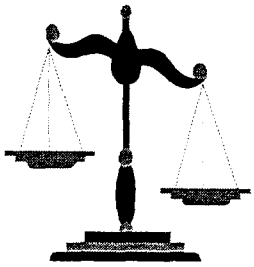
TABLE 9: COURT OF APPEALS JUDGES & APPELLATE DIVISION JUSTICES – 59 FULL-TIME, ALL LAWYERS

Complaints Received	20
Complaints Investigated	0
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 10: NON-JUDGES*

Complaints Received	173

*The Commission does not have jurisdiction over non-judges, administrative law judges, housing judges of the New York City Civil Court, or federal judges. Such complaints are reviewed, however, to determine whether they should be referred to other agencies.



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.

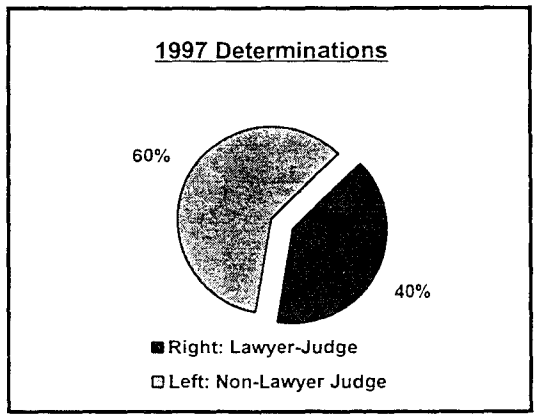
The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibits public disclosure by the Commission of the charges served, hearings commenced or related matters, absent a waiver by the judge, until the case has been concluded and a determination of admonition, censure, removal or retirement has been rendered pursuant to law.

Following are summaries of those matters which were completed and made public during 1997. The texts of the determinations are appended to this Report.

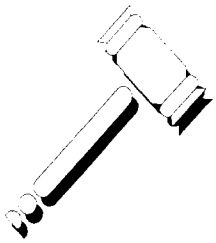
Overview of 1997 Determinations

The Commission rendered 20 formal disciplinary determinations in 1997: six removals, eight censures and six admonitions. Twelve of the 20 respondents disciplined were non-lawyer judges, and eight were lawyer-judges. Thirteen of the respondents were part-time town or village justices, and seven 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. (Town and village justices serve part-time and may or may not be lawyers; judges of all other courts must be lawyers, whether or not they serve full-time.)



Of course, no set of dispositions in a given year will exactly mirror those percentages. However, from 1987 to 1997, the number of public determinations, when categorized by type of court and judge, has roughly approximated the makeup of the judiciary as a whole: 118 (about 68%) have involved town and village justices, and 55 (about 32%) 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 (66%) is virtually identical to the percentage of town and village justices in the judiciary as a whole (65%).



Determinations of Removal

The Commission completed six disciplinary proceedings in 1997 which resulted in determinations of removal. The cases are summarized below.

Matter of Carlton M. Chase

The Commission determined on June 10, 1997, that Carlton M. Chase, part-time Town and Village Justice of Sullivan, Madison County, should be removed from office for interceding with the local police and another judge on behalf of three relatives in a period of eight months. Judge Chase used "profane, threatening and menacing language and gestures" in attempting to "intimidate" and assert his authority as a judge. Judge Chase is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Salvador Collazo

The Commission determined on July 18, 1997, that Salvador Collazo, a Judge of the New York City Civil Court (Bronx County) and an Acting Justice of the Supreme Court, New York County, should be removed from office for (1) writing a lurid note about the anatomy of a female law intern who was working for him at the time, (2) falsely answering a questionnaire from the Governor's Judicial Screening Committee which asked whether he was the subject of investigation, pursuant to the Governor's intention to nominate him for a vacancy on the Supreme Court, (3) falsely telling counsel to the Senate Judiciary Committee that there were no complaints against him at the Commission, at a time when the Senate was considering his nomination to the Supreme Court vacancy, and (4) testifying falsely under oath about these matters.

Judge Collazo requested review by the Court of Appeals, which upheld the Commission's determination and removed him from office.

Matter of Lorin M. Duckman

The Commission determined on October 24, 1997, that Lorin M. Duckman, a Judge of the Criminal Court of the City of New York, Kings County, should be removed from office for, *inter alia*, (1) intentionally acting contrary to law in dismissing 13 accusatory instruments under the guise of being insufficient on their face, (2) intentionally acting contrary to law in imposing two adjournments in contemplation of dismissal and one dismissal in the interests of justice without the consent of the People or otherwise ad-

hering to various statutory mandates, (3) repeatedly berating, insulting and otherwise demeaning numerous assistant district attorneys, (4) making numerous gender insensitive, racially insensitive and otherwise offensive statements while acting as a judge and (5) otherwise repeatedly demonstrating bias against the prosecution over a five-year period.

Judge Duckman requested review by the Court of Appeals. The Court's decision was expected in mid-1998 and will be reported in next year's Annual Report.

Matter of W. Joseph Embser

The Commission determined on April 2, 1997, that W. Joseph Embser, part-time Town Justice of Wellsville, Allegany County, should be removed from office for, *inter alia*, violating his fiduciary obligation as an attorney and as executor of an estate by taking more than $242,000 in fees and commissions, the bulk of which were unauthorized. Judge Embser is a lawyer.

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

Matter of Donald R. Roberts

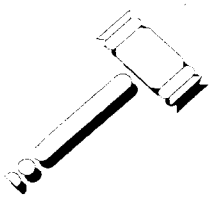
The Commission determined on May 29, 1997, that Donald R. Roberts, part-time Village Justice of Malone, Franklin County, should be removed from office for *inter alia*, demonstrating "biased and mean-spirited" behavior in domestic abuse and other cases, by denigrating orders of protection and making such statements as "every woman needs a good pounding now and then." Judge Roberts is not a lawyer.

Judge Roberts requested review by the Court of Appeals, which upheld the Commission's determination and removed him from office.

Matter of John F. Skinner

The Commission determined on May 29, 1997, that John F. Skinner, part-time Town Justice of Columbia, Herkimer County, should be removed for (1) dismissing a sexual abuse case at arraignment, without notice to the prosecution and otherwise contrary to law, based on statements made privately to the judge by the defendant and the defendant's wife, with whom the judge had personal and professional dealings for many years, and (2) refusing to assign counsel to an 18-year-old defendant and sentencing him to 30 days in jail on a $335 bad check charge, without either a trial or a guilty plea. Judge Skinner is not a lawyer.

Judge Skinner requested review by the Court of Appeals, which sustained the finding of misconduct but reduced the sanction from removal to censure.



Determinations of Censure

The Commission completed eight disciplinary proceedings in 1997 which resulted in determinations of censure. The cases are summarized below.

Matter of Arthur Birnbaum

The Commission determined on September 29, 1997, that Arthur Birnbaum, a Judge of the Civil Court of the City of New York, should be censured for improper campaign activity, including soliciting testimonials from tenants in a case pending before him, and disseminating literature which "gave the unmistakable impression that he would favor tenants over landlords in housing matters," which violated the Rule prohibiting promises of conduct in office other than the faithful and impartial performance of judicial duties.

The judge did not request review by the Court of Appeals.

Matter of Robert W. Engle

The Commission determined on February 4, 1997, that Robert W. Engle, part-time Town and Village Justice of Madison, Madison County, should be censured for lending the prestige of judicial office to assist a defendant in a criminal case before another judge, in that *inter alia* he communicated in writing on the defendant's behalf to the District Attorney, and he wrote on judicial letterhead to the presiding judge, vouching for the defendant's character, referring repeatedly to his judicial office, and denigrating the police officer and probation official involved in the case. Judge Engle is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Clarence F. Giles, Jr.

The Commission determined on February 4, 1997, that Clarence F. Giles, Jr., part-time Town and Village Justice of Clayton, Jefferson County, should be censured for presiding over two off-hour arraignments while under the influence of alcohol. Judge Giles agreed to an alcohol-abstention program on consultation with a physician, in recognition of the fact that he is on call 24 hours a day and periodically may be called upon to conduct off-hour arraignments. Judge Giles is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Robert J. Hanophy

The Commission determined on April 2, 1997, that Robert J. Hanophy, a Judge of the Court of Claims and an Acting Justice of the Supreme Court, Queens County, should be censured (1) for making undignified, discourteous and disparaging remarks about the defendant's family and country of origin at a sentencing proceeding and (2) for initially acknowledging his impropriety to the Commission but subsequently denying it and saying that he had "only" made his earlier insincere acknowledgment "based on advice that he had received from other judges, that such an acknowledgment would result in a confidential letter of dismissal and caution."

The judge did not request review by the Court of Appeals.

Matter of George B. Jensen

The Commission determined on May 29, 1997, that George B. Jensen, part-time Town Justice of Jerusalem, Yates County, should be censured (1) for repeatedly conditioning his disqualification from a case upon the withdrawal of complaints filed against him with the Commission by the defendant and a colleague of the defendant and (2) for stating several hours after court that it had "been a rough day – all those blacks in here." Judge Jensen is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Donald G. Purple

The Commission determined on September 29, 1997, that Donald G. Purple, a Judge of the Family and County Courts, Steuben County, should be censured for (1) being charged with and pleading guilty to driving while intoxicated, (2) presiding over an *ex parte* application for an Order of Protection while under the influence of alcohol and (3) angrily confronting the local sheriff (while still under the influence of alcohol) for relieving the judge's son for the day from his duties as a court officer because he, too, appeared to be intoxicated after drinking with the judge during the lunch hour. Judge Purple acknowledged being an alcoholic and sought treatment in in-patient and an out-patient programs.

The judge did not request review by the Court of Appeals.

Matter of Louis D. Smith

The Commission determined on October 29, 1997, that Louis D. Smith, part-time Town Justice of Ellenburg, Clinton County, should be censured for *inter alia* speaking *ex parte* on the telephone to a defendant-husband charged with harassing his estranged wife,

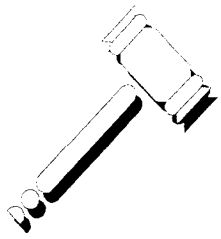
advising the defendant that a guilty plea would result in an adjournment in contemplation of dismissal, effecting that result over the phone without conducting an arraignment or notifying the District Attorney, and thereafter making statements indicating sexual bias. Judge Smith is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Calvin M. Westcott

The Commission determined on December 17, 1997, that Calvin M. Westcott, part-time Town Justice of Hancock, Delaware County, should be censured for, *inter alia*, (1) engaging in *ex parte* conversations with police officers about pending traffic cases and permitting the officers to sit beside the bench in a group and otherwise convey the impression that they were favored over individual motorists, (2) his practice of questioning traffic defendants prior to trial about their pleas of not guilty, in such a manner as to coerce them to change their pleas or waive their right to trial and (3) improperly conducting proceedings on several occasions in chambers, excluding the public from matters which, by law, were public. Judge Westcott is not a lawyer.

The judge did not request review by the Court of Appeals.



Determinations of Admonition

The Commission completed six disciplinary proceedings in 1997 which resulted in determinations of public admonition. The cases are summarized below.

Matter of Robert N. Going

The Commission determined on July 18, 1997, that Robert N. Going, a Judge of the Family Court, Montgomery County, should be admonished for telling the petitioner in a visitation proceeding that he appeared to be "nuts" and "more than a little nuts," at a time the judge mistakenly believed that he had previously ordered a psychological evaluation of the petitioner.

The judge did not request review by the Court of Appeals.

Matter of Charles J. Hannigan

The Commission determined on December 17, 1997, that Charles J. Hannigan, a Surrogate and Judge of the County Court, Niagara County, should be admonished for making numerous intemperate remarks to the 19-year-old first-time defendant while presiding over pre-trial plea discussion, such as calling her and her witnesses "trash" and "garbage," declaring that she was "not bright enough" and referring to her "constitutional right" to "be stupid" and "to relax, to lay back" and "have babies."

The judge did not request review by the Court of Appeals.

Matter of Esther F. Holmes

The Commission determined on May 20, 1997, that Esther F. Holmes, part-time Town Justice of Bangor, Franklin County, should be admonished for issuing a warrant of eviction (effective in two days) without any notice to the tenant, without conducting a court proceeding, and without keeping the required records of her action, based solely on the *ex parte* request of the landlord, who had not filed papers or commenced a legal proceeding. Judge Holmes is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Mardis F. Kelsen

The Commission determined on July 17, 1997, that Mardis F. Kelsen, part-time Town Justice of Cortlandville and Village Justice of McGraw, Cortland County, should be admonished for automatically requiring pre-determined bail in the amount of $100 in traffic cases on out-of-county motorists whom she did not know and who pleaded not guilty by mail, while not requiring bail on Cortland County residents or people she did know who pleaded not guilty in traffic cases – contrary to the CPL and despite having been cautioned previously by the Commission about the practice. Judge Kelsen is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of William J. Redmond

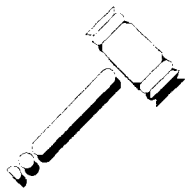
The Commission determined on December 17, 1997, that William J. Redmond, part-time Village Justice of Whitehall, Washington County, should be admonished for (1) hiring a defendant – who at the time was serving a sentence of community service imposed by the judge – to paint a portion of his home and (2) initially giving a misleading statement to the Commission abut the origin of an affidavit. Judge Redmond is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Lawrence R. Rice

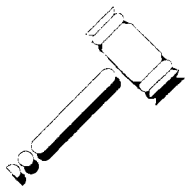
The Commission determined on January 31, 1997, that Lawrence R. Rice, part-time Town Justice of Maine, Acting Village Justice of Johnson City and Acting Town Justice of Nanticoke, Broome County, should be admonished for making intemperate remarks to an attorney and refusing to permit attorneys to participate fully in their clients' small claims cases. Judge Rice is not a lawyer.

The judge did not request review by the Court of Appeals.



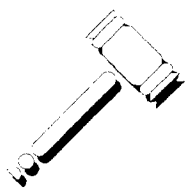
Dismissed or Closed Formal Written Complaints

The Commission disposed of 14 Formal Written Complaints in 1997 without rendering public discipline. In one of these cases, the Commission found that the judge's misconduct was established and the charges were sustained, but that the matter should be disposed of with a confidential letter of dismissal and caution. Seven cases were closed upon the resignation of the respondent-judge. One was closed upon the expiration of the respondent-judge's term of office. One was closed upon the death of the respondent-judge. In two cases, the charges were withdrawn upon the recommendation of the Commission's Administrator; in one of these two, the judge was thereafter cautioned; in the other, the file was closed upon the judge's resignation from office. Finally, in two cases, the charges were dismissed after formal hearings were concluded.



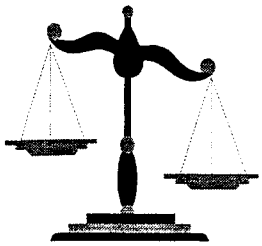
Matters Closed Upon Resignation

Eighteen judges resigned in 1997: 11 while under investigation and seven while under formal charges by the Commission. The matters pertaining to these judges were closed. By statute, the Commission may continue an inquiry for a period of 120 days following a judge's resignation, 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

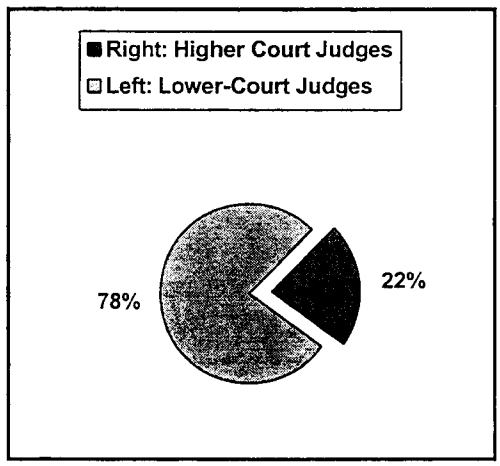
Pursuant to Judiciary Law Section 44(10), the Commission may refer matters to other agencies. In 1997, the Commission referred 37 matters to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor records keeping or other administrative issues. One matter was referred to an attorney disciplinary committee, and one matter was referred to both a District Attorney and the State Commission of Investigation.



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 public 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 1997, the Commission issued 49 letters of dismissal and caution, 48 of which were issued upon conclusion of an investigation; one was issued upon disposition of a Formal Written Complaint. Thirty-eight town or village justices were cautioned, including 12 who are lawyers. Eleven judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct, as the examples below indicate.



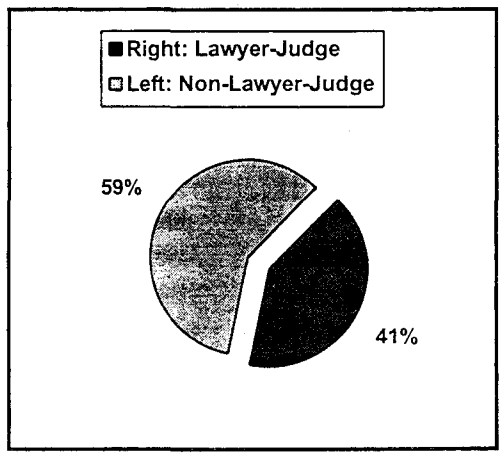
Unauthorized *Ex Parte* Communications. Five judges were cautioned for having unauthorized *ex parte* communications on substantive matters in pending cases. One part-time justice, for example, received and considered a communication on the merits from one party in a small claims case and withheld it from the other party. Another part-time justice telephoned one of the parties in a case before him and threatened her with contempt if she did not accede on an issue being raised by her adversary in a companion case which was pending before another judge. A third part-time justice was cautioned for privately seeking a legal opinion in a case from a village official who was participating in the case. A city court judge was cautioned for vacating a guilty plea based upon information learned outside court.

Conflicts of Interest. All judges are required by the Rules to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned. In 1997, three part-time justices were cautioned for failing to avert conflicts or for presiding over cases without disclosing actual or potential conflicts. For example, one part-time town justice who also practices law was simultaneously representing a client in a civil matter and presiding over a criminal case in which the client's spouse was the defendant. Another part-time lawyer-judge, who presided over traffic and other cases in which certain police officers regularly appeared as witnesses, was representing those same police officers in a civil case.

Inappropriate Demeanor. Several judges were cautioned for exhibiting discourteous, intemperate or otherwise offensive de-

meanor to those with whom they deal in their official capacity. For example, one judge was cautioned for making an undignified remark about women during a proceeding. Another made a vulgar anatomical reference about himself while commenting on an issue in a case before him. A third denigrated a court officer at a courthouse security checkpoint.

Political Activity. Five judges were cautioned for improper political activity. The Rules on Judicial Conduct prohibit judges from attending political gatherings, endorsing other candidates or otherwise participating in political activities except for certain specifically-defined periods when they themselves are candidates for elective judicial office. Judicial candidates are also obliged to campaign in a manner that reflects appropriately on the integrity of judicial office. Among the judges cautioned in 1997 for improper political activity were three who endorsed candidates for other political office or distributed literature which appeared to endorse such other candidates. Two judges were cautioned for making claims or promises which were unrelated to judicial office and therefore misleading.



Poor Administration; Failure to Comply with Law. Several judges were cautioned for failing to meet certain mandates of law, either out of ignorance or administrative oversight. For example, one town justice refused to schedule a traffic case or initiate steps to reinstate a motorist's suspended license despite timely and proper motion papers filed by the motorist's lawyer. Another town justice confiscated a driver's license, without authority, pending the driver's payment of a fine.

One town justice, despite numerous requests, repeatedly failed to file a Return after Notice of Appeal had been filed in a particular case. Another declined to accept for filing a valid misdemeanor complaint because he doubted the credibility of the complaining witness. A third did not advise a defendant of her rights because he believed the defendant already knew her rights.

A city court judge discouraged the defendant in a civil case from going to trial by warning about large lawyer fees, then rendered judgment in the matter based on unsworn statements from the plaintiff.

Practice of Law by Part-Time Judges. While judges who serve on part-time courts are also permitted to practice law, there are limitations in the Rules on the scope of that practice. For example, a part-time lawyer-judge may not act as an attorney on any matter in his or her own court. Nor may one part-time lawyer-judge practice law before another part-time lawyer-judge sitting in the same county. In 1997, one part-time lawyer-judge was cautioned for acting as an attorney in a suit against his own municipality. Another part-time lawyer-judge was cautioned for giving legal advice to a litigant who was appearing before another part-time lawyer-judge in the same jurisdiction.

Audit and Control. Six part-time town justices were cautioned for failing to make prompt deposits and remittances to the State Comptroller of court-collected funds, such

as traffic fines. There was no indication of misappropriated funds, and the judges all took appropriate administrative steps to avoid such problems in the future.

Lending the Prestige of Office to Advance Private Purposes. Judges are prohibited by the Rules from lending the prestige of judicial office to advance a private purpose, including such laudable activities as charitable fund-raising. In 1997, one judge was cautioned for using his judicial title in a charitable fund-raising appeal. Another judge was cautioned for using judicial letterhead in a personal dispute. A third judge, whose relative was appearing before another judge, communicated with that other judge about the case. A fourth judge spoke to an ADA assigned to her court about a traffic ticket issued to her spouse. A fifth judge invoked his judicial title while making a personal complaint about someone at a private gathering.

Other Cautions. One judge improperly closed a proceeding to the public, without a hearing, at the defendant's request. Another judge informally summarized court proceedings for reporters who had not been in court.

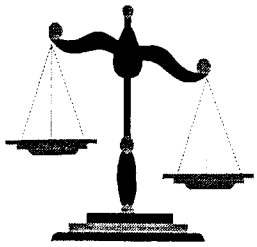
One judge was cautioned for being in arrears on his court-ordered child support obligations. Another was cautioned for failing to assure that the courtroom was accessible to a handicapped party-witness, who was denied access to court as a result. A third was cautioned for failing to file a mandatory financial disclosure statement on time.

One judge appeared to preclude appeals by requiring the parties in contested matters to sign a so-called "disposition agreement" which embodied the judge's decision in a case.

Follow Up on Caution Letters. 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. In certain instances, such as audit and control and records keeping matters, the Commission will authorize a follow-up review of the judge's finances and records, to assure that promised remedial action was indeed taken.

In 1997, the Commission admonished a judge who failed to heed a 1991 caution concerning her practice (which was contrary to the CPL) of automatically imposing a predetermined bail on traffic defendants who were not from her county and who pleaded not guilty by mail, while not imposing bail on traffic defendants residing in her county or whom she knew. The judge continued the practice notwithstanding the caution. (See *Matter of Mardis F. Kelsen, supra.*)

In addition, the Court of Appeals upheld the Commission's removal determination against a judge who *inter alia* continued to preside over cases involving his friends, notwithstanding that he had previously been cautioned by the Commission for doing so. *Matter of Ronald C. Robert v. Commission on Judicial Conduct*, 88 NY2d 745 (1997).



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 1997, the Court decided the four matters summarized below.

Matter of Ronald C. Robert v. State Commission on Judicial Conduct

The Commission determined on September 17, 1996, that Ronald C. Robert, part-time Town Justice of Chester, Warren County, should be removed from office for presiding over cases involving his friends, and for confronting a woman, in the presence of her employer, after she had sent a letter to the editor of a local newspaper containing a statement critical of the judge.

The Court of Appeals accepted the Commission's determination and removed Judge Robert from office on May 1, 1997. 88 NY2d 745. Moreover, the Court sustained a portion of the charge which the Commission had dismissed on procedural grounds: to wit, that Judge Robert presided over cases involving his friends, notwithstanding that he had been previously cautioned by the Commission not to do so. The Court noted that Judge Robert "continues to fail to comprehend the serious nature of his conduct" and that he "testified at the hearing that he intended to continue presiding over matters involving his friends." *Id.* at 747. The Court stated:

> The fact that the misconduct continued even after petitioner was on notice that the Commission considered his actions improper demonstrates that he is not fit for judicial office. *Id.* at 747.

Matter of W. Joseph Embser v. State Commission on Judicial Conduct

The Commission determined on April 2, 1997, that W. Joseph Embser, part-time Justice of the Wellsville Town Court, Allegany County, should be removed from office after having been disbarred for dishonesty, fraud and deceit in connection with his handling of an estate in his capacity as a private attorney, in that he improperly took for himself more than $242,000 in estate funds

The Court of Appeals accepted the Commission's determination and removed Judge

Embser from office on November 20, 1997. 90 NY2d 711.

The Court held that the Commission acted appropriately in summarily determining that Judge Embser should be removed based upon the record of the disbarment proceeding. The Court stated:

> Initially, we reject petitioner's arguments that the Commission acted inappropriately when it summarily determined the judicial misconduct charge against him on the basis of the findings in the prior attorney disciplinary proceeding. As we have previously stated, "the statutory requirement authorizing the commission to make a determination after a hearing does not require the commission to go through a meaningless formal hearing where no issue of fact is raised..." *Id.* at 715.

The Court also noted that in the proceedings before the Commission, Judge Embser did not raise any new factual matters and he did not request oral argument. He "merely made a series of conclusory arguments concerning the Appellate Division referee's credibility determinations." *Id.* at 714.

Matter of Donald R. Roberts v. State Commission on Judicial Conduct

The Commission determined on May 29, 1997 that Donald R. Roberts, part-time Justice of the Malone Village Court, Franklin County, should be removed from office for, *inter alia*, demonstrating "biased and mean-spirited" behavior in domestic abuse and other cases, by denigrating orders of protection and making such statements as "every woman needs a good pounding now and then."

The Court of Appeals accepted the Commission's determination and removed Judge Roberts from office on December 18, 1997. 91 NY2d 93.

The Court held that the judge exercised an "egregious" and "most serious abuse of judicial authority" in that he "directed the arrest and summarily ordered an individual to 89 days in jail, without affording even the most minimal, ordinary and fundamental constitutional and procedural safeguards," in a matter arising from a dispute over a $1.50 cab fare and the defendant's resulting obligation to pay a statutorily-mandated $90 surcharge. *Id.* at 95.

The Court also held that Judge Roberts' "callous comments" about women and orders of protection demonstrated a "gross insensitivity and applied dereliction of duty in regard to judicial responsibilities in the area of domestic abuse crimes and related matters." *Id.* at 96.

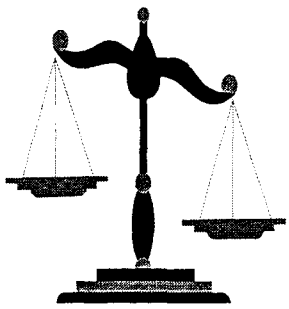
> [Petitioner's statements] are not actions of simple legal error, expressions of incidental carelessness, or indifference on or off the Bench. While the words and actions or inactions, in other circumstances, might fail to rise to the level of sanctionable and removable misconduct, the record here shows particularity and allows the inference of a mind-set of the most serious kinds of default in how Judges should conduct themselves and fulfill their judicial mission." *Id.* at 96.

Matter of John F. Skinner v.
State Commission on Judicial Conduct

The Commission determined on May 29, 1997, that John F. Skinner, part-time Town Justice of Columbia, Herkimer County, should be removed from office for (1) dismissing a sexual abuse case at arraignment, without notice to the prosecution and otherwise contrary to law, based on statements made privately to the judge by the defendant and the defendant's wife, with whom the judge had personal and professional dealings for many years, and (2) refusing to assign counsel to an 18-year-old defendant and sentencing him to 30 days in jail on a $335 bad check charge, without either a trial or a guilty plea.

The Court of Appeals found that Judge Skinner's misconduct was established as charged but rejected the Commission's determination of removal and imposed a public censure instead on December 18, 1997. 91 NY2d 141.

The Court agreed with the Commission that Judge Skinner's behavior "constituted serious misconduct deserving sanction," in that 'he improperly displayed favoritism, and he ignored his duty to advise a defendant of the right to assigned counsel." *Id.* at 144. However, the Court decided that removal was "unduly severe," because the judge was in his seventies and had served on the bench for nearly 40 years; there was no evidence of prior complaints; his behavior was not motivated by personal profit or ill-will; and the discrepancies in his testimony were not a result of dishonesty or evasiveness. *Id.* at 144.



Challenges to Commission Procedures

In addition to defending four Commission determinations which were reviewed by the Court of Appeals upon the request of the respondent judges, the Commission staff was engaged in litigation in the following matter, which was commenced by a respondent judge in Supreme Court in 1996 and was recently concluded with a decision rendered by the Appellate Division, First Department.

Matter of Honorable John Doe (An Individual Requesting Anonymity) v. Commission

In January 1998, the Appellate Division, First Department, dismissed a petition brought by a respondent judge against whom the Commission had rendered a determination of public admonition. The Court held that the petition failed to state a cause of action.

Background

On May 19, 1996, Family Court Judge Bruce M. Kaplan commenced an Article 78 proceeding in Supreme Court, New York County, seeking to overturn the Commission's determination that he be admonished, to remand to the Commission for a new hearing, and to stay release of the determination. (Although petitioner's papers identified him by name as Judge Kaplan, the action was commenced under the name of "Doe.") The petitioner argued that the determination was "fatally defective" because Helaine Barnett, one of the six members to vote for admonition, was not a member of the Commission on May 6, the date the determination was filed. (The vote for admonition was taken on March 14, and Ms. Barnett's term as a member of the Commission expired on March 31. No other vote was taken in the matter.)

Supreme Court Justice Edward H. Lehner issued a decision on May 24, 1996, denying the request for a stay and denying the request to seal the record. An interim stay was granted in the Appellate Division, First Department on May 30, 1996, then vacated on July 18, 1996, when the judge's motion was denied in its entirety. (Thus, *inter alia*, notwithstanding the use of the name "John Doe" in the caption, the judge's request for anonymity was denied.)

On August 16, 1996, Judge Lehner issued a decision holding that the Commission's determination was invalid and remanded the matter to the Commission. The Court held that there was no six-member majority, as required by Judiciary Law 41(6), at the Commission's meeting on April 19, when some essential "act of approval" of the determination took place. As to Commission counsel's argument that the Court of Appeals has exclusive jurisdiction to review the

validity of Commission determinations pursuant to Constitution and statute, the Court stated that it was acting to avoid "delay in the final adjudication of this controversy," while conceding that it was "unlikely" that the Court of Appeals, "with its broad powers of review," would impose a sanction without reviewing the procedural validity of the determination.

Commission counsel filed a notice of appeal, and the judge's attorney filed a notice of cross-appeal of the judgment insofar as it denied his request for dismissal of the formal written complaint and directed that the matter be remanded to the Commission.

The Appellate Division Decision

On January 20, 1998, the Appellate Division granted the Commission's motion to dismiss the petition for failure to state a cause of action, finding that the court below had "erred in holding [the Commission's] determination to be void." The Court held that the Commission's "discretionary or quasi-judicial act here was its March 14 deliberations and vote on the disciplinary action. The preparation and issuance of a writing memorializing such deliberations...[was] ministerial" and the fact that the Commission approved the writing on April 19 "did not make the March 14 determination 'preliminary,'" as Judge Kaplan had argued. *In re Application of John Doe v. Commission on Judicial Conduct*, 666 NYS2d 919 (AD 1st Dept 1998).

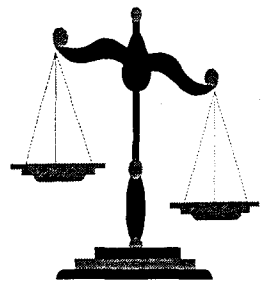
Previous Action by the Court of Appeals

Prior to Judge Kaplan's filing of the petition in Supreme Court, the Commission had, pursuant to the Judiciary Law, filed with the Court of Appeals its determination that Judge Kaplan should be admonished. In June 1996, the Court denied Judge Kaplan's motion to seal the record of that admonition. *Kaplan v. Commission on Judicial Conduct*, 88 NY2d 931 (1996). The Court granted an extension of time for Judge Kaplan to seek review by the Court of the Commission's determination. On January 27, 1997, the Court dismissed the matter for failure to perfect the review.

Special Topics and Recommendations

In the course of its inquiries and other duties, the Commission has identified issues and patterns of conduct that require discussion outside the context of a specific disciplinary proceeding. We do this for public education purposes, to advise the judiciary so that potential misconduct may be avoided, and pursuant to our authority to make administrative and legislative recommendations.

Political Activity by Judges and Judicial Appointees



Most of the judgeships throughout New York State are filled by election. The Rules on Judicial Conduct (Section 100.5) prohibit a judge from participating in political events or activities, except for certain specifically defined periods of time when the judge is a candidate for elective judicial office. For example, except for that "window period," a judge may not attend political gatherings, endorse other candidates or make political contributions, even to the party endorsing the judge. A judge may not even participate in a non-political event sponsored by a political organization, and the organization need not be a major political party for the stricture to apply. (For example, in Opinion 92-95, the Advisory Committee on Judicial Ethics ruled that a judge could not attend a picnic sponsored by a major local employer, because the event was under the aegis of the company's political activities committee. Similarly, Opinions 88-32 and 88-136 prohibit judges from speaking at a political club about the legal system or the functions of particular courts. Opinion 89-26 prohibits a judge from participating in an essay contest sponsored by a political club.)

The Rules also require a judge to impose certain constraints on his or her staff. Section 100.5(C) prohibits the judge's personal appointees from the following:

- holding 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;
- 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; and

- 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.

A judge is also obliged to assure staff compliance with Section 25.39 of the Rules of the Chief Judge, which *inter alia* prohibit court employees from directly or indirectly using the influence of office to induce political contributions, or condition employment on an applicant's political affiliation.

The Commission cautioned five judges 1997 on politically-related issues, for such conduct as endorsing or appearing to endorse other candidates, and making claims or promises of conduct which were unrelated to judicial office and therefore misleading.

One judge was cautioned for giving a non-political civics lecture at a non-fund-raising event held at and sponsored by a political organization. The judge's unfamiliarity with the Rule and with relevant Advisory Opinions appeared to be responsible for this lapse.

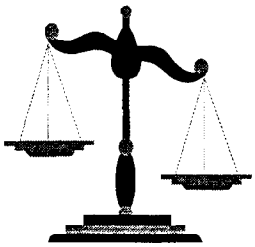
Judge's Personal Appointee
Serving as an Appointed Party Official

During the course of a recent investigation, the Commission became aware that the personal appointee of one judge gave up his *elected* position as an officer of a local political organization, only to be *appointed* as an officer of the same organization. While the Rules prohibit a judge's personal appointee from holding elective political office, they are silent on the subject of holding appointive political office. In this case, the local party organization apparently amended its by-laws – converting a particular elective party office into an appointive one – specifically to enable the judge's staff member to remain in the position without being in technical violation of the Rules.

Certainly it is anomalous to prohibit a court employee from holding a particular office by election while permitting the same employee to hold the same position

by appointment. If the point of the Rule is to separate politics from the courthouse, the Rule in its current form does not meet the goal.

The Commission recommends that the Office of Court Administration review the Rule and consider extending the prohibition on elective party office to appointive party office as well.



The Right to a Public Trial

Despite lengthy discussions in our previous annual reports, and several confidential cautions and public disciplines, some judges continue to conduct arraignments and other court proceedings in private or otherwise inappropriate settings, when by law they should be open and accessible to the public. For example, the Commission censured a judge in 1997 for *inter alia* improperly conducting proceedings in chambers on several occasions, excluding the public from matters which, by law, were public. *See, Matter of Westcott* in this Annual Report. The Commission also cautioned a judge in 1997 for improperly closing a proceeding to the public, at the defendant's request, without a hearing. Several other incidents came to the Commission's attention, either through newspaper reports or petitions filed by newspapers or interested parties, in which such proceedings as arraignments were conducted in chambers or otherwise non-public settings, contrary to law, usually without notice that the proceedings would be closed.

With certain rare and specific exceptions, state law requires that all court proceedings be public (Section 4 of the Judiciary Law). Court decisions as early as 1971 have further addressed the issue, specifically holding that a judge may not hold court in a police barracks or schoolhouse.[1] Unfortunately, these standards are not uniformly observed throughout the state. In 1996, for example, the Commission publicly admonished a town justice who, *inter alia*, conducted arraignments in the police station part of the local justice complex, notwithstanding the availability of his courtroom on the same floor of the same complex. *See, Matter of Cerbone*, in our 1997 Annual Report, and *Matter of Burr* in our 1984 Annual Re-

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

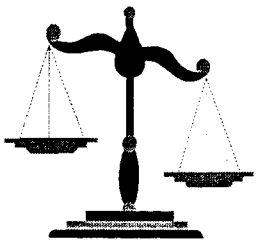
port. *See also*, the discussion in our 1997 Annual Report about the improper practice of automatically barring children from courtrooms.

Absent a controlling exception, all criminal and civil proceedings should be conducted in public settings which do not detract from the impartiality, independence and dignity of the court.

As we reported last year, the Office of Court Administration has made special efforts over the last several years to improve the facilities available to full-time judges around the state. But OCA's role is limited, since it is the local municipality, not the state government, which is responsible for providing appropriate space.

Some municipalities do not provide court facilities for their town and village justices, thereby requiring them to use other settings such as their homes or places of business – a practice which impairs not only the participant's right to a public trial but also the public's right to access, as well as effective oversight of court business by court administrators. Even if in theory such sessions are open to the public, few people are likely to know about or attend proceedings in a judge's house or place of business.

In view of these realities, OCA should continue to give special emphasis in its judicial training and education programs for town and village justices on the subject of proper, public settings for arraignments and other court proceedings.



Improper Delegation of Judicial Duties

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

Last year, the Commission completed a formal proceeding against a town justice who signed blank arrest warrants and left them with his court clerk for issuance as requested by the police or otherwise needed. The Commission determined that the

charge was established but that public discipline was not warranted under the circumstances, and it confidentially cautioned the judge. The Commission noted:

> The [judge's] procedure presents a serious potential for abuse should the warrants fall into the wrong hands or otherwise be used inappropriately and could undermine the integrity of the court and the proper administration of justice.

The Commission also noted that the judge recognized his error, ended the practice and pledged not to reinstitute it.

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

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

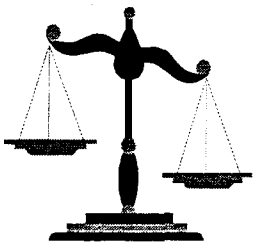
In *Matter of Hopeck,* 1981 Commission Annual Report, a town justice was censured for, *inter alia,* allowing his wife to preside over a series of traffic cases on an evening when the judge himself was unavailable.

In 1992, the Commission admonished 11 non-lawyer town and village justices in Cayuga County for delegating to the county sheriff's department the authority to review and approve bail bonds and sign the judges' names to release the defendants. The judge's responsibility to ensure that a bail bond provides adequate protection that a defendant will return to court cannot be delegated. In the 11 Cayuga County cases, numerous defendants were, in fact, released on legally insufficient bail bonds at the discretion of the sheriff's department, without review by a judge.

The Commission has also become aware of numerous situations in which law secretaries or law clerks act in a manner which creates the appearance that they are judges. It is not uncommon or inappropriate, for example, for a judge to ask a law secretary to conduct conferences with the attorneys in a case, report and make recommendations to the judge. However, there are some law secretaries who take

such assignments too far. Some take the bench to conduct such conferences, or refer to "my ruling" or "my cases," or otherwise convey the impression that they are the judges. For example, the Commission investigated one matter in 1997 in which a law secretary took the bench when a case was called and so conveyed the appearance of being a judge that the attorneys were calling him "Your Honor" or "Judge."

While a law secretary should know better than to allow such an appearance to be conveyed, it is the judge who is ultimately responsible. A judge is obliged not only to safeguard the integrity and independence of the judiciary, but to "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..." Section 100.3(C)(2).



Training and Education for Part-Time Judges

Pursuant to constitutional and statutory authority, all part-time town and village justices must satisfactorily complete training and education programs as a condition of serving on the bench.[2] Under the auspices of the Chief Administrator of the Courts, the Office of Court Administration offers basic and advanced education programs for both lawyer and non-lawyer town and village justices. (Non-lawyer justices must complete both courses; lawyer justices must complete only the advanced course. All town and village justices must attend the first available course after their ascension to the bench.) Failure to successfully complete the program disqualifies a judge from discharging the duties of judicial office; without certification, a town or village justice may not hear and decide cases.

In the past several years, the Commission has become aware that some part-time lawyer-justices appear unaware of various reporting requirements – such as monthly Audit and Control obligations – that tend to be covered in basic training programs which they are not required to attend. The Commission has also heard from some part-time judges who appear to believe certain reporting requirements

[2] Article 6, Section 20(c) of the State Constitution; Section 105 of the Uniform Justice Court Act; Section 31 of the Town Law; Section 17.2 of the Rules of the Chief Judge (22 NYCRR 17.2).

do not apply to them because they have extremely limited caseloads and make virtually no judicial salary.

The Commission, whose subject matter jurisdiction includes a judge's qualifications and fitness, has taken action on complaints alleging that particular judges have failed to meet the training and education certification requirements. In *Matter of Lobdell*, 59 NY2d 338 (1983), and *Matter of Yusko*, 1996 Annual Report, two non-lawyer town and village justices were removed from office for failing to complete the training and certification program and for nevertheless presiding over dozens of cases.

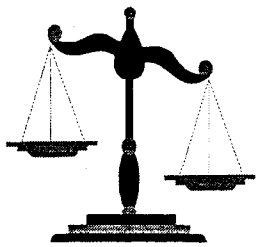
City court judges, who are required to be lawyers but in some jurisdictions serve part-time, are not required to attend judicial training courses. Yet a lawyer whose primary practice is matrimonial, for example, may be at a loss without appropriate training on how to deal as a part-time judge with arraignments and other criminal law proceedings. Some part-time city judges have attempted to explain inappropriate behavior (such as failing properly to advise indigent defendants of the right to assigned counsel) by claiming ignorance of the requirement.

In *Matter of Austria*, 1996 Annual Report, the Commission censured a part-time city court judge, *inter alia*, for failing at arraignments to advise numerous defendants of their rights, eliciting potentially incriminating statements from them, making remarks that presumed guilt, and improperly using bail in prostitution cases to deter future conduct and to punish defendants for failing to heed public warnings about prostitution. As part of the disposition, the judge agreed to attend both basic and advanced training programs offered by the Office of Court Administration.

The *Austria* case, and various complaints which have resulted in confidential cautions, illustrate the anomaly in requiring judicial training for part-time lawyer-judges of town and village courts, but exempting part-time city court judges from such requirements. In many respects, town and village justices play judicial roles similar to part-time city court judges; all have small claims jurisdiction, for example, as well as limited criminal jurisdiction. It is difficult in any event to rationalize why a part-time town or village lawyer-justice would require advanced judicial training but a part-time city court lawyer-judge, who may have far less experience in certain aspects of the law, would not. The complexities of the law and the great diversity in areas of law practice concentration make it unlikely that even a law-

educated part-time city court judge is going to be proficient in all the areas likely to arise.

The Commission recommends to the Legislature and the Office of Court Administration that training and education requirements be broadened so as to require all part-time city court judges and all town and village justices to attend both basic and advanced judicial training and certification programs, whether or not they are lawyers.



Undue Impatience with Small Claims
Litigants Who Appear in Court Without Attorneys

In the typical civil suit or traffic case in a town or village court, the parties appear on behalf of themselves, without counsel. At least in part for this reason, and because the monetary jurisdiction of these courts is generally limited to $3,000,[3] the Uniform Justice Court Act (UJCA) not only "establishes that informality is not to be discouraged if all of the parties accede to it," but the UJCA differs from other court acts "in its express invitation to informality contained at several key points." (UJCA, Article 1, *General Practice Commentary on the Uniform Justice Court Act and Its Background*; David D. Siegel, Commentator.)

The invitation to informality, of course, does not exempt town and village justices from the obligation to ensure that certain fundamental standards are met, such as the right to be heard and present evidence and examine witnesses. But town and village justices may grant considerable leeway to those who appear before them, and should do so to ensure that a fair proceeding is held. In a small claims case, for example, the plaintiff and defendant are unlikely to be familiar with the rules of evidence, and they should not be expected to know the proper way to introduce a document or to frame each question to a witness with the skill of an experienced lawyer.

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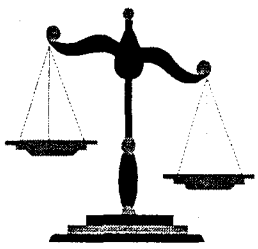
[3] UJCA §202 limits the court's jurisdiction to $3,000 for monetary actions and actions to recover chattel. However, UJCA 204 gives the court jurisdiction of summary proceedings to recover possession real property, to remove tenants therefrom and to render judgment for rent due "without regard to amount."

Most town and village justices – the vast majority of whom, like the litigants before them, are not lawyers – appreciate the flexibility afforded to them by the UJCA and allow *pro se* litigants reasonable latitude to present their cases. From time to time, however, the Commission becomes aware of certain judges who are so inflexible that they effectively inhibit or even prevent the parties from making a case.

The Commission investigated several cases in 1997 in which part-time or even full-time judges were alleged to have been rude toward *pro se* litigants and unduly hampered their presentation to the court. For example, the judges in these matters upbraided various small claims litigants for appearing without an attorney, for asking inartful questions and giving nervous answers, and for failing to understand or follow the rules of evidence. The Commission has cautioned judges in recent years for such conduct.

Often, *pro se* litigants and traffic defendants will make statements rather than pose questions in proper legal form, particularly on cross examination. When that occurs, an understanding response from the judge explaining the purpose of cross examination would be far better than harsh, abrupt or impatient criticism.

It is especially important for judges, when they are the triers of fact, to be flexible and permit unrepresented parties to express themselves. There is no jury to influence in such cases, and the judge can readily determine what is material to the case and what is extraneous. If a judge's inflexibility prevents a *pro se* litigant or traffic defendant from addressing the court on the merits of a claim, particularly where the judge does not explain his or her rulings, public confidence in the courts and the administration of justice will suffer.



Blanket Denials of Adjournments in Traffic Cases

The Commission has received several complaints in the past year concerning a practice in many town and village courts in which traffic defendants who plead not guilty by mail are issued trial notices and are told, in words or substance, that no requests for adjournments will be "considered" or "granted." A typical example, apparently issued on a computer-generated form, reads as follows:

> This Court has accepted your not guilty plea. You have been scheduled for trial as shown above. If you plan to be represented by an attorney he or she should accompany you and be ready for trial as scheduled. No adjournments will be considered.

Some courts disseminate such notices only to traffic defendants and not to the issuing officer or local prosecutor.

In one instance that came to the Commission's attention last year, a defendant recovering from surgery was advised by the clerk of a city court that requests for adjournment could not be made by telephone or mail, but only in person at the scheduled time. The defendant had to appear in court for that purpose, against her physician's advice.

In another case, a lawyer who had negotiated a reduced plea on behalf of his client, who lived 150 miles from the court, was unable to obtain a short adjournment despite advising the court clerk of his scheduling conflict. The clerk advised him that his client would either have to appear without counsel or retain new counsel. The client retained new counsel and ultimately paid fees to two lawyers, to plead guilty to a traffic charge.

Such rigid policies impair the judge's discretion to consider and grant reasonable requests for adjournments, and as such may be improper.

The Commission's Budget

Since its inception, the Commission has managed its finances with extraordinary care. In periods of relative plenty, we kept our budget small; in times of statewide financial crisis, we made difficult sacrifices. Our average annual increase since 1978 has been less than one percent – a no-growth budget which, when adjusted for inflation, has actually meant a major decline in financial resources.

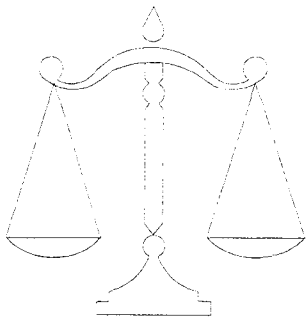
From a high of about $2.26 million, our funding has been as low as $1,584,000, as reflected in the chart below. While we had a staff of 63 in 1978, we have been as low as 20 in 1996-97. At the same time, the number of complaints received and reviewed in a year has more than doubled (to more than 1400 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 has remained constant, at about 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. For example, until this year, we had only one lawyer and one part-time investigator in our Rochester office, covering the entire Fourth Department, and one part-time investigator in our New York office, covering the First and Second Departments.

For the 1997-98 fiscal year, after the Governor's submission to the Legislature proposed a $59,500 budget cut, the Legislature restored that amount and added an additional $40,000. For the 1998-99 fiscal year, the Commission's budget has been set at $1,875,900, as recommended by the Governor and approved by the Legislature. This has permitted us to hire a second full-time attorney in Rochester and a full-time investigator for each of our three offices: New York, Albany and Rochester.

Budget Figures, 1978 to Present

Fiscal Year	Annual Budget	Percent Change	Complaints Received	Attorneys on Staff	Investigators on Staff	Total Staff
1978-79	$1,644,000		641	21	18 f/t	63
≈	≈		≈	≈	≈	≈
1988-89	$2,224,000		1109	8	12 f/t, 2 p/t	41
1989-90	$2,211,500	↓ 1.4%	1171	8	9 f/t, 2 p/t	41
1990-91	$2,261,700	↑ 2.2%	1184	8	8 f/t	37
1991-92	$1,827,100	↓ 19.2%	1207	7	7 f/t	32
1992-93	$1,666,700	↓ 8.7%	1452	7	6 f/t, 1 p/t	26
1993-94	$1,645,000	↓ 1.3%	1457	7	4 f/t, 1 p/t	26
1994-95	$1,778,400	↑ 8.1%	1438	7	4 f/t, 1 p/t	26
1995-96	$1,584,100	↓ 10.9%	1361	7	3 f/t, 1 p/t	21
1996-97	$1,696,000	↑ 7%	1490	7	2 f/t, 2 p/t	20
1997-98	$1,736,500	↑ 2.4%	1403	7	2 f/t, 2 p/t	20
1998-99	$1,875,900	↑ 8%	* *	8	5 f/t, 1 p/t	26



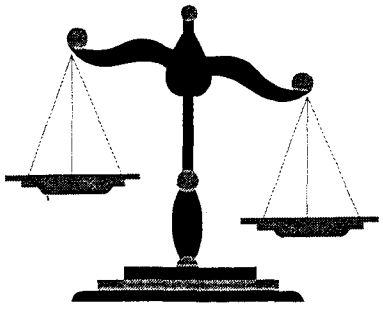
Conclusion

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 believe that the Commission's work contributes to that ideal, to a heightened awareness of the appropriate ethics standards incumbent on all judges, and to the fair and proper administration of justice.

Respectfully submitted,

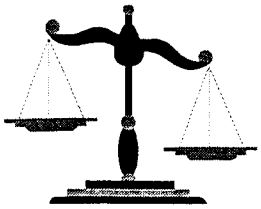
HENRY T. BERGER, CHAIR
JEREMY ANN BROWN
STEPHEN R. COFFEY
MARY ANN CROTTY
LAWRENCE S. GOLDMAN
DANIEL F. LUCIANO
ALAN J. POPE
FREDERICK M. MARSHALL
JUANITA BING NEWTON
EUGENE W. SALISBURY
WILLIAM C. THOMPSON

APPENDIX



Biographies of Commission Members and Attorneys
Roster of Referees Who Served in 1997
The Commission's Powers, Duties & History
Text of the Rules on Judicial Conduct
Text of 1997 Determinations
Statistical Analysis of Complaints

1998 Annual Report
New York State
Commission on Judicial Conduct



Biographies of Commission Members and Attorneys

There are 11 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.

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. Mr. Berger served as a member of the New York City Council in 1977.

JEREMY ANN BROWN is a recent graduate of Empire State College with a degree in Community and Human Services. In the past she attended Boston University School of Fine Arts and had a career in professional musical comedy theatre. She is a Credentialed Alcohol and Substance Abuse Counselor at the Rockland Council on Alcoholism and other Drug Dependence, Inc., in Nyack, New York. Ms. Brown previously served as C.A.S.A.C. at the YWCA Awakenings Program in White Plains, St. Christopher's Inn in Garrison, Phelps Hospital Outpatient Program in Ossining and the Westchester County Medical Center's Detox and outpatient program in White Plains. Ms. Brown is a New York State Certified Rape Crisis Counselor and volunteers as such for the Rockland Family Shelter in New City. She was honored by CBS Television as Woman of the Year in 1995. Ms. Brown is a member of Attorney General Dennis Vacco's Crime Victim's Advisory Panel and in 1996 was a recipient of the Governor George E. Pataki Distinguished Citizenship Award. She resides in South Nyack, New York, and has two children, Timothy and Samantha.

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 Treasurer of the National Association of Criminal Defense Lawyers, and former chairperson of its ethics advisory and white-collar committees, 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 been chosen for the outstanding criminal law practitioner award by the New York State Bar Association, the New York State Association of Criminal Defense Lawyers and 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 as 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, is currently a Delegate to the House of Delegates of the New York State Bar Association, and is President-Elect of the Association of Justices of the Supreme Court of the State of New York. Justice Luciano has held the positions of Director of the Suffolk County Women's Bar Association, and First Vice President, Secretary and Treasurer of the Association of Justices of the Supreme Court of the State of New York. Additionally, he is a 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.

ALAN J. POPE, ESQ. is a graduate of the Clarkson College of Technology (*cum laude*) and the Albany Law School. He is a member of the Broome County Bar Association, where he co-chairs the Environmental Law Committee; the New York State Bar Association, where he serves on the Insurance, Negligence and Compensation Law Section, the Construction and Surety Division, and the Environmental Law Section; and the American Bar Association, where he serves on the Tort & Insurance Practice Section and the Construction

Industry Forum Committee. Mr. Pope is also an Associate Member of the American Society of Civil Engineers, a member of the New York Chapter of the General Contractors Association of America, an Associate Member of the Building Contractors of Triple Cities, and a member of the Broome County Environmental Management Council.

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. He is a member of the Upstate New York Labor Advisory Council. 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.

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.

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 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 in 1994, teaching courses and lecturing on constitutional law, public management and ethics at the American University of Armenia and Yerevan State University.

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.

JOHN J. POSTEL, Chief Attorney (Rochester), is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission's staff in 1980 as an assistant staff attorney in Albany. He has been Chief Attorney in charge of the Commission's Rochester office since 1984. Mr. Postel is a past president of the Governing Council of St. Thomas More R.C. Parish. He is a former officer of the Pittsford-Mendon Ponds Association and a former President of the Stonybrook Association. He is the advisor to the Sutherland High School Mock Trial Team.

JEAN M. SAVANYU, Senior Attorney, is a graduate of Smith College and the Fordham University School of Law (*cum laude*). She joined the Commission's staff in 1977 and has been a senior attorney since 1986. Prior to joining the Commission, she worked as an editor and writer. Ms. Savanyu teaches in the paralegal program at Marymount Manhattan College and is a member of its advisory board.

ALAN W. FRIEDBERG, Senior Attorney, is a graduate of Brooklyn College, the Brooklyn Law School and the New York University Law School, where he earned an LL.M in Criminal Justice. He previously served as a staff attorney in the Law Office of the New York City Board of Education, as an adjunct assistant professor of business law at Brooklyn College, and as a junior high school teacher in the New York City public school system.

CATHLEEN S. CENCI, Senior 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.

SEEMA ALI, Staff Attorney, is a graduate of York University in Toronto, Ontario, and the Syracuse University College of Law. She has been a law clerk with the New York State Attorney General's Office and the law firm of D.J. & J.A. Cirando in Syracuse.

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 and was honored for excellence in teaching in 1996.

REFEREES WHO PRESIDED OVER COMMISSION HEARINGS IN 1997

The following individuals presided over Commission hearings in 1997.

NAME	CITY	COUNTY
Honorable Fritz W. Alexander, II	New York	New York
Edward Brodsky, Esq.	New York	New York
Bruno Colapietro, Esq.	Binghamton	Broome
Vincent D. Farrell, Esq.	Mineola	Nassau
Honorable Bertram Harnett	New York	New York
Jacob D. Hyman, Esq.	Buffalo	Erie
Robert M. Kaufman, Esq.	New York	New York
Milton Sherman, Esq.	New York	New York
Honorable Richard D. Simons	Rome	Oneida
Robert S. Smith, Esq.	New York	New York
Samuel B. Vavonese, Esq.	Syracuse	Onondaga

The Commission's Powers, Duties and History

Creation of the New York State Commission on Judicial Conduct

For decades prior to the creation of the Commission on Judicial Conduct, judges in New York State were subject to professional discipline by a patchwork of courts and procedures. The system, which relied on judges to discipline fellow judges, was ineffective. In the 100 years prior to the creation of the Commission, only 23 judges were disciplined by the patchwork system of *ad hoc* judicial disciplinary bodies. For example, an *ad hoc* Court on the Judiciary was convened only six times prior to 1974. There was no staff or even an office to receive and investigate complaints against judges.

Starting in 1974, the Legislature changed the judicial disciplinary system, creating a temporary commission with a full-time professional staff to investigate and prosecute cases of judicial misconduct. In 1976 and again in 1977, the electorate overwhelmingly endorsed and strengthened the new commission, making it permanent and expanding its powers by amending the State Constitution.

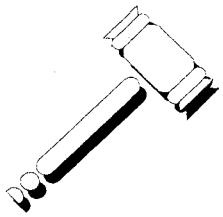
The Commission's Powers, Duties, Operations and History

The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of judicial misconduct in New York State. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding their right to decide cases independently. The Commission does not act as an appellate court. It does not review judicial decisions or alleged errors of law, nor does it issue advisory opinions, give legal advice or represent litigants. When appropriate, it refers complaints to other agencies

By offering a forum for citizens with conduct-related complaints, and by disciplining those judges who transgress ethical constraints, the Commission seeks to insure compliance with established standards of ethical judicial behavior, thereby promoting public confidence in the integrity and honor of the judiciary.

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

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



Membership and Staff

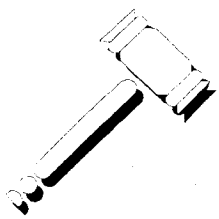
The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one each by the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and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

The following individuals have served on the Commission since its inception. Asterisks denote those members who chaired the Commission.

Hon. Fritz W. Alexander, II (1979-85)
Hon. Myriam J. Altman (1988-93)
Helaine M. Barnett (1990-96)
Herbert L. Bellamy, Sr. (1990-94)
*Henry T. Berger (1988-present)
*John J. Bower (1982-90)
Hon. Evelyn L. Braun (1994-95)
David Bromberg (1975-88)
Jeremy Ann Brown (1997-present)
Hon. Richard J. Cardamone (1978-81)
Hon. Carmen Beauchamp Ciparick (1985-93)
E. Garrett Cleary (1981-96)
Stephen R. Coffey (1995-present)
Howard Coughlin (1974-76)

Mary Ann Crotty (1994-present)
Dolores DelBello (1976-94)
Hon. Herbert B. Evans (1978-79)
*William Fitzpatrick (1974-75)
Lawrence S. Goldman (1990-present)
Hon. Louis M. Greenblott (1976-78)
Hon. James D. Hopkins (1974-76)
Michael M. Kirsch (1974-82)
*Victor A. Kovner (1975-90)
William B. Lawless (1974-75)
Hon. Daniel F. Luciano (1995-present)
William V. Maggipinto (1974-81)
Hon. Frederick M. Marshall (1996-present)
Hon. Ann T. Mikoll (1974-78)
Hon. Juanita Bing Newton (1994-present)
Hon. William J. Ostrowski (1982-89)
Alan J. Pope (1997-present)
*Lillemor T. Robb (1974-88)
Hon. Isaac Rubin (1979-90)
Hon. Eugene W. Salisbury (1989-present)
Barry C. Sample (1994-97)
Hon. Felice K. Shea (1978-88)
John J. Sheehy (1983-95)
Hon. Morton B. Silberman (1978)
Hon. William C. Thompson (1990-present)
Carroll L. Wainwright, Jr. (1974-83)

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



The Commission's Authority

The Commission has the authority to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings thereon, subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges within the state unified court system. This authority is derived from Article 6, Section 22,

of the Constitution of the State of New York, and Article 2-A of the Judiciary Law of the State of New York.

By provision of the State Constitution (Article 6, Section 22), the Commission:

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

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

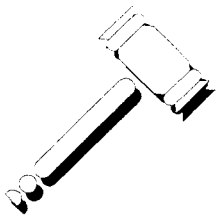
Standards of conduct are set forth primarily in the Rules Governing Judicial Conduct (originally promulgated by the Administrative Board of the Judicial Conference and subsequently adopted by the Chief Administrator of the Courts with the approval of the Court of Appeals) and the Code of Judicial Conduct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

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

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

In accordance with its rules, the Commission may also issue a confidential letter of dismissal and caution to a judge, despite a dismissal of the complaint, when it is determined

that the circumstances so warrant. In some cases the Commission has issued such a letter after charges of misconduct have been sustained.



Procedures

The Commission meets several times a year. At its meetings, the Commission reviews each new complaint of misconduct and makes an initial decision whether to investigate or dismiss the complaint. It also reviews staff reports on ongoing matters, makes final determinations on completed proceedings, considers motions and entertains oral arguments pertaining to cases in which judges have been served with formal charges, and conducts other Commission business.

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

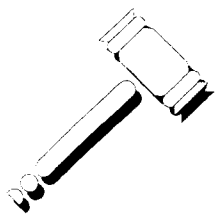
After the Commission authorizes an investigation, the Administrator assigns the complaint to a staff attorney, who works with investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge may be asked to respond in writing to the allegations. In some instances,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

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

respondent-judge (in addition to his or her counsel) may appear and be heard at oral argument.

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

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



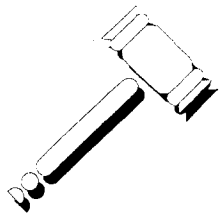
Temporary State Commission on Judicial Conduct

The Temporary State Commission on Judicial Conduct was established in late 1974 and commenced operations in January 1975. The temporary Commission had the authority to investigate allegations of misconduct against judges in the state unified court system, make confidential suggestions and recommendations in the nature of admonitions to judges when appropriate and, in more serious cases, recommend that formal disciplinary proceedings be commenced in the appropriate court. All disciplinary proceedings in the Court on the Judiciary and most in the Appellate Division were public.

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

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

Five judges resigned while under investigation.



Former State Commission on Judicial Conduct

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

The former Commission was empowered to investigate allegations of misconduct against judges, impose certain disciplinary sanctions and, when appropriate, initiate formal disciplinary proceedings in the Court on the Judiciary, which, by the same constitutional amendment, had been given jurisdiction over all 3,500 judges in the unified court system. The sanctions that could be imposed by the former Commission were private admonition, public censure, suspension without pay for up to six months, and retirement for physical or mental disability. Censure, suspension and retirement actions could not be imposed until the judge had been afforded an opportunity for a full adversary hearing. These Commission sanctions were also subject to a *de novo* hearing in the Court on the Judiciary at the request of the judge.

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

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

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

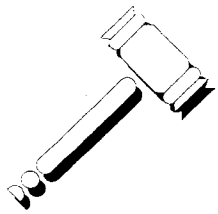
- 15 judges were publicly censured;
- 40 judges were privately admonished;
- 17 judges were issued confidential letters of suggestion and recommendation.

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

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

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

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



Continuation from 1978 to 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions

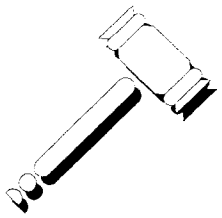
Thirty-two formal disciplinary proceedings which had been initiated in the Court on the Judiciary by either the temporary or former Commission were pending when the former Commission was superseded on April 1, 1978, and were continued without interruption by the present Commission.

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

- 4 judges were removed from office;
- 1 judge was suspended without pay for six months;
- 2 judges were suspended without pay for four months;
- 21 judges were censured;
- 1 judge was directed to reform his conduct

consistent with the Court's opinion;

- 1 judge was barred from holding future judicial office after he resigned; and
- 2 judges died before the matters were concluded.



The 1978 Constitutional Amendment

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

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

Summary of Complaints Considered Since the Commission's Inception

Since January 1975, when the temporary Commission commenced operations, 22,843 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 18,064 (79%) were dismissed upon initial review and 4779 investigations were authorized. Of the 4779 investigations authorized, the following dispositions have been made through December 31, 1997:

- 2290 were dismissed without action after investigation;

- 942 were dismissed with letters of caution or suggestions and recommendations to the judge; the actual number of such letters totals 873, 51 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct;
- 383 were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings; the actual number of such resignations was 272;
- 341 were closed upon vacancy of office by the judge other than by resignation;
- 671 resulted in disciplinary action; and
- 152 are pending.

Of the 671 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission. (It should be noted that several complaints against a single judge may be disposed of in a single action. This accounts for the apparent discrepancy between the number of complaints and the number of judges acted upon.)

- 124 judges were removed from office;
- 3 judges were suspended without pay for six months (under previous law);
- 2 judges were suspended without pay for four months (under previous law);
- 208 judges were censured publicly;
- 139 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission.

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.

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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.

(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.

(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 re-

siding 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 po-

lice 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 extrajudicial 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.

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

ARTHUR BIRNBAUM,

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

APPEARANCES:

Gerald Stern for the Commission
Hoffinger Friedland Dobrish Bernfeld & Stern, P.C. (By Jack S. Hoffinger) for Respondent

The respondent, Arthur Birnbaum, a judge of the Civil Court of the City of New York, New York County, was served with a Formal Written Complaint dated June 5, 1997, alleging improper campaign activity. Respondent did not answer the Formal Written Complaint.

On June 23, 1997, 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 July 10, 1997, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Civil Court of the City of New York since January 1, 1997.

2. Respondent, who was then serving as a housing judge in the Civil Court, was a candidate for Civil Court judge in the Democratic primary on September 10, 1996. He had one opponent.

3. Respondent's campaign spent only a small amount on paid advertising; mailings to potential voters constituted the most significant part of the campaign. About two weeks before the primary, respondent's campaign mailed a brochure to approximately 8,000 voters, all of whom had been identified as tenants.

4. The brochure asserted that voters had a "clear choice" between respondent, who was identified as a tenant, and his opponent, who was identified as a landlord. The brochure contained photographs and quotations that were favorable to respondent from tenants who had appeared before him in the Housing Part of the Civil Court, including tenants in a case that was pending before him at the time.

5. It was respondent's idea to refer in the brochure to litigants in his cases. He directed his campaign staff to prepare the brochure, and he approved it before it was mailed.

6. Respondent selected the tenants whose photographs and quotations appeared in the brochure, contacted them and asked them to participate and accompanied the photographer to the building where the tenants lived.

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, 100.5(A)(4)(a), 100.5(A)(4)(d)(i) and 100.5(A)(4)(d)(ii), and Canons 1, 2 and 7B(1) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

The campaign activities of judicial candidates are significantly circumscribed. (*See, Matter of Decker*, 1995 Ann Report of NY Commn on Jud Conduct, at 111, 112). A judicial candidate must "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary...." (Rules Governing Judicial Conduct, 22 NYCRR 100.5[A][4][a]). The candidate may not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," (22 NYCRR 100.5[A][4][d][i]) and may not "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," (22 NYCRR 100.5[A][4][d][ii]).

Respondent's campaign literature gave the unmistakable impression that he would favor tenants over landlords in housing matters, which are often the subject of Civil Court proceedings. Respondent identified himself as a tenant and his opponent as a landlord. He selected, solicited and used testimonials from tenants speaking of his favorable handling of their cases, including quotations from tenants in a case that was pending before him at the time. In doing so, he compromised his impartiality and failed to maintain the dignity expected of a judicial officer.

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

Mr. Berger, Mr. Coffey, Ms. Crotty, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Mr. Goldman was not present.

Ms. Brown was not a member of the Commission when the vote was taken in this matter.

Dated: September 29, 1997

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

CARLTON M. CHASE,

A Justice of the Sullivan Town Court and
Chittenango Village Court, Madison County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Bond, Schoeneck & King, L.L.P. (By Francis E. Maloney, Jr.) for Respondent

The respondent, Carlton M. Chase, a justice of the Sullivan Town Court and the Chittenango Village Court, Madison County, was served with a Formal Written Complaint dated June 27, 1995, alleging that he improperly intervened on behalf of his daughter in three separate incidents. Respondent filed an answer dated July 19, 1995.

By order dated August 3, 1995, the Commission designated Travis H.D. Lewin, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 27 and 28, 1996, and the referee filed his report with the Commission on July 18, 1996.

By motion dated August 16, 1996, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent's misconduct had been established. Respondent opposed the motion on September 10, 1996. The administrator filed a reply on September 11, 1996. Oral argument was waived.

By motion dated February 6, 1997, respondent moved to re-open the hearing. The administrator opposed the motion by affirmation dated February 13, 1997. By determination and order dated April 2, 1997, the Commission denied the motion. Also by determination and order dated April 2, 1997, the Commission made the findings of fact enumerated below. Both parties filed memoranda as to sanction. On May 22, 1997, 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.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Chittenango Village Court since 1973 and a justice of the Sullivan Town Court since 1981.

2. Donna Watson is respondent's daughter. She also serves as his court clerk.

3. On October 8, 1993, respondent was advised that Ms. Watson had been arrested for Driving While Intoxicated and was being held at a Madison County Sheriff's Department substation in Morrisville.

4. Respondent drove to the substation and arrived in the parking lot as his daughter was about to be transported in a patrol car for arraignment.

5. Sheriff's Deputies Karl R. Taylor and Joseph M. Gaiser, Sr., recognized respondent and knew that he was a judge. Rather than proceed with the arraignment, Deputy Taylor decided to release Ms. Watson to respondent.

6. Respondent appeared angry and upset. He loudly said to Deputy Taylor, "Wouldn't you have called me? You have my number."

7. Respondent also said, "Are you afraid of losing your job? With all my problems, you've caused me another one."

8. Respondent told Deputy Gaiser that Ms. Watson did not need to be arrested and said that he "didn't need this shit right now."

As to Charge II of the Formal Written Complaint:

9. Carla Watson is Donna Watson's daughter and respondent's granddaughter. On May 13, 1994, Carla Watson was 15 years old.

10. On May 13, 1994, respondent was advised by Donna Watson that his granddaughter had left home after a disagreement with her mother. He later learned that Carla Watson was at the Chittenango Police Station.

11. Respondent went to the police station, but his granddaughter had been removed to the home of friends. Respondent asked Officer Jerome M. Duda where Carla Watson was. Officer Duda did not know respondent and refused to reveal her whereabouts. Respondent then said that he was Carla Watson's grandfather and the village justice. Officer Duda then revealed that she had been sent to stay with a family named Ormsby.

12. Respondent was agitated and spoke loudly. He stood within two feet of Officer Duda and, raising his hand, respondent yelled, "Where the fuck do you live?" He also said, "How long have you lived in this fuckin' village," and, "Where do you fuckin' people get off doing what you did?"

13. Respondent said to Officer Duda in the presence of another police officer, "I'll have your fuckin' job."

14. Upon learning where Carla Watson was staying, respondent said, "The fuckin' Ormsbys; I can't believe you people."

As to Charge III of the Formal Written Complaint:

15. On June 16, 1994, respondent was advised by Donna Watson that William Berry had come to respondent's home, had attempted to remove a wheelbarrow and had verbally abused Ms. Watson and her children. Ms. Watson had an Order of Protection against Mr. Berry which had been signed by respondent's fellow judge in the Sullivan Town Court, William Danehy.

16. Respondent and a friend drove around Chittenango looking for Judge Danehy until they spotted him pumping gasoline at a station on a public street.

17. Respondent approached Judge Danehy and stood above him on an island about a foot away.

18. Respondent asked Judge Danehy about the Order of Protection. Judge Danehy responded that he had found no violation. Respondent loudly berated Judge Danehy, exclaiming, "If you won't protect my daughter, who will?"

19. Respondent said that Judge Danehy was "no good" and was not worthy of being a judge.

20. Respondent was red in the face and gestured with his hands at Judge Danehy.

21. Respondent's friend and at least one other patron of the gas station observed the confrontation.

22. Judge Danehy was frightened and appeared shaken after the confrontation.

23. The Order of Protection involved a matter pending before Judge Danehy on June 16, 1994.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a), 100.2(c) and 100.3(a)(4) [now 100.3(B)(6)], and Canons 1, 2A, 2B and 3A(4) of the Code of Judicial Conduct. Charges I, II and III of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

Using profane, threatening and menacing language and gestures, respondent intervened with authorities on behalf of family members on three occasions during the course of eight months. His conduct could only have been meant to intimidate the police and another judge

concerning a case then pending. Respondent was evidently trying to assert his authority in the community by making it known that other officials could not deal with his family without answering to him. Such conduct deviates from the high standards expected of every judge.

Even absent a bald request for favoritism, it is wrong for a judge to intervene in official matters when he or she is known as a judge. (*See, Matter of Edwards v State Commission on Judicial Conduct,* 67 NY2d 153, 155; *Matter of DeLuca*, 1985 Ann Report of NY Comm on Jud Conduct, at 119).

As the Court of Appeals observed:

> Wherever he travels, a Judge carries the mantle of his esteemed office with him, and, consequently, he must always be sensitive to the fact that members of the public, including some of his friends, will regard his words and actions with heightened deference simply because he is a Judge. (*Matter of Steinberg v State Commission on Judicial Conduct*, 51 NY2d 74, at 81).

Respondent's conduct in this matter makes it clear that two prior sanctions for using his judicial office to seek favors in cases before other courts (*Matter of Chase*, 1 Commission Determinations 123) and for his rude, loud and angry statements and giving the appearance of bias (*Matter of Chase*, 1992 Ann Report of NY Commn on Jud Conduct, at 41) have not sensitized him to the high ethical standards placed upon him as a judge. Prior discipline for similar misconduct "is an aggravating factor militating in favor of the strictest sanction." (*Matter of Rater v State Commission on Judicial Conduct*, 69 NY2d 208, at 209).

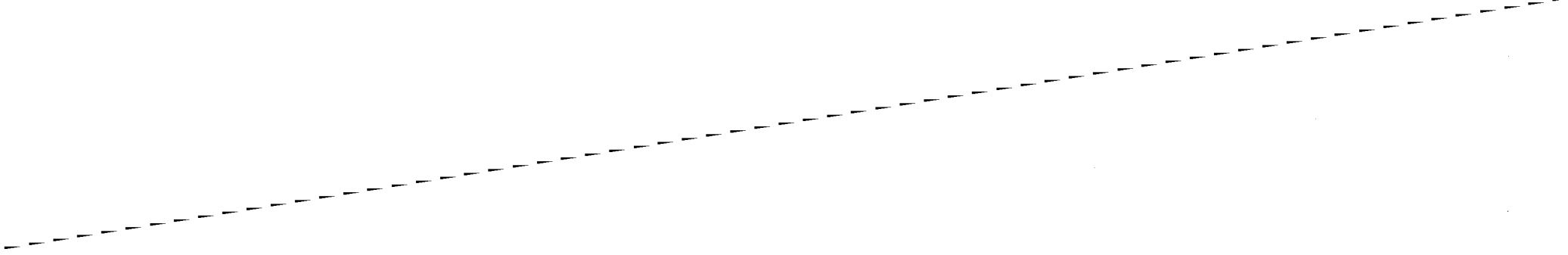
By reason of the foregoing, the Commission determines that the appropriate sanction is removal.

Mr. Berger, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope and Judge Salisbury concur.

Ms. Crotty and Judge Thompson were not present.

Mr. Pope did not participate in the finding of misconduct.

Dated: June 10, 1997



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

SALVADOR COLLAZO,

a Judge of the Civil Court of the City of New York
and an Acting Justice of the Supreme Court,
New York County.

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission
Marvin Ray Raskin for Respondent

The respondent, Salvador Collazo, a judge of the Civil Court of the City of New York and an acting justice of the Supreme Court, 1st Judicial District, was served with a Formal Written Complaint dated October 17, 1995, alleging five charges of misconduct. Respondent filed an answer dated December 22, 1995.

By order dated January 17, 1996, the Commission designated the Honorable Leon D. Lazer as referee to hear and report proposed findings of fact and conclusions of law. A hearing was commenced on July 17 and 18, August 30 and October 4, 1996. By motion dated October 18, 1996, respondent moved to stay further hearing dates, for a hearing on confidentiality pursuant to Judiciary Law §§ 45 and 46, and to dismiss the Formal Written Complaint. The administrator of the Commission opposed the motion by affirmation and memorandum dated October 28, 1996. By letter dated October 31, 1996, the Commission declined to stay the hearing. The hearing was concluded on November 4, 1996. By determination and order dated February 6, 1997, the Commission denied respondent's motion in all respects.

The referee filed his report with the Commission on March 10, 1997. By motion dated April 2, 1997, the administrator moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on April 17, 1997. The administrator filed a reply dated April 24, 1997. Respondent submitted a sur-reply on May 5, 1997, and the administrator responded on May 6, 1997.

On May 22, 1997, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Civil Court of the City of New York since January 1991. Since February 1993, he has served by designation as an acting justice of the Supreme Court.

2. In April or May 1993, while in a robing room, respondent passed a note to his court attorney which referred to a female law intern who was also in the room. The note read, "Ralph S - She

has some knockers - Look at those nipples sticking out."

3. Shortly thereafter, the law intern remarked that it was hot in the room. Respondent suggested that she remove her jacket. The woman replied, "Have you lost your mind? I don't have anything on underneath my jacket." Respondent then said, "Why don't you take it off anyway?"

As to Charge II of the Formal Written Complaint:

4. On March 15, 1995, respondent testified during the course of the investigation in this matter. Under oath, respondent said:

a) that he had written the note in response to a Penthouse magazine that he found on his bench when he returned from a recess on a day in 1991; respondent suggested that the magazine had been placed there by a court officer in reference to a case against Penthouse and its publisher that was being tried at the time in another courtroom; and,

b) that he never suggested to the law intern that she disrobe in any fashion.

5. At the hearing in this matter on November 4, 1996, respondent gave a different version of the events concerning the note. He said that the magazine was handed to him in a folder by the court attorney, Ralph Silverman, while they were on the bench during a court proceeding. Respondent testified that he wrote the note in answer to one handed to him by

Mr. Silverman, referring to a model in the magazine and attached to her picture.

6. The allegations in Paragraphs 6C, 6D, 6E, 6F, 6G and 6H of Charge II are not sustained and are, therefore, dismissed.

As to Charge III of the Formal Written Complaint:

7. In 1995, respondent was nominated by Governor Pataki for appointment to a vacancy on the Supreme Court. Prior to his nomination, respondent was asked by the Governor's Judicial Screening Committee to complete a questionnaire. One of the questions, under the heading, "Investigatory Actions," asked, "Have you ever been the subject of any inquiry or investigation by a federal, state or local agency (other than for routine background investigations for employment purposes)?" On May 15, 1995, respondent answered, "No," even though he had given testimony in connection with the Commission's investigation two months earlier and knew that he was the subject of a pending investigation. In signing the questionnaire, respondent certified that "to the best of my knowledge the information I have supplied is complete, true and accurate."

As to Charge IV of the Formal Written Complaint:

8. After his nomination by the Governor, respondent's name was put before the State Senate for confirmation. Respondent was asked by the Senate Judiciary Committee to sign a waiver authorizing the Commission to provide "any and all records and documents relating to me in its possession...."

9. When respondent failed to execute the waiver in a timely fashion, Amy Karp, counsel to the Judiciary Committee, attempted to reach respondent by telephone at least once a day from June 1 to June 6, 1995. On June 6, Ms. Karp spoke to respondent and asked him, in connection with the waiver, whether there were any "complaints," "admonitions" or other "problems with this." Respondent replied, "No," even though he knew that he was the subject of a pending investigation by the Commission.

10. Respondent executed the waiver and returned it to Ms. Karp on June 7, 1995, a day before he was to be considered for confirmation. The waiver was presented to Commission staff, which forwarded a copy of the complaint against respondent.

11. Ms. Karp advised the Governor's Office of the complaint, and respondent's nomination for the Supreme Court was withdrawn.

As to Charge V of the Formal Written Complaint:

12. On August 22, 1995, respondent again testified in connection with the Commission's investigation. Under oath, respondent falsely said that Ms. Karp had never asked him whether he

had any disciplinary problems or complaints before the Commission.

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. Charge I, Paragraphs 6A and 6B of Charge II, Charge III, Charge IV and Charge V of the Formal Written Complaint are sustained, and respondent's misconduct is established. Paragraphs 6C, 6D, 6E, 6F, 6G and 6H of Charge II are dismissed.

Respondent's remark to a female law intern was unprofessional and inappropriate. Even outside of the hearing of the general public, remarks that demean women lack the courtesy, dignity and respect expected of a judge at all times. (*Matter of Doolittle*, 1986 Ann Report of NY Comm on Jud Conduct, at 87, 88).

As he acknowledges, it was also improper for respondent to write to his court attorney a note which the referee has described as "lurid" and which respondent characterizes as containing "locker-room banter."

Compounding these transgressions are respondent's far-more-serious subsequent series of untruths and deceptive tactics.

In his own testimony, respondent swore during the investigation that he never suggested that the law intern disrobe in any fashion, despite the contrary testimony of the other two persons in the room at the time. He also advanced, under oath, varying versions of the circumstances surrounding the note, both at odds with the testimony of the court attorney. And respondent denied that counsel to the Senate Judiciary Committee ever spoke with him about complaints before the Commission, despite her disinterested and credible testimony to the contrary. Thus, we conclude that respondent has given "patently false explanations to the Commission despite contrary objective proof." (*See, Matter of Kiley v State Commission on Judicial Conduct*, 74 NY2d 364, at 370).

Moreover, at a time when he knew the Commission was investigating his conduct, respondent advised the Governor's Judicial Screening Committee that he was not under investigation by any "federal, state or local agency...." Although the question did not specifically mention the Commission, a law-trained judge surely would understand this language to encompass an investigation of his judicial conduct by a state commission. Respondent also delayed executing the release of Commission records to the Senate Judiciary Committee and misled its counsel in hopes that the waiver would come too late to derail his confirmation to the Supreme Court.

Respondent attempted to deceive the Governor and the Senate in order to secure a promotion, as well as this Commission in its pursuit of its lawful mandate. "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, at 554; *see also, Matter of Mazzei v State Commission on Judicial Conduct*, 81 NY2d 568, 572). A judge who has so little regard for the truth "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, at 171).

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

Mr. Berger, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Marshall, Mr. Pope and Judge Salisbury concur.

Judge Newton dissents as to Paragraph 6A of Charge II, Charge IV and Charge V and votes that those allegations be dismissed and dissents as to sanction and votes that respondent be censured.

Ms. Crotty and Judge Thompson were not present.

Dated: July 18, 1997

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

LORIN M. DUCKMAN,

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

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian and Jean M. Savanyu, Of Counsel) for the Commission
Ronald G. Russo (Richard W. Levitt, Of Counsel) for Respondent

The respondent, Lorin M. Duckman, a judge of the Criminal Court of the City of New York, Kings County, was served with a Formal Written Complaint dated June 5, 1996, alleging, in 363 specifications, that he willfully disregarded the law, displayed intemperate demeanor, abused the power of his office and exhibited bias against the prosecution. Respondent filed an answer dated August 24, 1996.

Also on August 24, 1996, respondent moved to dismiss the complaint in certain respects. The administrator of the Commission opposed the motion on August 30, 1996. Respondent replied by affidavit dated September 10, 1996. By determination and order dated September 13, 1996, the Commission denied respondent's motion in all respects.

By order dated August 15, 1996, the Commission designated the Honorable Matthew J. Jasen as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 6, 7, 8, 12, 13, 14, 15, 18, 19, 20, 21,22, 25 and 26 and December 2, 3, 4, 5, 6 and 11, 1996, and the referee filed his report with the Commission on May 28, 1997.

By motion dated June 2, 1997, the administrator moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on August 11, 1997. The administrator filed a reply dated August 21, 1997.

By letter dated September 2, 1997, respondent waived confidentiality pursuant to Judiciary Law § 44(4), and on September 11, 1997, the Commission heard oral argument in public session, 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 Criminal Court of the City of New York since April 1991.

2. Between mid-1991 and early 1996, as set forth in Appendix A, respondent repeatedly referred to prosecutors appearing before him by pejorative or derisive names; impugned their

motives; derided their professional integrity and "sense of justice;" rebuked them for their plea, bail and sentencing recommendations; expressed anger, raised his voice and yelled or screamed when they did not accede to his suggestions for more lenient dispositions; often got red in the face, stood up, leaned over the bench and stared at them or paced behind the bench with his hands on his hips; criticized them for policies of "your society" or "your government" and otherwise delivered inappropriate speeches propounding his views, and derided, rebuked and criticized prosecutors and the police in a manner that gave the appearance of bias against the police and the prosecution.

3. In 13 cases, as set forth in Appendix B, respondent dismissed valid accusatory instruments as insufficient on their face because the prosecutors would not consent to respondent's requests for more lenient dispositions or because he believed that the cases should not be prosecuted. He dismissed the cases without fair notice to the prosecution, without giving the prosecution an opportunity to be fully heard, without requiring written motions by the defense and without giving the prosecution the right to re-draft the charges, as required by CPL 170.30 and 170.35. His dismissals were often coupled with harsh criticisms of the prosecutors and police and other inappropriate behavior, such as screaming and ejecting a prosecutor from the courtroom.

4. As set forth in Appendix C, respondent dismissed the charges in one case in the interest of justice knowing that he was not following the provisions of CPL 170.40 and adjourned in contemplation of dismissal two other cases without the consent of the prosecution, as required by CPL 170.55(1). Respondent coupled these dispositions with sarcastic criticism and other inappropriate comments directed at prosecutors.

5. As set forth in Appendix D, respondent made statements indicating bias in cases involving domestic violence.

As to Charge II of the Formal Written Complaint:

6. On May 13, 1992, respondent granted a prosecution application for an adjournment in contemplation of dismissal in *People v Tanda Brock*, an assault case in which both the defendant and the alleged victim were African-American women. Thereafter, from the bench, in the presence of Legal Aid Society lawyer Mary Zaslofsky, respondent admittedly told Assistant District Attorney Viola Abbitt, who is African- American, "At the risk of sounding racist and sexist, [the case] is really just two women, and you know sometimes certain things are just cultural."

7. In the summer of 1992, after a lunch recess, respondent told Assistant District Attorney Deborah Fried-Rubin that he had attended a step aerobics class. When Ms. Fried-Rubin said such a class might alleviate her back problems and that wearing high heels did not help her back, respondent said, "Oh, you're just to sexy too wear flats," and "There's nothing like a well-turned heel." In denying the substance of the claim that he was encouraging her to wear high heels, respondent admitted to telling Ms. Fried-Rubin that she had "nice legs."

8. On the same day, after respondent reduced bail on a defendant, Ms. Fried-Rubin "plopped" her file folder on counsel's table about a foot away, and respondent called out that she had been discourteous. At the end of the day, when Ms. Fried-Rubin told respondent that it was a novel experience for her to be called discourteous, respondent said, "You'd like to be a bad girl."

9. In November 1993, during an informal discussion in respondent's courtroom, respondent told Assistant District Attorney Nancy Rothenberg Mukasey that the skirt she had worn the day before was "much too long" and that the skirt she was wearing, which was above the knee, "looks much better on you." Respondent made the statement when they were both standing in the doorway between the robing room and the courtroom. There were

other people in the general area but no one in the immediate vicinity.

10. In June 1995, in *People v Pardobani et al.*, a four-defendant bias case, respondent asked Court Officer Lorecia Alston to apprise him whether any defendants were late to court. One morning before the proceedings began, Ms. Alston went up to the bench where respondent was standing and told him that two defendants were late; respondent asked whether she knew why they were late; when Ms. Alston said "no," respondent said, "Because they're on CP time." When Ms. Alston asked what he meant, respondent said, "You know, color people's time. You know, they have to take the train and come from the projects...[which] makes them late."

11. Kevin McGrath, Jr., a Kings County Assistant District Attorney, is totally blind in his left eye and legally blind in his right. In order to read something, he must hold it within a few inches of his face. On September 13, 1994, during *People v Piczicara*, Mr. McGrath; the defense lawyer, Michael Millet, and respondent were having colloquy on a possible disposition of the case. Mr. McGrath was reading his paperwork at the prosecution table, leaning over the table to get close to the various documents to be able to read them and answer the questions that he was being asked. Respondent then called him and defense counsel to the bench, where respondent waived a rolled-up blue-back form in Mr. McGrath's face and asked, "Do you see me?" Mr. McGrath said, "Yes, your Honor," then put his hand on the blue-back and lowered it. Mr. McGrath believed that respondent was making a reference to his vision by waving the blue-back in his face.

12. In December 1994, Mr. McGrath appeared before respondent for trial in *People v Santos*. During the course of the two-day trial, respondent accused Mr. McGrath of having broken a courtroom lectern by leaning on it and said that he would "teach" Mr. McGrath "how to properly stand up in court." Respondent was "angry" and was "yelling" at Mr. McGrath. He repeatedly accused him of breaking the lectern and said that he would teach Mr. McGrath how to use it. Respondent was admittedly "distraught," "upset," "shocked" and "dismayed" that the lectern had been broken and felt that "it was like a part of me that had gotten broken." He admits that his law clerk "calmed me down" by assuring him that the lectern could be fixed.

13. A year later, in December 1995, respondent and Mr. McGrath met after business hours at a restaurant bar near the courthouse. Respondent turned to Mr. McGrath and said, "And he's the one who broke my lectern." Mr. McGrath replied, "No, I didn't." Respondent was "not kidding" or "jovial."

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a), 100.3, 100.3(a)(1) [now 100.3(B)(1)], 100.3(a)(2) [now 100.3(B)(2)], 100.3(a)(3) [now 100.3(B)(3)] and 100.3(a)(4) [now 100.3(B)(6), and Canons 1, 2A, 3, 3A(1), 3A(2), 3A(3) 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.

Respondent's mean-spirited, bullying tirades against prosecutors over a five-year period reveal that he is a biased, intemperate judge who deliberately misapplies the law and abuses judicial powers. Such qualities are inimical to the proper role of a judge who must apply the law fairly, impartially and dispassionately after hearing both sides to a dispute. By his pattern of contrary conduct, respondent has demonstrated that he poses a threat to the proper administration of justice. (*See, Matter of Reeves v State Commission on Judicial Conduct*, 63 NY2d 105, 110-11).

In 16 cases, respondent abrogated the prosecution's authority and subverted due process of law by disposing of properly-initiated criminal cases without either the consent of the parties or trial. Without a legal basis to do so and without giving the prosecution an adequate

opportunity to be heard, he dismissed 13 cases as insufficient on their face, one "in the interest of justice" and two by adjournment in contemplation of dismissal. These extra-legal dispositions were often accompanied by impatient and personal criticisms of young prosecutors in obvious retaliation for their insistence on following the policies of their offices rather than acceding to the more lenient dispositions that respondent advocated. Respondent assumed the defense position in these cases himself; little or nothing was heard from the defense attorneys.

In these cases and many other instances, respondent badgered young prosecutors in cross-examination style and gave inappropriate "speeches" concerning social problems and government policies. Thereby, he gave the unmistakable impression that he was biased in favor of the defense and against the police and the prosecution. Whether he, in fact, harbors such bias is immaterial, for a judge must both be impartial and appear impartial so that "the public can perceive and continue to rely upon those who have been chosen to pass judgment on legal matters involving their lives, liberty and property," (*Matter of Sardino v State Commission on Judicial Conduct*, 58 NY2d 286, at 290-91). As the Court of Appeals has held with respect to nepotism by judges, we are convinced that the appearance of bias "is no less to be condemned than is the impropriety itself," (*Matter of Spector v State Commission on Judicial Conduct*, 47 NY2d 462, at 466).

Respondent cannot justify his behavior as the need to "teach" inexperienced and poorly-prepared prosecutors. Teaching need not involve angry screaming and humiliation and is not effective when the lesson is that a judge may abandon the law and abuse judicial authority. Neither the chaotic conditions of the courtroom (*see, Matter of Friess*, 1984 Ann Report of NY Commn on Jud Conduct, at 84, 88) nor the need to dispose of cases on a congested calendar (*see, People v Douglass*, 60 NY2d 194) are acceptable explanations of such conduct. And the facts that other judges may follow some of the same procedures (a fact not proven in this record) or that respondent handled many other cases appropriately are irrelevant. It is no defense that other judges "may be similarly derelict," and consideration of cases properly handled by respondent would only establish "that his behavior was erratic, which itself is inconsistent with a Judge's role." (*Matter of Sardino, supra*, at 291).

Respondent's wrongdoing is exacerbated by his failure to control his actions over a five-year period and to change them even after numerous discussions about his treatment of prosecutors with their superiors in both counties in which he sat as a Criminal Court judge. (*See, Matter of Sims v State Commission on Judicial Conduct*, 61 NY2d 349, 357). The fact that he continually refused--until oral argument before the Commission--to acknowledge that he had improperly disposed of cases also militates in favor of the strictest sanction. (*See, Matter of Shilling v State Commission on Judicial Conduct*, 51 NY2d 397, 404).

A judge may not be removed for poor judgment or even extremely poor judgment. (*Matter of Cunningham v State Commission on Judicial Conduct*, 57 NY2d 270, 275). The proper purpose of sanction is to protect the judiciary from unfit incumbents. (*Matter of Vonder Heide v State Commission on Judicial Conduct*, 72 NY2d 658, 660). Respondent's judgment is not at issue in this proceeding. But, by knowingly ignoring the law and proper legal procedure in case after case, while simultaneously attacking the prosecution and arguing the defense himself, respondent effectively destroyed public confidence in his ability to properly perform the duties of a judge and harmed public perception of the judiciary as a whole. (*See, Matter of Esworthy v State Commission on Judicial Conduct*, 77 NY2d 280, 283). Every citizen who enters a courtroom--whether defendant, complainant or observer--has the right to expect that the judge will follow the law and treat those before the court with dignity and fairness. To permit a judge who repeatedly does otherwise to remain on the bench would erode the image of the state's judiciary as an independent and honorable one.

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

Mr. Berger, Ms. Brown, Ms. Crotty, Judge Luciano, Judge Marshall, Judge Newton and Judge Salisbury concur as to sanction.

Mr. Berger dissents only insofar as the majority finds that respondent's actions conveyed the appearance of bias.

Judge Marshall and Judge Newton dissent with respect to Specification 330 of Charge I and vote to sustain that allegation.

Ms. Brown, Ms. Crotty, Judge Luciano and Judge Marshall dissent as to Specification 342 of Charge I and vote to sustain that allegation.

Mr. Goldman dissents as to Specifications 7, 18, 19, 23(a), 27, 28, 33, 236 through 242, 250 through 257, 258 through 259, 261 through 269, 277 through 283, 294 through 302, 303 through 309, 310 through 315, 316 through 319 and 320 through 328 of Charge I and as to Paragraphs 5, 12 and 13 of the findings of fact herein and votes that those allegations be dismissed.

Mr. Coffey, Mr. Goldman, Mr. Pope and Judge Thompson dissent insofar as the majority finds that respondent's actions conveyed the appearance of bias and dissent as to sanction and vote that respondent be censured.

Dated: October 24, 1997

APPENDIX A

As to Specification 6 of Charge I:

1. In September or October 1993, respondent asked Bronx County Assistant District Attorney Nancy Rothenberg Mukasey why she was acting "like such a Nazi" in making certain plea offers and bail recommendations, which respondent regarded as harsh.

As to Specification 7 of Charge I:

2. On another occasion during which Ms. Mukasey was appearing on a case, she identified herself as appearing "for the People." Respondent then: (a) stood up, took off his robes and pointed at her; (b) said, "For the people? You don't represent the people;" (c) directed her to face the defendant and the other defendants and spectators in the courtroom; and, (d) said, "Those are the people. And look at the defendant. That's the people."

As to Specification 8 of Charge I:

3. On numerous other occasions, on and off the bench, respondent referred to Ms. Mukasey as "the Princess" and "Princess Nancy," both directly to Ms. Mukasey and when speaking about her to other prosecutors.

As to Specification 9 of Charge I:

4. Between January 1993 and April 1994, respondent referred to Bronx County Assistant District Attorney Garmon Newsom on numerous occasions as "Mr. Nuisance."

As to Specifications 10 and 11 of Charge I:

5. Between October 1993 and April 1994, on the bench, respondent regularly referred to Bronx County Assistant District Attorney John Dillon as "the Marshal" or "Marshal Dillon," and, on numerous occasions, harshly criticized Mr. Dillon when he did not accede to respondent's request for a lower plea offer. Respondent also called Mr. Dillon a "good little soldier" from the bench on numerous occasions when he insisted on adhering to his office's plea policies.

As to Specification 12 of Charge I:

6. In October 1992 and April 1993, respondent called Bronx County Assistant District Attorney Renee Fortain a "good little soldier" from the bench on several occasions when he did not agree with her plea offer, bail recommendation or request for an Order of Protection.

As to Specifications 13 and 14 of Charge I:

7. In late 1992, respondent: (a) berated Bronx County Assistant District Attorney Joanne Joyce from the bench when she would not accede to respondent's request that she make a plea offer more favorable to the defendant; and, (b) shouted and derisively asked whether a misdemeanor would represent "a stripe on your

arm [and] a notch on your belt." Respondent later apologized to Ms. Joyce because he learned she became upset, but he still believes his comments to her were appropriate, and he was shocked that she was upset by the comments. Thereafter, respondent called Ms. Joyce a "good little soldier" from the bench on numerous occasions when she adhered to her office policies on plea offers.

As to Specifications 15 and 16 of Charge I:

8. Between April and October 1993, respondent called Bronx County Assistant District Attorney James Ferguson a "good little soldier" or a "good little soldier boy" from the bench on several occasions. Respondent also repeatedly told Mr. Ferguson that certain other prosecutors assigned to respondent's court were "incompetent," "bullies" and "unjust" because they made plea offers and bail recommendations which respondent regarded as harsh and because they would not reduce their recommendations as respondent wanted. Often respondent would yell while making these remarks, get red in the face and accentuate his anger by standing at the bench, putting his hands on his hips and staring at Mr. Ferguson in a "penetrating" way.

As to Specification 17 of Charge I:

9. On several occasions in 1993, respondent raised his voice in anger, paced behind the bench and called Bronx County Assistant District Attorney Sharon Braunstein a "mannequin" and a "puppet" when she would not deviate from her office policies on plea offers.

As to Specification 18 of Charge I:

10. In September 1993, at an arraignment in which Bronx County Assistant District Attorney Jacqueline Hattar requested that bail be set at $5,000, respondent got very angry, got red in the face, stood up at the bench, glared at Ms. Hattar, told her to "look at the defendant," and said: "Miss Hattar, you may have that kind of money. You may come from a middle class background and have that kind of money ... to make bail, but look over at this defendant. I want you to stop for a moment and look over at this defendant. Do you think this defendant has that kind of money to make bail so that he can go home?"

As to Specification 19 of Charge I:

11. Between June and September 1994, after Kings County Assistant District Attorney Laura Noble made a plea offer in a case, respondent pointed to the defendant and said in a loud, demeaning and angry voice that Ms. Noble should "look at the defendant" before making another plea offer and that, if she looked at the defendant, she would lower her offer.

As to Specification 20 of Charge I:

On November 18, 1992, in the course of presiding over *People v. Edgar DelaRosa and David Rodriguez*, respondent disagreed with the position being asserted by Bronx County Assistant District Attorney Deborah Fried-Rubin. Respondent told her, from the bench, that she was "unprofessional," that he "could not accomplish anything with" her because "you always have to be right," that she was "too lofty" to appear again in his court on the case, that the case would be adjourned and another prosecutor "with a little more reason and a sense of justice will come back and handle the case," and that he did "not like [her] attitude."

As to Specification 21 of Charge I:

12. In March 1993, while presiding over arraignments, respondent twice called Bronx County Assistant District Attorney Mark Brisman to the bench *ex parte* and told him to lower his bail recommendations in certain drug cases because respondent was setting bail in lower amounts than Mr. Brisman was recommending, and said, "You're making me look bad in front of the audience." Respondent did not want prosecutors to recommend higher bail than he would set, in part, because he did not want to be criticized for setting low bail.

As to Specification 23 of Charge I:

13. From 1992 through 1995: (a) respondent told various prosecutors not to recommend bail in amounts less than $750, which he considered "poor man's bail," because he did not believe

that defendants should be held on bail lower than $750, and he did not set bail lower than that amount; and, (b) at times, when prosecutors asked for bail that was too high by respondent's standards, he accused them of misleading the court.

As to Specifications 25 and 26 of Charge I:

14. Between January and February 1995, respondent frequently told Kings County Assistant District Attorney Michael Packer that he had "no guts" because he would not make more lenient plea offers than approved by his supervisors. In one conversation, respondent said that Mr. Packer's supervisor, Jodi Mandel, was "incompetent," "didn't understand the system" and "didn't know what was going on."

As to Specification 27 of Charge I:

16. In November 1994, in response to a series of plea offers made by Kings County Assistant District Attorney Lewis Lieberman which respondent regarded as harsh, respondent stated to Mr. Lieberman: "Don't you understand that all you're doing is putting poor black men in jail?" When Mr. Lieberman replied, "Judge, I have a lot of poor black victims," respondent got very angry and said, "Don't speak to me that way [or] embarrass me in my courtroom."

As to Specification 28 of Charge I:

17. In the summer of 1994, when Kings County Assistant District Attorney Dawn Bristol made a plea offer that respondent believed was too harsh in a case involving an alleged car theft by a defendant who is black, respondent called Ms. Bristol to the bench. He expressed his unhappiness with the plea offer and told Ms. Bristol, who is African-American, that she did "not understand the plight of the African-American male."

As to Specification 31 of Charge I:

18. During the week of October 10, 1994, Assistant District Attorney Aaron Nottage appeared before respondent in a criminal mischief case involving a broken window, and he made a plea offer which included restitution in the amount of $500. Without any discussion, respondent started yelling at Mr. Nottage and said that Mr. Nottage did not understand "these people" because of his "middle class background." Later that day, in court, respondent asked Mr. Nottage, "Where did you get your education, off of the back of a milk carton?"

As to Specification 32 of Charge I:

19. On January 10, 1996, Robert Codrington, a defendant who was scheduled to appear before respondent in Kings County, was arrested outside the courtroom on a charge that he had violated parole. The prosecutor assigned to the case, Michael Ryan, had notified the defendant's parole officer that the defendant would be in court, and the parole officer had the defendant arrested before the court proceeding. The next day, respondent saw Mr. Ryan in the courthouse corridor, angrily referred to the defendant's arrest and said that if Mr. Ryan "ever pulled anything like that again, [he] would regret it." When Mr. Ryan replied that he always treated respondent with respect and courtesy and asked whether he could comment, respondent said, "No," and demanded to speak to Mr. Ryan's supervisor.

As to Specification 33 of Charge I:

20. On October 25, 1993, Bronx County Assistant District Attorney John Dillon appeared before respondent in *People v. Jerry Langley*, an assault case in which the complaining witness was a police officer. Mr. Dillon refused to accede to respondent's request to dispose of the case with a violation or an adjournment in contemplation of dismissal, and the matter was set down for trial before another judge. After the proceeding, respondent told Mr. Dillon not to be "naïve," that the nature of the police officer's injuries indicated that it was the officer who had assaulted the defendant, that "police officers lie all the time about these things" and that the officer was not credible. Respondent often commented to Mr. Dillon that police officers were not credible.

As to Specifications 36 and 37 of Charge I:

21. Respondent engaged in the foregoing conduct, notwithstanding many admonitions from senior prosecutors that his conduct was improper. From June 1991 through October 1993, on more than 30 occasions, Assistant District Attorney Joseph Ferdenzi, then the Bureau Chief of the Bronx County District Attorney's Criminal Court Bureau, spoke to respondent about his "negativity" toward prosecutors and about his harsh and otherwise inappropriate treatment of and comments to the prosecutors appearing before him. Mr. Ferdenzi told respondent that he was being "overly aggressive" and emotional in speaking to prosecutors and that he was "unduly harsh with the assistants, yelling at them and demeaning them and belittling them." Mr. Ferdenzi warned respondent that he could "get himself into trouble" because of his inappropriate behavior and said that, if respondent was unhappy with the policies and training that prosecutors were getting, he should "yell" at him, not the young prosecutors. Respondent at times agreed with Mr. Ferdenzi and acknowledged having lost his temper, and he said he would "try to calm down" in court. During that same time period, Chief Assistant District Attorney Barry Kluger of Bronx County had several similar conversations with respondent. Moreover, respondent knew that the District Attorneys' offices were compiling transcripts "to warehouse complaints against me."

22. From June 1994 through January 1996, several senior prosecutors in Kings County spoke on at least nine occasions with respondent about his harsh and otherwise inappropriate treatment of and comments to the prosecutors appearing before him.

As to Specification 22 of Charge I and Specification 360 of Charge II:

23. In June and July 1993, respondent presided over *People v. Robert Rudland.* On July 1, 1993, Bronx County Assistant District Attorney Bernadette Perez filed a written motion to reargue respondent's decision permitting an expert to present an opinion on the complaining witness's veracity based upon the expert's in-court observations of the witness's testimony.

24. Respondent learned about Ms. Perez's motion during an *ex parte* meeting with the defense attorney, who wanted to know from respondent whether he should respond to the People's motion.

25. Respondent was upset with Ms. Perez because she had made her motion on notice to defense counsel, rather than by Order to Show Cause. After learning from defense counsel about the motion, respondent, from the bench, pointed, yelled and screamed at Assistant District Attorney Randy Perelmutter, who happened to enter the courtroom. Respondent demanded that Ms. Perelmutter immediately locate Ms. Perez, screaming, "You get her in here now!" When Ms. Perelmutter said she would leave to find Ms. Perez, respondent yelled, "No... You get in here now. You get on this phone... You get on this phone now, and you get Ms. Perez down here now!"

26. Ms. Perelmutter remained in the courtroom until there was a break, when she approached respondent and spoke to him privately in the robing room. Ms. Perelmutter told respondent that she objected to his behavior, that she had done nothing wrong, and that she was embarrassed to be yelled at in that manner in front of spectators and her colleagues. Respondent replied that she needed to have a "thick skin," should not "take things personally" or be "so sensitive"; otherwise she would not become a good lawyer.

27. When Ms. Perez came to court, respondent asked her to come to chambers, where he engaged in an *ex parte* discussion with her about her motion. Respondent yelled at and scolded Ms. Perez for filing the motion to reargue. Respondent said Ms. Perez had "offended" him by filing such a motion, and he yelled, "How dare you? Do you know what you've just done? You've insulted me. You're wrong. I'm a judge and you should think before you do something like this." Respondent told her that her motion was denied. Ms. Perez , who at that time had not yet been admitted to the bar, did

not raise her voice or address respondent disrespectfully .

28. The next day, respondent sent to Ms. Perelmutter a so-called "Lawyer Training" certificate, which he had produced on his computer, depicting an angry dragon and including comments that appearing in court is not "a gentle experience," that "thin skins and easily bruised egos are not permitted," and that lawyers must "prepare well."

As to Specifications 236 through 242 of Charge I:

29. Sheba Murphy was charged with Petit Larceny and Criminal Possession of Stolen Property for stealing $75 worth of Similac infant baby formula. Similac is sometimes used by drug addicts for mixing with heroin. The defendant had a record of 51 convictions, including 19 drug-related misdemeanor convictions.

30. On March 31, 1995, the case came before respondent. Defense counsel Debra Green advised the court that the defendant had a four-year-old child and had applied to "the WIC program."

31. Respondent then asked Assistant District Attorney Kieran Holohan to "ACD this case, please?" When the prosecutor replied that he wanted to see the paper-work on the claimed application to the WIC program, respondent stated: "Listen, it is over. ACD the case... Now, ACD the case." When Mr. Holohan replied that he needed "something to make up an ACD," respondent said: "Get me a supervisor. This case is over."

32. Mr. Holohan's supervisor, Jodi Mandel, entered and offered an "A misdemeanor." The defendant then pleaded guilty to the two charges, and Ms. Mandel asked for a sentence of 60 days in jail, based on the defendant's record of 27 prostitution convictions, 19 drug-related misdemeanor convictions, two Petit Larceny convictions, one Criminal Possession of Stolen Property conviction, one Menacing conviction and one drug-related felony conviction.

33. Respondent then asked Ms. Mandel a question about the defendant's record which he did not permit her to answer; then, in an angry tone of voice in which he yelled and screamed, respondent, in an uninterrupted colloquy which lasted for three transcribed pages, said:

> COURT: Are there any similar crimes that she committed for what she was convicted; that were within the past 5 years?
>
> MS. MANDEL: Your Honor, given the fact that--
>
> COURT: Excuse me. Just answer the question or otherwise I'll talk. Either you answer the questions that I ask or I'll talk. I'll talk.
>
> There aren't any similar arrest. A large majority of the crimes are drug related. And perhaps if you go back to 1986, she was loitering for the purpose of engaging in prostitution. So she's not a person who regularly goes into places and steals things, gets caught and convicted and comes back here.
>
> The second point I'd like to make -- since you're like the rest of the assistants when I ask questions they don't respond to what I'm asking. So I'll talk and then I'll give you a chance to talk. The second thing is there was no property that was actually lost.
>
> While I'm not condoning people going into stores, I think that if there is no actual property lost, that it is unfair and not right to make the state or the city, as the case may be, pay for her incarceration for 60 days; a great cost.
>
> My solution would have been that she shouldn't have had to plead to a misdemeanor; that she should have plead to a violation because she didn't need to take the crime. She could have done some community service. Her failure to do so would have resulted in her going to jail for 15 days.

I like the fact that she came back to court and that she showed up and then today we had an opportunity to talk to her. I don't think her prior record has anything to do with this.

I don't know whether she's going to continue committing crimes, but most of her crimes were committed at the time when she was a much younger lady when she may have had different interests and involvements.

In addition, I think the money that would have been spend [sic] on putting her in jail is better spend [sic] either helping her to get a job so she can't go do this again. Because I don't know why she took it, other than to give it to a child or sell it to somebody so that she could have money; and that this person would given it to a child, which would be okay also. I'm not sure she wasn't going to drink it herself.

If we didn't spend so much money on so many cases that come into this court that don't have any purpose and we spend the money on training or some sort of rehabilitation, our society would be better off.

In addition, by you doing four days of community service would have benefited society a lot more. So now she's forced to take a plea to a misdemeanor so if she ever goes to get a job and they ask her if she has presently been convicted of a crime, she have [sic] to say yes. And perhaps maybe she can't get the job.

But if she comes back to me, I'll right [sic] a letter to the job and I'll tell them that I think this should not stop her from getting a job.

But since I don't have the power to dismiss, or the logical powers to convince you for your reasoning or your since [sic] of justice to have let her plead to a violation; she have [sic] to take this plea.

Respondent believes that nothing he said to Ms. Mandel was improper.

As to Specifications 243 through 249 of Charge I:

34. Martin Schendler was arrested twice in July 1995 for possession of crack. Both cases came before respondent on August 22, 1995. The defendant in the previous seven years had a criminal record of two Disorderly Conduct convictions on drug-related arrests; a larceny, Class A misdemeanor conviction; a Petit Larceny conviction, and a Class A misdemeanor conviction for Criminal Possession of a Controlled Substance. He also had four bench warrants issued during that period.

35. Assistant District Attorney Patria Frias offered a plea to a B mis-demeanor and probation to cover both pending accusatory instruments, whereupon respondent said, in a loud, angry and, at times, screaming tone:

> THE COURT: Oh, please. Disorderly Conduct and something. Really, it is not a crime. Do you understand? Darryl Strawberry is playing left field for the New York Yankees. Does he have a criminal record? Jerry Garcia is going to have a memorial in Central Park. Did he get a record? You are not going to give him a record. We don't prosecute just poor people. Now it's 240.20. Give him community service. You can try to help him with a drug problem. Don't give him a criminal record or anything more. That's that. One day he is going to recover from his need to do drugs, and nobody is going to hire him because you gave him a criminal record.
>
> So, let's get this straight. These are social problems. I don't care -- quiet. I don't need any public approval for my judgment. Did you hear what I said? Now, you want to clog the Court? Do

you want to deal with the issues that have to be dealt with?

MS. FRIAS: Judge--

THE COURT: You spend more money on prisons than helping people. Build some schools, build some drug rehabs.

MS. FRIAS: You are absolutely right.

THE COURT: You don't have to give me any permission. Now, dispose of this case.

MS. FRIAS: Your Honor, if he's not pleading to a crime--

THE COURT: I know. Probation can supervise him. But you put too many people--that's not an alternative. Now, you don't want to dispose of it. Let's not dispose of any cases. We will bring all these people back. Now I say, get rid of these cases.

MS. FRIAS: Judge, the offer is a B and Probation for today. I think it is appropriate. I think this defendant needs help.

THE COURT: It is not appropriate. We will send him for a CHRP interview. There is a question as to how much resources we have. We don't have many resources, and this person is not going to qualify for the resources because your office only puts people in drug rehab, where they can really get treatment, when they have prior Felonies. So, what you do, you suck people in with drug problems. You give him Probation, which is generous, and then it's a threat of going to jail. They're supposed to heal themselves. They don't need a threat of jail to heal themselves. They need a threat of some future job, a house, health care. And your society doesn't want to give those things. Do you understand that?

MS. FRIAS: I respectfully disagree with the Court.

THE COURT: I don't want your respect for that. Because what you are doing, that is only because I am a judge. You are not saying what you feel. But I will show you that you are wrong. He's paroled, and he will come back on another drug case because he can't do anything else except go out and get more drugs.

MS. FRIAS: We need then--

THE COURT: I don't believe I am giving him any help by giving him a conviction. I would tell him, you don't have to spend a night in jail on detox, or we want you to go to parole. I would tell him, if any place, he should go to the Legal Aid Society and they will get you in contact with a program if you need help. Oh, I'm sorry, I can't do that because your government wants to hire 300 more Assistant District Attorneys and reduce her staff to like three people who stand up and plead everybody out because you have the power to do it. She doesn't--now, you want to be heard further? I don't want you to tell me what your respect is. That's what it is about. Don't repeat that ridiculous offer again. Defendant is paroled. What date do you want?

MS. STRAUSS: Two weeks, Judge.

THE COURT: And you keep an eye over here. I will put [sic] that every person that comes up here is a person that doesn't have a lot of money. I don't need an indictment that says they're poor. They're people without funds and they're who you are prosecuting. And you are not prosecuting them. You are telling them that you will go to jail to get other jail problems. They don't understand about jail or about drugs. I don't need you to tell me about that. Get rid of these cases. You won't dispose of any of them. So you will have over 400 cases on in the next Part. We are trying to stop violence

between men and women. I'll say, because the Assistant in arraignment didn't want to get rid of the cases that could be gotten rid of....

You think I just started yesterday? And if you don't like it, get a supervisor to stand where you are. He's paroled. Let's move these cases.

As to Specifications 250 through 257 of Charge I:

36. On July 27, 1993, respondent presided over *People v. Jose Vanderhorst and Nelson Almanzar*. He asked Assistant District Attorney Robin Holley to tell him what one of the defendants allegedly did. As she began to answer, indicating what the complainant had observed, respondent interrupted, told her to approach the bench and "answer my question." Ms. Holley and defense counsel Sam Braverman were joined at the bench conference by another prosecutor, James Ferguson.

37. At the bench conference, respondent asked various questions of Ms. Holley and was dissatisfied with her responses, particularly as to a reference that Mr. Ferguson suggested she make about the contents of the police department's property voucher in the case. Neither Mr. Ferguson nor Ms. Holley addressed respondent sarcastically or in any other inappropriate manner. As it became clear that respondent would not be satisfied with the prosecutors' answers, Mr. Ferguson said to Ms. Holley that she had done her best and that respondent was "going to do whatever he's going to do."

38. Respondent then addressed Mr. Ferguson on the record in a harsh, angry tone, yelling: "[D]on't you dare speak to me like that. Don't you dare. Do you understand me?" When Mr. Ferguson tried to speak, respondent immediately interrupted, yelled, "I am talking," repeated his warning, stood up, put his hands on his hips, continued to yell, and angrily stated:

> [THE COURT]: [D]on't you tell me about some property voucher because some Police Officer put a name down that means that a person was in possession of something. You do not have a sworn statement here that charges anybody with a crime and don't you dare assail my values. Do you understand that? Yes or no.
>
> MR. FERGUSON: No, I do not, Judge.
>
> THE COURT: Well, you should, Mr. Ferguson.
>
> MR. FERGUSON: I feel the same way.
>
> THE COURT: Because you are supposed to be in charge here.
>
> MR. FERGUSON: And I am responding, Judge.
>
> THE COURT: I said yes or no.
>
> MR. FERGUSON: I would like to make a record in this matter. Are you denying me the opportunity?
>
> THE COURT: You are absolutely right because I am in control here and you are not. If you do not like it, it is too bad. Is that clear?
>
> MR. FERGUSON: As we are clear on the record.
>
> THE COURT: Is that clear?
>
> MR. FERGUSON: I am denied the opportunity to make a record.
>
> THE COURT: You are entitled to talk when I tell you to talk.
>
> MR. FERGUSON: We are entitled to make a record.
>
> THE COURT: You are wrong. Where does it say that? When I say the case is on and I am ready to listen to you, then you are entitled to talk, but you are not entitled to say anything you want to say. Is that clear? Just tell me yes or no.
>
> MR. FERGUSON: It is not clear.
>
> THE COURT: Well, you should understand it. Go talk to somebody about it. Second call. Get somebody

with more authority than you have to come down and explain that. Don't you dare talk to me like that.

COURT OFFICER: Step in.

THE COURT: Is that opposed?

MR. FERGUSON: Excuse me?

THE COURT: Is that opposed?

MR. FERGUSON: Is it opposed?

THE COURT: Yes. Outrageous.

As to Specifications 258 through 269 of Charge I:

39. Armando Ventura's parents brought felony larceny charges against him for stealing items from the home and using the father's ATM card to withdraw $1,500 from the father's bank account. The defendant had a drug problem and had failed to complete various voluntary drug treatment programs.

40. On August 18, 1993, respondent presided over the case. The prosecutor assigned to the case, Stephen Saltzman, was not in court. The Legal Aid attorney, Mira Gur-Arie, told respondent on the record that the prosecutor's offer was a Class A misdemeanor and that the defendant would enter a drug program at Rikers Island on a deferred sentence of one year (to be effected if the defendant failed to complete the program).

41. Respondent, in the absence of Mr. Saltzman, said:

> That is typical of Mr. Saltzman's bureau and Mr. Saltzman. So, let's adjourn the case. No. I want to see me [sic] Saltzman and/or see someone with familiarity with the case. Second call.

42. On second call, respondent asked Mr. Saltzman whether he would agree to a reduction from felonies to misdemeanors and a drug program. Mr. Saltzman replied, "Yes. So long as the condition of the plea is that there would be a year period of probation as well." Respondent replied, "That would be acceptable to the Court," and the matter was adjourned.

43. On the adjourned date, August 30, 1993, there was a meeting in chambers among respondent; Mr. Saltzman; his supervisor; Warren Walters, a new defense attorney, and the defendant's parents. At this meeting, respondent persuaded the parents not to prosecute their son, telling them, in essence, that they would effectively be jailing their son if he did not complete the drug program. Respondent explained that, if their son did not complete the mandated program, respondent would have to sentence him to jail, and respondent would prefer an adjournment in contemplation of dismissal and voluntary drug treatment.

44. On first call of the case, prior to the conference in chambers, a prosecutor had proposed the offer of an "A misdemeanor" and probation, to which respondent said: "Forget it," and added, "Probation is inappropriate...." On second call, after the conference in chambers, Mr. Saltzman repeated the offer of a Class A misdemeanor conviction, probation, and, as a condition of probation, a residential drug program. Respondent, *inter alia*, then announced that he was going to release the defendant and stated:

> THE COURT: And have you consulted with the--with these people--who you refer to as the complainants--as to whether or not they want an order of protection?
>
> These people--who you call the complainants--are the mother and father of Mr. Ventura, with whom I've had a conversation in chambers, who have indicated that they do not want to participate in the criminal prosecution of their son.
>
> So my first question is: Have you asked them whether or not--
>
> MR. SALTZMAN: I will verify--
>
> THE COURT: You can ask them right now, because I'm going to parole the defendant. And the question is, whether or not when I parole him, I issue an order of protection.

Mr. Walters, is the representative from Day Top here?

MR. WALTERS: Yes.

THE COURT: This is a case where, at the request of the defendant's attorney, the defendant is staying in Rikers Island. Mr. and Mrs. Ventura, would you step up here, please.

45. When the defendant's parents approached, respondent directed them not to stand with Mr. Saltzman. Respondent was angry and yelled at Mr. Saltzman. Respondent blamed Mr. Saltzman for imposing himself on the defendant's parents and forcing them to go through the criminal justice system, even though they had commenced the case by filing charges; accused Mr. Saltzman of promoting his own personal position when he tried to state the "People's" position; announced that it was ***his*** "decision" that the defendant "not be prosecuted"; the following colloquy then took place:

THE COURT: Let me ask you this, Mr. Saltzman, what would constitute, in your view, the completion of the drug program?

MR. SALTZMAN: For the defendant not to leave at all, to cooperate with whatever service this program provides, and to leave at such a time when the program feels it is appropriate for him to leave.

THE COURT: Mr. and Mrs. Ventura, would you like to participate in this case to the extent of having to testify against your son in court if you're asked to do so?

MR. VENTURA: No.

MRS. VENTURA: No.

THE COURT: Now, Mr. Saltzman, did you hear what these people just said? They want their son to go to a drug program. They don't want you to be involved in their lives anymore, you or the People. Does that have anything to do with your decision?

* * *

THE COURT: Now, would you like to reconsider your decision and adjourn the case in contemplation of dismissal so that you can have the parents not have to come back here, so we can have the defendant--and if you look at them, their [sic] nodding their heads saying that's what they want to do.

MR. SALTZMAN: Judge, I understand their beliefs. All factors have been taken into consideration, and the decision of the District Attorney's Office is to proceed with this case as stated previously.

THE COURT: The defendant is paroled.

* * *

MR. SALTZMAN: Is that being adjourned into Jury Part 1?

THE COURT: No. It's going to stay here, because I think in a month, Mr. Saltzman, either I'm going to have a conversation with your bureau chief, or your [sic] going to have a conversation with the parents of the defendant and you're going to make a different decision.

Because I don't think that this is the People's decision, I think it's your decision. It's unfair and unjust, and I think that the case should be adjourned in contemplation of dismissal.

MR. SALTZMAN: I don't appreciate your characterization that this is my decision personally. It's been discussed with a number of supervisors, and it's the decision of my bureau--

THE COURT: Well, I think that your entire bureau should become more enlightened. Sometimes I hear people from your bureau come into court and

they say they're prosecuting this case because the complainant is interested and they want the case prosecuted.

Here is a case where two people--the mother and father--had been forced to bring charges against their son. They don't want the case prosecuted, they want not to have you involved in this, ask them. And your [sic] going to prosecute anyway.

So I think--and this is the last word--I think that somebody ought to re-examine the policy.

MR. SALTZMAN: If I may complete the record?

THE COURT: No, you may--listen, I think enough has been said. We have spent enough time on this in chambers. I spoke to both parents, I heard them. I spoke to the social worker, I heard--and I heard you.

I still disagree with you. And I don't appreciate the position that you're taking either. I think that the just decision in this case is an A.C.D., but you have the power.

So I will put this case on again September 27th. That's the end, Mr. Saltzman. That's the end.

MR. SALTZMAN: Judge, I would like to—

THE COURT: Thank you. I would like—

MR. SALTZMAN: May I just ask if I can complete the record?

THE COURT: Mr. Saltzman, no, you may not. That's the end of it.

MR. SALTZMAN: Okay. Thank you.

46. The defendant was released, was not compelled to attend the drug treatment program, did not complete the drug program, was arrested on new felony drug charges shortly thereafter and was sentenced by another judge to a term of two-to-six years in prison. Respondent believes that nothing he said to or about Mr. Saltzman was improper.

As to Specifications 270 through 276 of Charge I:

47. On September 14, 1993, respondent presided over *People v. Gary Henderson.* The defendant was charged with Criminal Possession of a Controlled Substance as a felony, which was reduced to a Class A misdemeanor. When Assistant District Attorney Gary Certain announced that he was "showing the lab report to the defense counsel, and filing with the Court," respondent cut in and said, "We try to call People by their names as much as we can."

48. When Mr. Certain offered a Disorderly Conduct plea with 12 days community service, respondent said it was "unacceptable" and "unreasonable." Mr. Certain's alternative offer was a Class B misdemeanor and five days community service, which respondent called "even more ridiculous," and he asked counsel to approach the bench.

49. At that point, another prosecutor stated his appearance for the record: "Garmon Newsom II, office of the District Attorney." Respondent immediately said:

> THE COURT: Mr. Newsom, Mark Twain once said, if I could quote him accurately, that he hoped that People would do the right thing, because sometimes it would please some people and sometimes it would astonish some people.
>
> If you ever did the right thing in a courtroom, it would astonish me. It might please the defendant.

50. Respondent and Mr. Newsom then discussed the People's basis for wanting the defendant to plead to a Class B misdemeanor, and, as Mr. Newsom described the events leading to the arrest, the court reporter asked

him to speak more slowly. The following colloquy then took place:

> THE COURT: It's Mr. Newsom's discourteous attitude that is resulting in him speaking in a fast rate using a tone of voice that you can't understand.
>
> MR. NEWSOM: I object to that, which is inaccurate and not true.
>
> THE COURT: Repeat what you had to say.
>
> MR. NEWSOM: The defendant removed a bag from his pocket, a clear plastic bag, tossed it to the ground, and the officer saw the bag, retrieved the bag and given that it was clear, seeing that the vials were in the bag--
>
> THE COURT: Ms. Aarons, would you like to make a motion to suppress?
>
> MS. AARONS: Yes. May I add that the recitation given at arraignments [sic] was a police radio run of six individuals firing shots. Cops arrive and saw defendant stuffing something in his pants.
>
> THE COURT: Facts don't mean anything to Mr. Newsom.
>
> MS. AARONS: I am sure that is sometime.
>
> MR. NEWSOM: Another unprofessional response from the judge.
>
> THE COURT: Mr. Newsom, if you make one more comment like that, I will have you removed from the courtroom.
>
> MR. NEWSOM: I will volunteer.
>
> THE COURT: Then leave.

51. At that point, Mr. Newsom left the court-room, and respondent adjourned the case and asked to see the bureau chief.

52. Respondent testified that his comment about Mr. Newsom's alleged discourtesy in speaking too fast for the court reporter to transcribe was appropriate. Respondent's reference to Mr. Newsom's discourtesy was spoken in a volume louder than Mr. Newsom was speaking and loud enough for spectators in the rear of the courtroom to hear.

As to Specifications 277 through 283 of Charge I:

53. Francisco Nieves, Adalberto Aponte and Carlos Rosario were arrested for several crimes, including possession of a weapon, ammunition and a bag of cocaine. They were allegedly behind a counter in a store, near the gun and the cocaine. On September 2, 1993, respondent stated that he was inclined to dismiss because none of the defendants could be connected to the gun.

54. Respondent stated, "You have one gun found -- if you believe the police officer -- behind a counter, if we believe the police officer."

55. Assistant District Attorney James Ferguson, a supervisor, then made an appearance. Respondent told Mr. Ferguson that the accusatory instrument was insufficient, then asked:

Now, are there facts that you can allege if you were given the opportunity that would make out the charges, because if you don't have facts in your possession at this time, then I'm going to dismiss the charges.

56. Mr. Ferguson began to respond and was interrupted by respondent, who, in the following colloquy, was standing with his hands on his hips, was shouting, was red in the face and was staring in a "penetrating" fashion:

> MR. FERGUSON: As to all possession charges: the fireworks, the marijuana that was found on the person of two of the defendants--
>
> THE COURT: That I can take care of easily. What about the gun?
>
> MR. FERGUSON: The ammunition and the weapon, Your Honor, our position as to the Possession of the

Weapon and the Ammunition is that the defendants were behind the counter.

In addition, the defendant's [sic] statements that "we just work here," defendants Rosario's statement that "it's my father's store," we believe also supports the People's case--

THE COURT: How does the fact--no. No, I'm interrupting you because I think that you have not made it yet, so I'm--

MR. FERGUSON: Judge--

THE COURT: Excuse me. I ask the questions, you answer. When I talk, you're quiet, because sometimes I don't have to hear what you have to say. What I want to hear is an answer to a question that's going to persuade me to give you an adjournment.

MR. FERGUSON: That's what I was about to finish but--

THE COURT: Excuse me, but the way you were going was off in a direction that I didn't think was answering my question. Does the fact that a person working in a store where a gun is found make them responsible for possessing it?

MR. FERGUSON: That fact alone--the People would,be hard pressed to prove that person was in possession of the weapon. If I may be able to make a full record--

THE COURT: Please, Mr. Ferguson, right now I'm asking you questions. The answers to the questions are supposed to be short and clear. The next question is--assuming that your next statement is true--is the fact that a person's father owns the store enough to make the son responsible for the possession?

MR. FERGUSON: With additional facts that I believe the People can allege.

THE COURT: Tell me what--but that fact alone is not enough; is that right?

MR. FERGUSON: Judge, what I'm arguing--what I'm trying to argue is the totality of the circumstances--

THE COURT: The totality of the circumstances, Mr. Ferguson, is not the law in this state.

MR. FERGUSON: You're not permitting me to make a record.

THE COURT: But please don't say that again. Please don't say I'm not permitting you. I'm asking that you respond to me. We have not finished this.

MR. FERGUSON: I'm just asking--

THE COURT: Please don't talk while I'm talking. Respond to the questions that I ask and then say, "May I continue?" And then I will make a decision whether you get to continue or not, do you understand that?

MR. FERGUSON: No, I don't.

THE COURT: Third call. I didn't stop you from making a record.

MR. FERGUSON: You stopped me from making a record.

THE COURT: I didn't stop you from making a record. Go find someone to tell you how to act in court, Mr. Ferguson. You have a bunch of new people, Mr. Ferguson, you're putting on a show for the new people and the people in the audience.

MR. FERGUSON: I resent that and I believe that it's unprofessional and inappropriate.

THE COURT: I don't think it's inappropriate. I'm telling you, when a Judge asks you to answer a question you don't interrupt.

MR. FERGUSON: I have not interrupted--

THE COURT: Third call. You're the one who drafted this. If you draft a complaint--

MR. FERGUSON: I did not draft this complaint, judge.

THE COURT: Then don't defend it, Mr. Ferguson.

MR. FERGUSON: It's my job as a Prosecutor--

THE COURT: I'm sorry, Mr. Ferguson, you're job is to do justice, not to stand up and make arguments that are not based on the law of [sic] the facts.

MR. FERGUSON: I'm trying to make arguments based on the facts--

THE COURT: Mr. Ferguson, when a Judge asks you a question, you answer it. You don't go off and talk about what you want to talk about. Now, sit down.

As to Specifications 291 through 293 of Charge I:

57. Kurt Jensen had been sentenced in 1985 to serve five days in jail or pay a fine of $25.00, on a conviction for Disorderly Conduct. The defendant did not satisfy the sentence, and ten years later, on April 3, 1995, he was brought before respondent on a warrant.

58. When Assistant District Attorney Stacey Blanshaft asked respondent to execute judgment, respondent harshly said on the record that "nobody with any sense of justice" would make such a recommendation. Even though the defendant had been sentenced by another judge and had evaded the consequences for ten years, respondent vacated the sentence and told the defendant, "Have a good life."

As to Specifications 294 through 302 of Charge I:

59. Michael Jackson was charged with felony assault; misdemeanor assault; Harassment, second degree, and Criminal Possession of a Weapon, fourth degree. The accusatory instrument alleged that the defendant had repeatedly hit a woman with a beer bottle in the head, neck and side, and punched her repeatedly, causing substantial pain and bruises and swelling on her head and torso. The defendant was held by another judge on $1,500 bail.

60. On May 15, 1995, the case came before respondent. On motion of Assistant District Attorney Ann Nielsen, the felony assault was dismissed. Respondent asked various questions about the complainant's injuries and treatment, and Ms. Nielsen advised the court that the defendant had threatened to kill the complainant and that she was awaiting medical records.

61. When the colloquy turned to the issue of bail, respondent yelled at Ms. Nielsen:

MS. NIELSEN: The injuries were serious enough.

THE COURT: No, they're not serious. ADA's who have taken training programs in Mr. Hyne's [sic] office, who have no serious physical injuries are charged under the charge of 120.05, which you moved to dismiss. Isn't that correct?

MS. NIELSEN: That's correct, your Honor.

THE COURT: Thank you. You don't even have physical injuries because under 120.05, using a dangerous instrument, you have to have physical injuries, because bruising and swelling is not physical injury.

MS. NIELSEN: We have to await the medical records.

THE COURT: Somebody should not have to sit in jail while they're innocent because they don't have five hundred dollars. Now, they're all on the same playing field, you tell me you want bail the same?

MS. NIELSEN: We don't know he's innocent.

THE COURT: Did you really just say that?

MS. NIELSEN: I don't mean to imply anything.

THE COURT: Let's try this again. Did you really just say that?

MS. NIELSEN: I said, we did not know whether--

THE COURT: He's entitled to the presumption of innocence.

MS. NIELSEN: Well--

THE COURT: I'm not Bozo the Clown, I'm not Ronald McDonald, when I ask you questions, I'm the Judge and who are you? You are an A.D.A., right?

MS. NIELSEN: That's correct.

THE COURT: So I asked you the questions about the seriousness of the injuries and the extent of the injuries, because I'm interested. I don't do it as some law school exam, I do it because I'm determining somebody's liberty, which you don't care about. Now, you tell me the answers to the questions I asked you and then you answer the questions that I ask. The question is, do you want me to keep the bail the same, yes or no?

MS. NIELSEN: Yes, Judge.

THE COURT: And what's your reason and don't start with it's a serious injury, because it's not. We've already decided that, because you moved to dismiss. Let's go on for your next reason. This is a Courtroom.

MS. NIELSEN: One minute, your Honor. He's got unverified community ties, he has a history of bench warrants in the past, so based on those factors, People's position is--

THE COURT: Mr. Chisam [defense attorney]?

62. Respondent then released the defendant.

As to Specifications 303 through 309 of Charge I:

63. John Roman had been held on $200 bail for five days on charges of Assault, Harassment and Endangering the Welfare of a Child. On March 29, 1995, respondent lectured Assistant District Attorney Keith Braunfontel on the subject of bail, accusing him of having deprived the defendant of his liberty, notwithstanding that it was another judge who had set the original bail. Respondent stated:

> Who stays in jail for not having $200.00? Poor people. That's not right. It matters not that the detective is unable. You deprive a person of his liberty; made them go to jail for five days because he didn't have $200.00. That's not right. Outrageous.

64. When the audience reacted, respondent told them to desist from such conduct. The following colloquy then took place:

> THE COURT: ...This is outrageous. Now, what do you want to do with this case?
>
> MR. BRAUNFONTEL: People are going to offer a B, conditional discharge, and 35 hours--
>
> THE COURT: He's not taking a B and he's not taking 35 hours. You're not ready.
>
> MR. BRAUNFONTEL: Your Honor--
>
> THE COURT: Listen to me, don't tell me what you think unless you were present. And if you were present, you shouldn't be a prosecutor, right? And you didn't have anyone put in a sworn statement, right?
>
> So he's not pleading guilty to a crime in this case, and he's not taking 35 hours, especially after he did five days in jail, which you couldn't have gotten because you couldn't convict him of a crime and get a Judge to sentence him to the prison time.

Now, all you have to say now is you're not ready. Tell me whether or not you want an order of protection and then I'll hear from Mr. Stello, who will tell you himself that he doesn't want the plea.

Isn't that right?

MR. STELLO [Legal Aid]: Correct, Judge.

65. When Mr. Braunfontel requested two Orders of Protection, one for the defendant's mother and the other for the defendant's sister, respondent again erroneously accused Mr. Braunfontel of a decision which was actually rendered by another judge, saying, "And you accommodated her and put him in jail for five days because he didn't have $200.00."

As to Specifications 310 through 315 of Charge I:

66. On September 2, 1995, Juan Lopez appeared before respondent on charges of Operating a Motor Vehicle Under the Influence of Alcohol, with a blood alcohol level of .21. Assistant District Attorney Joseph Sack offered a guilty plea with a proposed $300 fine. The defendant pleaded guilty, and, in the midst of the allocution, Mr. Sack realized that there were two "Lopez" cases on the calendar, both involving D.W.I. charges, and that the cases had been confused. When Mr. Sack and a senior prosecutor, Kathleen Rice, called the mistake to his attention, respondent said it was too late to undo the "contract" that had been entered, even though the allocution had not been completed, that "contract" law is inapposite, and that there was no legal reason to proceed with a mistaken plea by the wrong defendant. At one point, respondent invited Mr. Sack to ask for a second call, then immediately said, "Application denied," when Mr. Sack did so.

As to Specifications 316 through 319 of Charge I:

67. Andres Torres was charged with Assault and Criminal Possession of a Weapon. He appeared before respondent on September 2, 1993. Respondent criticized Assistant District Attorney Garmon Newsom in the following colloquy:

THE COURT: Is this your first appearance in Court?

THE DISTRICT ATTORNEY: No, sir.

THE COURT: Take your hands out of your pockets. I'm not sir, I'm the Judge. My last name is Duckman.

THE DISTRICT ATTORNEY: People are offering --

THE COURT: That's funny, isn't it Mr. Newsome [sic].

Sit down Mr. Newsome.

THE DISTRICT ATTORNEY: Yes, sir. * * * Judge, I can't, I'm really supposed to stand up there.

[After Assistant District Attorney Newsom declined the suggestion of an ACD]:

THE COURT: What's your -- was that your personal judgment or was that something that another Assistant District Attorney told you to say?

THE DISTRICT ATTORNEY: I don't have the authority to do that.

THE COURT: That's the right answer. You don't have the authority to do it without talking to somebody.

THE DISTRICT ATTORNEY: Exactly.

THE COURT: I know that. I have been here before. That's why I asked if you did.

As to Specifications 320 through 328 of Charge I:

68. John Galindo was charged with Disorderly Conduct and related charges stemming from his allegedly throwing a bottle at a police officer who was arresting someone else. On September 2, 1993, respondent stated that he wanted two misdemeanor charges reduced to a violation. When the prosecutor noted that the charges had

only been filed four days earlier and that the People needed time to get a supporting deposition, respondent twice said there is "no case" here. The following colloquy then took place:

THE COURT: What's the case?

THE DISTRICT ATTORNEY: That he threw a bottle at an officer.

THE COURT: What does that mean?

THE DISTRICT ATTORNEY: At the very least, he menaced or harassed the officer.

THE COURT: You can't menace a police officer. You know that.

THE DISTRICT ATTORNEY: I'm not speaking in --

THE COURT: Tell me what the facts are that make out the fact that he threw the bottle at the officer... I want to know what's going on. Just tell me. You are the one who offers the disorderly conduct because you looked at the facts and you made an informed decision.

Tell me a little bit more about this incident. Again, those cases don't get prosecuted in this Court at trial.

Now, tell me that this is different, somebody is being arrested and you -- you push a police officer and then what happens?

THE DISTRICT ATTORNEY: He threw a bottle at the officer.

THE COURT: What do you mean?

THE DISTRICT ATTORNEY: He picked up a bottle and threw it. A motion such as this, Your Honor.

THE COURT: However, how far from the police officer was the bottle?

THE DISTRICT ATTORNEY: I don't know.

THE COURT: So how do you know he threw it at him?

THE DISTRICT ATTORNEY: Because that's what he asserts and that's what the officer is claiming.

THE COURT: Then you have a sworn statement by the officer. You don't have anything.

THE DISTRICT ATTORNEY: Not the officer, not the officer who wrote it.

* * *

THE COURT: ... This is your case. Is this case going to be dumped into the lap of one of the People who clearly don't know what they are doing?

THE DISTRICT ATTORNEY: No, it's clear.

THE COURT: Let's dispose of this so he can take care of the case in New York county. Why should he have to come back here?

Do you think this is a case?

How many of these cases are ever prosecuted in this building because your vast experience --

THE DISTRICT ATTORNEY: Your Honor, --

THE COURT: Do you have a different answer?

THE DISTRICT ATTORNEY: No. I am relying on your --

THE COURT: If that's true then dispose of this case.

THE DISTRICT ATTORNEY: I stopped relying on it at this point and I'm not offering anything lower than an A misdemeanor.

THE COURT: Why? You can't make out a misdemeanor. You couldn't select six People from this community and put them on a jury and tell them you will be their best friend and get a conviction in this case. Please, dispose of this.

THE DISTRICT ATTORNEY: I disagree with that. The offer at this time is a B misdemeanor.

69. Other than noting his appearance, the only words spoken by the defense attorney in this eight-page transcript were to confirm that the defendant had a pending drug case in Manhattan. Subsequently, the defendant pled guilty to a Disorderly Conduct charge covering the entire case and was sentenced to a jail term of 15 days.

70. Specifications 29 and 30, 89, 231 through 235 and 284 through 290 of Charge I are not sustained and are, therefore, dismissed.

APPENDIX B

As to Specifications 38 through 61 of Charge I:

1. Alvin S. was accused of Menacing, third degree, for pointing "what appeared to be a silver semi-automatic pistol" at the alleged victim and several children, causing the alleged victim "to fear serious physical injury." On April 7, 1994, at arraignment, respondent asked about the "disposition" of the case. When defense counsel replied that the prosecutor wanted "to approach" the bench, respondent replied, "No, it's an ACD or it's dismissed." When Assistant District Attorney Richard Petrillo said he would "object to that," respondent replied, "You can't object to that. If the gun is recovered, then you got a gun; if you don't have a gun recovered, you have no case," even though the proceeding was an arraignment, not an evidentiary proceeding, and even though a weapon need not be recovered to prove a Menacing charge.

2. When respondent again suggested an adjournment in contemplation of dismissal with an Order of Protection for six months, Mr. Petrillo started to reply, "Your Honor, I will argue --," but respondent cut him off and said he was "not asking [the Assistant District Attorney] to argue. I am telling you, you have two choices, like ACD the case."

3. Respondent again misstated the law, saying that there was no gun recovered and, "You can't have menacing, based on those facts." Respondent yet again misstated the law, saying, "You left out the word 'imminent ability' on the part of the person, to carry out whatever threat there appears to be there." Respondent then asked, "Did you recover a gun?" As the prosecutor replied, "The gun was unrecovered but--," respondent intervened, again misstating the law: "Then you don't have anything," and respondent repeated, "The word is 'imminent' and there has to be an objective level." When the prosecutor asked "for an opportunity to redraft" and to require the dismissal motion to be in writing, respondent replied that he should "ACD and maintain the peace," adding: "Don't just come up with some nonsense and tell me you want an opportunity to redraft." Respondent said that the defendant had "spent a day in jail on this. ACD this case."

4. Mr. Petrillo reiterated an accurate recitation of law, that "placing what appeared to be a silver, semi-automatic pistol would be physical menace." When respondent asked how he would prove there was a gun, the prosecutor replied with another accurate recitation of law, "With the testimony of the complaining witness, Your Honor." Respondent then again misstated the law, saying that the defendant had "to have the ability to do it. That's why there is a difference between a knife and a gun," and repeating that, without a recovered gun, "[y]ou can't prove that the person was capable of carrying out the threat."

5. Mr. Petrillo added that the defendant had stated to the alleged victim, "I'm going to break a bottle over your head." Respondent asked whether the defendant had a bottle and, for the first and last time, defense attorney James Feck spoke: "You can't incorporate this and make it sufficient," to which respondent replied, "I agree with you." When Mr. Petrillo began to explain that he was "not attempting to incorporate--", respondent interrupted him and said to "ACD it." When the assistant district attorney replied, "Your Honor, I can't ACD it,"

respondent then dismissed the charges for "facial insufficiency."

6. When Mr. Petrillo replied, "Over the People's objection," respondent stood up, angrily berated and yelled at the prosecutor:

> THE COURT: Please don't say that. It's not over your objection. My objection is that you can't stand here and act like a lawyer.
>
> How are you going to proceed in this case? It's not over your objection.
>
> You are supposed to come into court -- don't smile, put that down and look at me -- I said to look at me, Mr. Petrillo.
>
> I am going to tell you what offends me. I tell you fifty times, it's not over your objection, you are given an opportunity to be heard.
>
> When you can't make out the charges, the charges are dismissed. These are people's lives.
>
> Based on that nonsense, you had a person go to jail. What am I supposed to say to you, about the lack of respect that I have for you prosecuting a person, when you don't have a case?
>
> You don't have an objection. You are just mouthing some words that somebody told you, for no reason, and insulting me, and I am insulted and I don't want to hear it again.
>
> MR. PETRILLO: I did not intend to insult--
>
> THE COURT: Did I ask you to talk; did I? You told me it was over your objection, and I am telling you what my objection is and I speak last.
>
> He does it all the time, and you do it all the time and lawyers don't do that. They stand up here and do what they are supposed to do.
>
> You can't come up here, with a facially insufficient complaint, and say "we are moving to dismiss or we are ACD'g it." It's too bad we don't have more who do.
>
> The case is over. I am not listening to you. Move away. Next case.
>
> Don't do it again. If you smile, you are going to find out what power I really have. Do you understand that? Do you understand that; yes or no?
>
> MR. PETRILLO: Yes, I do.

7. The next day, Mr. Petrillo placed an order with a court stenographer for the Alvin S. arraignment transcript. When respondent learned that Mr. Petrillo was doing so, he told him that the events of the previous day "would not have happened" if Mr. Petrillo had "ACD'd the case."

8. Respondent knew that it was not essential for the gun to be recovered to establish the crime charged and that, on the facts alleged and on the charge set forth, it was not essential for the words, "imminent ability" to be in the accusatory instrument for it to be facially sufficient pursuant to Penal Law § 120.15.

9. Respondent dismissed the charge because of Mr. Petrillo's refusal to consent to respondent's request for an adjournment in contemplation of dismissal.

10. Respondent knew at the time he was excoriating Mr. Petrillo that respondent's conduct was improper.

As to Specifications 62 through 72 of Charge I:

11. In 1993, Raymond M. was convicted of Criminal Trespass, third degree (trespassing in a building within a public housing project), a violation of the Penal Law, and was sentenced to a 10-day jail term. Prior to 1993, the defendant had been convicted of one felony weapons charge, five misdemeanors, and one violation. On June 15, 1994, Mr. M. was arrested in a building within a public housing project at the request of the building custodian. The charge stated that there were conspicuously posted signs against loitering and trespass and that the defendant was not a resident of the building and could not provide a legitimate reason for being

there. He was charged with Criminal Trespass, third degree.

12. On June 16, 1994, at arraignment, respondent asked whether the Assistant District Attorney would agree to a guilty plea of trespass as a violation. Assistant District Attorney Angela Insalaco replied that this was defendant's second offense (on this charge) and that he had pleaded guilty to a B misdemeanor and had been sentenced to 10 days in jail. Respondent stood, paced and raised his voice in the following colloquy:

> THE COURT: You want to know something? I think that was inappropriate, if that was all the facts there were. We are talking about an offense that takes place in 1994. That officer was a housing police authority officer for the Transit Department in certain security measures that never before have been heard of by free people in this country. This person was in the wrong place. They interfered with his freedom. Put him in jail. As far as I am concerned in the absence of some breaking in or some drugs or some boisterous conduct or anything, community service is inappropriate and jail is certainly inappropriate. How about 140.05? He spent a day in jail. Where was he? Look at him. He needs a CHRP interview and probably a place to stay or some food or something. Is that pretty close, Mr. Goldstein [defense counsel]?
>
> MR. GOLDSTEIN: I think it is, Judge.
>
> THE COURT: We can't keep incarcerating America and people we can't provide social services for and this is one of the people.
>
> MS. INSALACO: The offer is a violation and five days community service.
>
> THE COURT: Let's try again. I think it's inappropriate.
>
> MS. INSALACO: Your Honor--
>
> THE COURT: Wait. Let's dispose of the case. I am suggesting that is appropriate. It is fair and just and I don't know what he did the last time. I have not spoken to the Judge and I don't have the Complaint in front of me. I am not those people. You want to have sentence guidelines? Go to Eastern District.
>
> MS. INSALACO: We feel that a violation and community service is appropriate.
>
> THE COURT: I think it's inappropriate.
>
> MS. INSALACO: I'm sorry, your Honor; five days community service.
>
> THE COURT: It's inappropriate. How is this? The charges are dismissed by reason it doesn't state a crime. You can state whatever objection you want. Good day.

13. Respondent was aware that the crime charged had been enacted by the legislature for the explicit purpose of protecting residents of public housing against trespass and that the essential statutory components of the trespass had been properly included in the accusatory instrument.

14. Respondent dismissed the charge because of the prosecutor's refusal to accept respondent's suggestion of a reduced plea and no community service.

As to Specifications 73 through 85 of Charge I:

15. Ramon L. was apparently unconscious in the passenger seat of a car on September 2, 1995, at 6:15 A.M., when a police officer attempted to awaken him, and the defendant grabbed the officer by the shirt, pulled him into the car and repeatedly punched him in the face, causing bruising, swelling and "substantial pain." On September 3, 1995, at arraignment, respondent asked Assistant District Attorney Ari Lieberman whether he wanted to "ACD the case." When the prosecutor replied, "I can't,

not at this time," respondent replied, "I understand. Here's the case, ACD it or dismiss it."

16. Mr. Lieberman asked why it would be dismissed. Even though this was an arraignment, not an evidentiary proceeding, respondent said in the following colloquy:

> THE COURT: It doesn't state a crime. This person is allegedly unconscious and asleep in a car. Somebody comes up to the car that he is sleeping in and opens the door. He gets scared and he hits the person. Lo and behold, it's a police officer. Now he's charged with assaulting the police officer and resisting arrest. He had the intent to hit the police officer.
>
> MR. LIEBERMAN: That--I would argue that would be a matter of fact, and I would ask your Honor to adjourn the case just to speak to the police officer to--just for investigation.
>
> THE COURT: Thank you. Do you have anything else you would like to say other than the fact you don't want me to dismiss the charges?
>
> MR. LIEBERMAN: I ask your Honor not to dismiss the charges now. We can probably come to a disposition later on.
>
> THE COURT: I am not making him come back. He spent a day in jail. The charges are dismissed for facial insufficiency.
>
> MR. LIEBERMAN: I object.
>
> THE COURT: Excuse me. Here is how it works. I say to you do you want me to do this or don't you. You say you don't. I do it. Then you don't get to speak. You don't get to criticize what I do. That's it. That's the end of the discussion.
>
> MR. LIEBERMAN: I just want to say--
>
> THE COURT: Excuse me--
>
> MR. LIEBERMAN: --it is over the People's objection.
>
> THE COURT: Excuse me, Mr. Lieberman, don't say that again. Watch this. I would like you to leave the Courtroom right now. I would like you to walk outside and have a conversation with yourself or tell me that--understand that I am not going to permit this again. Now walk out of the Courtroom.
>
> MR. LIEBERMAN: Your Honor requests that I walk out, I will walk out.
>
> THE COURT: Now do you understand after I rule I don't need to hear whether you object or not? I don't care what your feelings are. You get to make a record and then I rule. Is that clear?
>
> MR. LIEBERMAN: It is clear to me.
>
> THE COURT: Thank you.
>
> Next case. I didn't ask you to speak.

17. Defense attorney Barry Jacobson did not speak at all and did not assert the position that the defendant had no intent to hit the officer or acted out of self-defense, mistake, or was justified in hitting the officer. In addressing Mr. Lieberman, respondent spoke loudly enough to be heard in the back of the courtroom. Respondent dismissed the case for facial insufficiency after the prosecutor had refused to agree to an adjournment in contemplation of dismissal.

18. In dismissing the accusatory instrument, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 86 through 95 of Charge I:

19. Ali B. was charged with Criminal Trespass, second degree, and Harassment, second degree, for entering the apartment of Angela Bacon on November 27, 1995, at 1:42 A.M., without permission or authority, and for threatening her. On November 30, 1995, on the oral application of defense counsel, respondent dismissed the charges for "facial insufficiency."

Even though this was an arraignment, not an evidentiary proceeding, respondent both misstated the law and assumed as true a defense which raised an issue of fact, stating, *inter alia,* that the defendant "is the landlord. He got in with his keys. There is no allegation that the keys that he had were the complainant's keys. The landlord have [sic] the right of entry into apartments." At the hearing, respondent referred to the complainant as a "squatter," even though the accusatory instrument clearly identified her as the tenant. Respondent acknowledged that the accusatory instrument does not identify the defendant as the landlord.

20. Respondent knew that it was improper to assume as true a defense that raised an issue of fact.

21. In dismissing the accusatory instrument, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 96 through 109 of Charge I:

22. Luis V. was charged with Obstructing Governmental Administration, Resisting Arrest and Disorderly Conduct. He was accused of pushing and attempting to restrain police officers who were lawfully arresting another individual, Johnny V.

23. On March 22, 1995, at arraignment, respondent immediately asked Assistant District Attorney Aaron Nottage whether he wanted to adjourn the case in contemplation of dismissal. When the prosecutor indicated that he did not, respondent asked what the other person was being arrested for. When Mr. Nottage said that Johnny V. "was being arrested on a warrant hit," respondent asked where that fact was in the *Luis V.* accusatory instrument. As the prosecutor began to answer, respondent interrupted him and said, *inter alia*, "this is an ACD." As Mr. Nottage said, "Your Honor, we have

grounds under --," respondent again interrupted him and said, "You want to ACD?"

24. When the prosecutor attempted to respond and said "No, I am not --," respondent again interrupted him and said to defense counsel, "You have a motion?" Defense attorney Cara Graziano then moved to dismiss for "facial insufficiency," without articulating any grounds in support of the motion. After the prosecutor opposed the motion and said that the complaint was sufficient, respondent dismissed the charge. Respondent did so because of the Assistant District Attorney's refusal to consent to an adjournment in contemplation of dismissal.

25. Respondent admitted that he did not give the prosecutor sufficient notice before dismissing. Respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 110 through 120 of Charge I:

26. On December 24, 1993, respondent presided at the arraignment of Felix A., who had been arrested that day and charged with Attempted Auto Stripping, Unauthorized Use of a Vehicle, Criminal Mischief, and Resisting Arrest. According to the accusatory instrument: the defendant had been observed by a police officer inside a car manipulating the dashboard area with his hands; the passenger-side window was broken; the rear seat was partially pulled forward; the named owner did not give the defendant permission to be inside the car, damage it, or take any part of it and, as the officer placed the defendant under arrest, the defendant ran three blocks, then kicked, flailed his arms, and punched one of the officers in his chest with a clenched fist as he was being handcuffed.

27. During the arraignment, respondent stated that no one had observed the defendant break the window or pull the rear seat forward. Respondent said that the defendant is not "responsible for breaking a window," and that there is no adequate allegation that the defendant intentionally defaced the vehicle. Assistant District Attorney Ilyssa Rothman replied that the accusatory instrument was sufficient since the defendant was inside the car with a broken window and, "There is indicia of theft and...manipulation of the dashboard." She

argued also that the charge of Resisting Arrest was adequately alleged. When the prosecutor would not consent to disposing of the case as a violation, respondent dismissed the case and denied leave to restore, admittedly, in part, because it was Christmas Eve.

28. Respondent dismissed the charge because the defendant was arraigned on Christmas Eve and because the Assistant District Attorney would not reduce it to a violation. In doing so, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 121 through 133 of Charge I:

30. Jason M. was charged with Riot, Obstructing Governmental Administration, Resisting Arrest, and Disorderly Conduct. He was allegedly part of a shouting, "jeering" crowd, approached a police car and attempted to pull a prisoner from the car by pulling on the apprehended person in the car. The defendant allegedly struggled with the police, flailed his arms, and refused to be handcuffed.

31. On November 22, 1994, after the assistant district attorney offered a reduced plea to a violation with three days community service, respondent replied: "How about an A.C.D.?" The prosecutor replied: "No, your Honor, I'm sorry." When respondent asked, "Why not? Don't be sorry, why not, tell me why not?" the prosecutor referred to the allegations and said they warrant community service. Respondent then said he would give an adjournment in contemplation of dismissal with community service, and he pressed for an A.C.D. When the assistant district attorney said she "can't consent to an ACD," respondent announced a "second call" and told her to "talk to somebody." On second call, respondent asked the prosecutor whether she had reconsidered, and she reported that her supervisor had said that they could not consent to an A.C.D.

32. Respondent then dismissed the charge for facial insufficiency, and, in so doing, misstated the facts in the accusatory instrument and made statements which assumed facts not before the court based upon his personal views of what occurs when police officers make arrests. Respondent admittedly dismissed the charge, in part, because it was Thanksgiving, notwithstanding his belief that his decision would be reversed were the matter appealed.

33. Respondent intentionally misstated the accusatory instrument by implying that the defendant was charged merely with "putting his arm on someone in police custody."

34. Respondent knew that his dismissal was not sanctioned by law, and he believed that, if his decision were appealed, the Appellate Term would have reversed, since there was no proper basis to dismiss for facial insufficiency.

35. In dismissing the accusatory instrument, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 134 through 145 of Charge I:

36. Wayne G. and Pete R. were arraigned on charges of Obstructing Governmental Administration, Possession of a Weapon and Resisting Arrest. They were charged with being inside a vehicle where another person, who was arrested, had thrown a loaded .32-caliber, semi-automatic handgun. The defendants had allegedly refused repeated requests by police officers to come out of the vehicle, and, after being advised that they were under arrest, they "pulled away" from the officers and "refused to be handcuffed." Defendant Wayne G. possessed a knife in excess of four inches; defendant Pete R. had no weapon.

37. On September 2, 1995, respondent conducted the arraignment immediately after the mistaken plea offer was discovered in *People v. Juan Lopez*. The prosecutors, Joseph Sack and Kathleen Rice, were the same in both cases. Respondent asked Mr. Sack whether he wanted to dismiss the charges, and Mr. Sack replied that there was "no offer and the People are seeking bail." Respondent then spoke in a loud, angry manner, at times yelling at both prosecutors, and

he dismissed the charges. Respondent's conduct toward the prosecutors elicited cheering, clapping and whooping from the spectators in the audience. Respondent made statements which assumed facts not before the court based upon his personal views of what occurs when police officers make arrests in the following colloquy:

> MR. SACK: They are in a car, Your Honor.
>
> THE COURT: Somebody in a car with a gun, police officer goes to the car and they don't move--the cops then try to do something to get them out.
>
> MR. SACK: We don't know that, what they--
>
> THE COURT: What? What they did to get them out of the car, whether they were abused, grabbed, hit, berated--when they finally get out of the car, cops try to 'cuff them, they lift up their hands, what are you doing? We didn't do anything. One has a knife. They spend a day in jail.
>
> You want to ACD? Dismiss or ACD. That is your choice.
>
> MR. SACK: Judge I am not prepared to do either right now.
>
> THE COURT: You have a reason for that? Is there something I said--that was wrong?
>
> MR. SACK: Judge, I am reviewing the write-up.
>
> THE COURT: I think I gave you five minutes to look at it and--Ms. Rice, you have a problem? Stand up. I didn't ask you to talk.
>
> MS. RICE: Do I have a problem, Your Honor.
>
> THE COURT: I didn't ask you to talk. Then leave the Courtroom and solve your problem.
>
> MS. RICE: You want me to leave now?
>
> THE COURT: Don't you shirk and give me weird looks, okay.
>
> MS. RICE: I apologize, Your Honor, if I gave--
>
> THE COURT: Here we go again. You want to dismiss or ACD the cases, Mr. Sack.
>
> MR. SACK: Judge, I see that a count is not charged. I therefore, with the Court's permission, move to add that to the complaint at this time--
>
> THE COURT: Your application is denied. You charged him with this. ACD or dismiss. If you want to re-arrest him or go, go to their houses and charge them with the Administrative Code Violation. Are you ready to do it?
>
> MR. SACK: With all due respect, Your Honor, the factual allegations in the complaint do make out--
>
> THE COURT: Didn't I just dismiss your application? You want me to--you want to say it five more times? When I ask you and I rule that is it. Go on to the next point.
>
> MR. SACK: My next point, Judge is to ask for bail.
>
> THE COURT: Charges dismissed. Good day.
>
> (WHEREUPON THERE OCCURRED A COMMOTION IN THE COURTROOM)
>
> COURT OFFICER: Everybody out.
>
> THE COURT: This is a Courtroom. Step out.

38. Respondent ignored the attempt by Mr. Sack to amend the complaint, prevented him from advising respondent of the amendment and summarily denied his application.

39. Respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 146 through 156 of Charge I:

40. Fong Z. was charged with misdemeanor assault; three counts of Menacing, third degree, and Criminal Possession of a Weapon. The accusatory instrument charged that the defendant and eleven other individuals had surrounded three men and "punched and kicked" one of the men, while one of the eleven stabbed the same man, causing a wound, swelling and substantial pain, and causing the other two victims to be in fear of physical injury. At arraignment, the defendant was released on his own recognizance.

41. On April 3, 1995, respondent presided over the case. The defendant failed to appear. The defendant had also failed to appear on a prior occasion and had been arrested on a bench warrant. Respondent showed the accusatory instrument to the prosecutor and cut him off as he started to defend the sufficiency of the instrument. Respondent then asked defense attorney Jennifer Fiess, "How about moving to dismiss because they don't allege what this Defendant did?" In response, the prosecutor argued, "The People do allege it. They make out the charges." Assistant District Attorney Brian Coffey added that the People were "ready"; that the motion should be in writing; that the defendant was absent, and that "the dismissal is over the People's objection." Respondent told Mr. Coffey not to say that again.

42. Respondent stated that Mr. Coffey had no file, and, "There are insufficient facts in The Accusatory Instrument from which it could be alleged that this person did not do anything to aid, assist, or act in concert." Respondent dismissed the charges.

43. In dismissing the accusatory instrument, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 157 through 166 of Charge I:

44. Rahmel S. was charged with Assault, third degree, and Possession of an Imitation Handgun. The accusatory instrument alleged that a police officer had observed the defendant in possession of the imitation pistol, took it from the defendant's waistband, and observed the defendant grab another police officer by the neck and throw the officer to the ground. The other officer, according to the accusatory instrument, sustained redness to his neck and suffered substantial pain.

45. On December 2, 1994, respondent presided over the case. Defense counsel claimed that the defendant had been beaten by the police. Respondent suggested a Disorderly Conduct plea offer, with time served; the prosecutor declined the suggestion. Respondent then misstated the law and the accusatory instrument itself, saying that the imitation pistol was "not properly pled" because the color and barrel were not described and that the Resisting Arrest charge was not properly pled, when, in fact, there was no charge of Resisting Arrest. Respondent dismissed the charges for facial insufficiency.

46. In dismissing the accusatory instrument, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 167 through 176 of Charge I:

47. John S. was charged with Assault, Attempted Assault, Harassment and Disorderly Conduct for cursing and threatening two police officers, attempting to push one of them, and pushing the second officer to the ground, causing lacerations to the officer's head and causing the officer to be alarmed and to suffer substantial pain.

48. On March 29, 1995, respondent presided over the case. When Assistant District Attorney Michael Packer offered a violation and five days of community service, respondent asked defense attorney Morton Minsley whether he had an application to make. When Mr. Minsley moved for an adjournment in contemplation of

dismissal, respondent coached him to move for dismissal, stating, "No, Mr. Minsley. Are you moving to dismiss the accusatory instrument for facial insufficiency?" Mr. Minsley took respondent's cue and moved to dismiss.

49. Respondent then asked Mr. Packer whether he wished to "reconsider the offer." When Mr. Packer indicated that the officer had suffered "lacerations to the head and extensive pain" and tried to defend the sufficiency of the accusatory instrument, respondent, in the following colloquy, misstated the law, yelled and screamed at him and threw him out of the courtroom, which provoked laughter among the spectators in the audience:

> THE COURT: Attempting to push, as Mr. Minsley said, is nothing. For those reasons the charges are dismissed for facial insufficiency, and the record is sealed. Good day.
>
> Next case.
>
> MR. PACKER: Your Honor, the People would like –
>
> THE COURT: Excuse me. The lesson here is how the court works. I know you haven't been in court. Mr. Minsley talks, you respond, I rule.
>
> Next case.
>
> MR. PACKER: Your Honor, this is over the People's objection.
>
> THE COURT: Excuse me. When I talk, you don't talk. You understand that?
>
> MR. PACKER: Yes, Your Honor.
>
> THE COURT: Here is how it works, he talks; you respond; and I rule. That is it. You don't get to talk after me. I talk last once the charges are dismissed.
>
> MR. PACKER: Over the People's objection.
>
> THE COURT: Take a step outside. Take a step out of the courtroom. Did you hear what I said?
>
> MR. PACKER: Judge –
>
> THE COURT: Excuse me. I didn't ask you to talk. See the door? Step out of the courtroom; take a deep breath and after your deep breath, come back in.

50. Respondent testified that he "may have been wrong" in dismissing the charges but that he still "did the right thing in this case." When asked, "Even though you were wrong, you did the right thing?", he responded, "That's correct."

51. In dismissing the accusatory instrument, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

As to Specifications 177 through 193 of Charge I:

52. Jose S. was charged with Driving Under the Influence of Alcohol, Unlicensed Operation of a Motor Vehicle, and Illegal Possession of a Vehicle Identification Number Plate. According to the accusatory instrument, the defendant had a blood alcohol level of more than .07%, smelled of alcohol, had slurred speech and red, watery eyes, and was unsteady on his feet. It was alleged further that his license had been suspended, that he had had five suspensions, that he had failed to answer numerous traffic summonses, and that the VIN plate was registered to another vehicle.

53. On March 29, 1995, respondent presided over the case. He pressed Assistant District Attorney Kieran Holohan for evidence on the charges of Driving Under the Influence of Alcohol, and, each time Mr. Holohan answered, respondent retorted that the evidence was insufficient to convict. Mr. Holohan advised the court that the defendant had registered a .08 on the breathalyzer, a representation which respondent challenged, even though the record clearly supported Mr. Holohan.

54. During the proceeding, respondent was angry and shouted at Mr. Holohan. Respondent asked defense attorney Joseph Stello for a motion, and Mr. Stello moved to dismiss, even

though he conceded that the accusatory instrument was valid and even though blood alcohol readings of more than .07 and less than .10 are prima facie indicia of driving with impaired ability, pursuant to Vehicle and Traffic Law § 1195(2)(c). Mr. Holohan objected, and the following colloquy took place:

> THE COURT: It is not over your objection. I didn't ask you whether you objected or not. He made a motion; I didn't make the motion. I went through this with the person that is standing behind you with the blue jacket this morning.
>
> I didn't ask you whether you objected; I asked whether you oppose his application. If you don't oppose it, I'll dismiss it; if you do, tell me what your opposition is, then I'll rule.
>
> MR. HOLOHAN: Well, we do oppose it, Your Honor.
>
> THE COURT: Thank you. Excuse me. Watch. In court -- you're a lawyer, aren't you?
>
> MR. HOLOHAN: Yes.
>
> THE COURT: In court defense counsel makes motions; you answer his motions; I rule. You don't talk after I rule. That is how it works.
>
> MR. HOLOHAN: Okay.

55. Respondent then dismissed the alcohol charges. As to the Unlicensed Operation charge, the defendant pleaded guilty and was fined $500. With respect to the remaining charge, the prosecutor asked for a violation plea and a $100 fine. Respondent dismissed for facial insufficiency.

56. In dismissing the accusatory instrument, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law. Respondent knew of the provision in the Vehicle and Traffic Law that more than .07 of alcohol in a person's blood is to be given prima facie effect in determining whether the ability to operate a motor vehicle is impaired by the consumption of alcohol.

As to Specifications 194 through 200 of Charge I:

57. Dennis G. was charged with Assault, third degree, and Harassment based on allegations by a woman that the defendant had struck her in the face with his closed fist, "causing swelling and bruising to the face and to suffer substantial pain and to be alarmed." On March 29, 1995, respondent presided over the case. Mr. Holohan stated that he was ready for trial, and a plea discussion ensued between respondent and the prosecutor. Respondent misstated the accusatory instrument; although there is nothing about a "push" in the accusatory instrument, respondent said, "You don't make out an assault. A push is not an assault. All you do is practice statutory language. It's harassment. It's a CD [conditional discharge]."

58. The defendant pleaded guilty to Harassment. Respondent then asked defense attorney Joseph Stello whether he "want[s] to move to dismiss" the assault count. When Mr. Stello said, "Yes, I do," Mr. Holohan stated that the "statutory language is made out," in that the victim "suffered pain." Respondent responded, "That is a conclusion. I'm not going to accept it. Do you have any other facts?" Mr. Holohan replied that the victim "received swelling and bruising to the face." Respondent dismissed the misdemeanor assault charge for facial insufficiency.

59. In doing so, respondent knowingly disregarded his statutory obligations and knowingly acted contrary to law.

APPENDIX C

As to Specifications 201 through 211 of Charge I:

1. Laroyal S. was charged with Theft of Services for allegedly entering the New York City subway without paying the required fare on December 22, 1993, in the Bronx. At the time,

a similar charge was pending against him in New York County.

2. On December 23, 1993, at arraignment, respondent immediately requested that Assistant District Attorney Joi Mathlin offer a plea to Disorderly Conduct and a sentence of time served. Ms. Mathlin declined and offered a plea to the misdemeanor, with time served.

3. At the time, respondent had before him the court file, including the defendant's record, which showed four prior Class A misdemeanor convictions.

4. The following colloquy then took place:

> THE COURT: We will send him back to New York County to deal with his other fare beat. I am not a potted plant. It still seems to me to be unreasonable for a person to have to plead to a misdemeanor on a fare beat. If there is another reason, it's okay. It seems 240.20, and time served if this individual has done this numerous times. He doesn't have money. He doesn't have a job, and he jumps onto the subway. What you want me to do is remand him or set bail, and he has to stay in on that and give him a day so he goes back to the other. A misdemeanor seems inappropriate. I am asking you to do just 240.20 and time served.
>
> MISS MATHLIN: The People believe justice would be that this individual take the docket, then he will have time served, and he can go to New York County and handle his other jumping the turnstile in New York County, your Honor.
>
> THE COURT: Do you think you respect the law by doing that?
>
> MISS MATHLIN: No, your Honor. How many times does one person jump the turnstile before they have to stay? A vast [sic] have to pay.
>
> THE COURT: We have different roles. I think the people should pay and the people should have jobs and people should have homes; and I think there should be health care on demand. If he was given the same opportunity that you and I have, he would have a home, a job and money, and he wouldn't be jumping the turnstile. I don't think he is jumping the turnstile because he has money in the pocket, because he thinks it's a way of being futile [sic] and save money.
>
> MISS MATHLIN: The People recommend he take the docket.
>
> THE COURT: Any question? Do you think you are doing justice?
>
> MISS MATHLIN: I do.
>
> THE COURT: I disagree....

5. After defense attorney Mary Peppito indicated that the defendant would not take the plea to a Class A misdemeanor and after a bench conference, respondent accused Ms. Mathlin of being "unreasonable," invited defense counsel to move for dismissal, dismissed the case "in the interest of justice" notwithstanding that the motion was not written, made no findings as required by law, and then blamed the prosecutor for making him "do something stupid."

6. Respondent knew that, according to law, dismissal in the interest of justice must be on written application and on notice to the prosecution.

7. Before dismissing the case, respondent knowingly: (a) failed to require a written application; (b) failed to give the prosecutor adequate notice and an adequate opportunity to be heard; and, (c) failed to make findings on the record as required by CPL 170.40.

8. Respondent dismissed under the guise of a dismissal "in the interest of justice" because the prosecutor would not accept a plea urged by respondent.

As to Specifications 212 through 217 of Charge I:

9. Elliot V. was charged with larceny of a bicycle after the bicycle owner caught the defendant with the bicycle. On March 29, 1995, respondent presided over the case. Mr. Packer offered a plea to a violation and three days community service. Respondent replied, "The case is nothing," and granted an adjournment in contemplation of dismissal without the consent of the People and without hearing from the prosecutor. Earlier that day, respondent had ejected Mr. Packer from court for noting his objection to respondent's dismissal of the charges in *People v. John S.*

10. Respondent knowingly granted an adjournment in contemplation of dismissal, without the consent of the People, contrary to law, and notwithstanding that: (a) he knew that he needed the prosecution's consent; and, (b) the prosecutor had taken a position for a conviction on a lesser charge.

As to Specifications 218 through 224 of Charge I:

11. Rafael R. was charged with Assault, second degree, and Criminal Possession of a Weapon, fourth degree. The accusatory instrument alleged that the defendant had stabbed another man in the chest with a knife.

12. On December 15, 1995, respondent presided over the case. Defense attorney Harvey Herbert stated that the defendant had served five months on another charge, and respondent stated that he would like the case disposed of with an adjournment in contemplation of dismissal. Assistant District Attorney Roger McCready did not consent. Respondent nevertheless adjourned the case in contemplation of dismissal over the prosecutor's specific objection.

13. Respondent knew that he needed the prosecution's consent.

14. Specifications 225 through 230 of Charge I are not sustained and are, therefore, dismissed.

APPENDIX D

As to Specifications 329 through 352 of Charge I:

1. In August or September 1993, Assistant District Attorney James Ferguson had a conversation with respondent in the robing room concerning a domestic violence case in which the victim and defendant were Hispanic. Respondent asked whether Mr. Ferguson thought that he was really going to make a difference in these cases, and respondent said "that this was a cultural thing, that domestic violences were viewed differently in some cultures," and that Mr. Ferguson, "by enforcing the policies of the District Attorney's office regarding those cases, was being oppressive to certain people of certain cultures."

2. On March 2, 1995, in a conversation outside the courthouse, respondent told Assistant District Attorneys Leslie Kahn and Arlene Markarian that domestic violence charges brought in his court were often exaggerated.

3. On January 26, 1996, respondent presided over People v Benito Oliver, in which the defendant was charged, inter alia, with Assault, Aggravated Harassment and Criminal Contempt for violating an order of protection. The complaining witness was Galina Komar. Respondent criticized the prosecutor, Patria Frias, for arguing for higher bail and more restrictive terms in an order of protection than had been set in previous court proceedings. Respondent told Ms. Frias that she had a duty to the defendant to be fair but that that "doesn't seem to matter to you, since you don't seem to care that he was in jail for all those dates for all those charges...."

4. When Ms. Frias argued against a modification of the order of protection, respondent replied:

> I told you what I thought about the actions of the two other Judges to whom you misrepresented certain facts, and that what you did after you couldn't get me to raise the bail was you had to have him re-arrested after he posted $2,000.

* * *

> Then it went to a Judge who was on the front page of every newspaper in the city, who was worried about getting reappointed. What did you expect that person to do? He raised bail.
>
> And it went to a Judge who had just been criticized because of a misrepresentation said by your office where they didn't tell that Judge about the condition of a victim and she paroled somebody and she was in every newspaper in the city, and I am not sure that her bail was reliable.

5. Assistant District Attorney Bryanne Hamill was assigned to the Bronx County District Attorney's Domestic Violence and Sex Crimes Bureau. One of her cases was *People v. Domenech*, in which the defendant was charged with breaking his former wife's wrist when he went to her home to pick up their son.

6. At trial, after the victim testified and the People rested, she returned to court to hear the defendant's testimony, even though Ms. Hamill had advised against it. Respondent immediately called counsel to the bench, "was very angry" at Ms. Hamill and said, "Ms. Hamill, I have just lost all respect for you. You are doing this for impact. Tell her to leave." Ms. Hamill replied that this was the victim's choice, that she had a right to be in the courtroom and that she would not be a rebuttal witness. Respondent very angrily responded, "She can leave or she may stay or you can tell her to leave, but you will have to live with the consequences of your decision." Ms. Hamill felt "intimidated" and took respondent's words to be a "threat" that respondent would make rulings against her if the victim did not leave. Ms. Hamill then asked the victim to leave the courtroom, which she did.

7. While she was delivering her summation, Ms. Hamill referred to inconsistent statements made by the defendant, first to the police upon his arrest that he had acted in self-defense, then on the stand at trial that the victim had broken her wrist by accident. Respondent "got very angry," "immediately stopped [the] summation" and called a conference in the robing room. In a "very loud" voice, with his face red, respondent said there would be no mention of self-defense because defense counsel Mary Zaslofsky had previously withdrawn her request for a self-defense charge.

8. After the conference, respondent told the jury to disregard Ms. Hamill's comments about self-defense. When summations were finished, respondent charged the jury but did not include a self-defense charge. Defense counsel Zaslofsky then requested an additional jury charge covering self defense, which respondent granted over Ms. Hamill's objection. Ms. Hamill was not permitted to call witnesses on rebuttal or to re-sum up on the self-defense charge. Previously, respondent had assured Ms. Hamill that if he charged self defense, he would permit her to rebut and sum up on that defense. He testified that he "changed" his mind as to the prior assurance to her, but he never told her that he changed his mind.

9. While the jury was deliberating, Ms. Hamill told respondent in the courtroom, "You've sandbagged me," that despite defense counsel's "accident" defense and despite respondent's prior statements that there would be no self-defense charge, he instructed the jury on such a charge without giving her the opportunity to disprove it.

10. Later, while the jury was still deliberating, respondent invited both attorneys to the robing room to discuss the case. Respondent said, "Well, you know, I've been involved in a personal domestic violence situation. And without giving too much away, it didn't involve children, it involved a woman... You can't believe that it's you doing these things." Respondent went on to say that domestic violence "was not, or should not be, or is not criminal."

11. Specifications 329, 330, 331, 332, 333, 334, 335, 336, 337, 340, 342, 343, 344 and 345 of Charge I are not sustained and are, therefore, dismissed.

CONCURRING OPINION BY JUDGE MARSHALL

The majority rightly concludes that the appropriate sanction is removal.

I would emphasize, however, respondent's consistent and outrageous disregard of the law, thus abdicating his judicial responsibilities to safeguard the public and to promote respect for our judicial system.

The Referee in this case held hearings over a 20-day period. There were 67 witnesses and approximately 4,400 transcribed pages and 200 exhibits in evidence after which he concluded, among other acts of misconduct:

1. "Respondent abused the power of his office and acted in a manner inconsistent and prejudicial to the fair and proper administration of justice."

2. "Respondent, in the exercise of his judicial duties, willfully disregarded provisions of the law that resulted in the improper dismissal of criminal charges and willfully engaged in intemperate and injudicious conduct with Assistant District Attorneys."

3. "Respondent's apparent bias against prosecutors resulted in Respondent dismissing, as facially insufficient, accusatory instruments which were sufficient on their face without giving the prosecution adequate notice or opportunity to be heard or amend."

4. "Respondent delivered ad hominem criticisms and injudicious lectures to Assistant District Attorneys that unfairly attributed to them improper and harsh values and judgments in their role as prosecutors."

5. "Respondent made intemperate, derisive comments to Assistant District Attorneys."

6. "Respondent failed to maintain order and decorum in his court and failed to be patient, dignified and courteous."

In the past, removal has been deemed appropriate for far less egregious conduct in cases involving judges' intemperate behavior, refusal to follow the law and conveying the appearance of bias. (*See, e.g., Matter of Hamel v State Commission on Judicial Conduct*, 88 NY2d 317 [in connection with two cases, judge ignored the law and improperly jailed defendants on the ostensible grounds that they had failed to pay restitution]; *Matter of Esworthy v State Commission on Judicial Conduct*, 77 NY2d 280 [in 12 cases, Family Court judge flouted the law, conveyed the impression of bias and made intemperate statements]; *Matter of Vonder Heide v State Commission on Judicial Conduct*, 72 NY2d 658 [judge removed on five charges involving intemperate language on and off the bench and the failure to follow proper legal procedure in disposing of cases, even though he was a non-lawyer who professed ignorance of the law and his ethical obligations]; *Matter of McGee v State Commission on Judicial Conduct*, 59 NY2d 870 [in a handful of cases, judge discouraged defendants from exercising their right to counsel and disposed of cases without guilty pleas or trial]; *Matter of Straite*, 1988 Ann Report of NY Commn on Jud Conduct, at 226 [judge showed hostility toward attorneys or defendants in seven cases and ignored proper legal procedure in their arraignment or disposition, as well as improperly intervened in three cases in which he or his son had an interest]).

Dated: October 24, 1997

DISSENTING OPINION BY MR. GOLDMAN, IN WHICH MR. COFFEY AND MR. POPE JOIN

I concur, with certain qualifications, in the Commission's determination that Judge Duckman committed judicial misconduct. I dissent, however, from the Commission's determination that Judge Duckman be removed from the bench. I believe that in consideration of

all the facts and circumstances in this case, the appropriate sanction is censure.

I agree with the majority that Judge Duckman committed serious misconduct in the disposition of 16 cases. Judge Duckman, over the objection of the prosecutor, in knowing violation of law, dismissed 13 cases for purported legal insufficiency of the complaint and one case in the interest of justice, and adjourned two cases in contemplation of dismissal. Most of these improper dispositions occurred after the prosecutor rejected the judge's suggestion as to what he believed was an appropriate disposition of the case.

The Legislature has enacted a statutory scheme in which a court may not accept a plea of guilty to a lesser included crime (*see*, CPL 220.30[1]) or impose an adjournment in contemplation of dismissal (*see*, CPL 170.55[1]) without the consent of the prosecutor.[1] Further, the legislative scheme permits the District Attorney to condition the court's acceptance of a plea to a lesser offense on the imposition of a specific sentence. (See, *People v Farrar*, 52 NY2d 302).

Judge Duckman's apparent disagreement with the legislative allocation of power to the District Attorney was not an acceptable basis for him to impose without the required consent of the prosecutor what he believed to be an appropriate disposition. As a judge, however much he disagreed with the statutory scheme, he had an obligation, if not to respect it, at least to follow it.

I also agree that Judge Duckman committed misconduct in his intemperate name-calling of prosecutors and insensitive remarks,[2] although I believe that was considerably less serious than his misconduct involving the disposition of cases. That he did so in an effort to cajole prosecutors to agree to what he believed to be a just disposition or in a mentoring effort to make them better lawyers is no excuse. A judge, especially when dealing with young and inexperienced and often sensitive attorneys, should forego *ad hominem* comments.

I disagree, however, with several of the majority's findings that Judge Duckman's speeches were inappropriate. A judge, especially in the congested criminal courts of New York City, has a responsibility to dispose of cases in order to allow the courts simply to function. In this regard a judge should be allowed considerable leeway in speaking to attorneys to urge or cajole them to reach a disposition. I further believe that, in recognition of the importance of an independent judiciary, this Commission should be extremely cautious in its condemnation of judicial speech. I do believe, however, that when judicial speech includes abusive personal attacks, it goes beyond

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[1] A judge need not receive the prosecutor's permission to dismiss a case in the interest of justice, and may make such a motion himself. (*See*, CPL 170.40[2]). However, there are substantive requirements for such a disposition, many of which were not met here. (*See*, CPL 170.40[1]).

[2] Although I reluctantly accept the referee's implicit findings on credibility, I find his report inadequate. It contains no explicit credibility findings, although by having sustained every allegation urged by staff counsel except one involving the alleged impropriety of a speech by Judge Duckman (and thus not involving a credibility determination), the referee implicitly made every credibility determination against Judge Duckman. The report fails to make explicit credibility findings even when the allegation is based wholly on the testimony of a single witness, a prosecutor, and was contradicted by not only Judge Duckman but also a defense attorney who was a witness to the incident in question.

The uniform acceptance of the veracity of every witness who testified against Judge Duckman, and the concomitant near-uniform rejection of all those who testified for Judge Duckman, without any explanation, is troubling. In view of the referee's "peculiar advantage of having seen and heard the witnesses," (*People v Prochilo*, 41 NY2d 759, at 761), however, I accede to the referee's apparent credibility evaluations (although not necessarily to his findings of fact in other areas). In any case, the vast majority of the allegations in this case is based on undisputed evidence, such as court transcripts, and not on disputed witness testimony.

permissible bounds.[3] I make a distinction between unnecessary and gratuitous personal abuse, which I believe generally constitutes misconduct, and speech, however dramatic, expressing a judge's view of the appropriate role of the prosecutor or other aspects of the criminal justice system or of the case before the court, which I believe is within the bounds of propriety. For instance, I believe it is misconduct to call a prosecutor a pejorative term such as "Nazi" (see specification 6) but it is not misconduct to point out that bail in amounts less than $750 serve only to incarcerate "poor people" (see specification 23[a]).

Judge Duckman's misconduct, however serious, I believe, does not, in light of all the circumstances in this case, mandate removal. While he committed a considerable number of acts of misconduct, none of them resulted in deprivation of liberty. (*Cf., Matter of LaBelle*, 79 NY2d 350 [judge censured for in at least 24 cases knowingly improperly committing defendants to jail] and *Matter of Sardino*, 58 NY2d 286 [judge removed for misconduct in 62 cases, including failing to set bail as required, over a two-year period]). None were motivated by self-interest. All of his improper dismissals involved misdemeanors, comparatively minor crimes. Indeed, although Judge Duckman had no right to dismiss a case for legal insufficiency based on the unlikelihood of conviction, his factual analysis of the weakness of the cases he dismissed was generally on the mark. It is significant that on no occasion did the prosecutor find Judge Duckman's erroneous dismissal of a complaint serious enough to warrant an appeal to a higher court.

Further, the extent of Judge Duckman's misconduct must be considered in light of the intense scrutiny of him, apparently covering five years, by the Kings County and Bronx County District Attorneys. Both of these large law offices apparently kept dossiers of Judge Duckman's purported misconduct.[4] While the number of instances of misconduct is considerable in absolute numbers, it is not so great in light of the tens of thousands of cases Judge Duckman handled in those five years. Moreover, with the exception of one claimed act of misconduct involving his submission of an instruction on self-defense for jury consideration after telling the prosecutor prior to summation he would not charge the jury on that defense (*see*, Determination, Appendix D, paragraphs 6-9), the acts of misconduct do not involve Judge Duckman's conduct at trial or at hearings.

While precedent in the area of judicial misconduct is rarely a clear guide because of the fact-intensive nature of each case, precedent does seem to favor a lesser sanction than removal. In *LaBelle (supra)*, decided five years ago, the Court of Appeals, albeit by a split vote, overturned a Commission determination of removal and imposed the sanction of censure upon a judge who on at least two dozen occasions had knowingly wrongfully incarcerated individuals before any determination of their guilt, sometimes for periods longer than the maximum sentence permissible after conviction. That behavior, which resulted in censure, appears to me to be more egregious than Judge Duckman's misconduct.

Lastly, I do not believe that this Commission should ignore the impact of the removal of Judge Duckman on the independence of the judiciary. This case should not be considered in a vacuum. It was triggered by complaints by the Governor and Majority Leader of the State Senate as a result of Judge Duckman's bail decision in the

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[3] I also disagree with the majority's determination that Judge Duckman made statements indicating bias in domestic violence cases. Even if every allegation in this area, as set forth in Appendix D to the Determination, is accepted as true, they fall far short of establishing bias.

[4] As a practical matter, only a large institution such as a district attorney's office is capable of cataloging a large list of complaints. By mentioning this, I do not criticize the prosecutors' offices; the compilation of complaints of judicial misconduct is a proper function of such an office. I do believe that the Commission should, however, evaluate the seemingly large number of incidents of potential misconduct in the context of this intensive scrutiny.

Benito Oliver case, which this Commission has rightly found to have been properly within the judge's discretion. Following the vast amount of publicity reporting the criticism of and the Commission complaint against Judge Duckman, there has been, according to testimony at the hearing of this matter, a discernible increase in the numbers and percentages of defendants incarcerated because of bail set beyond their reach. Criminal Court judges, understandably concerned about personal attacks from the media and political figures, have, according to the attorneys practicing in that court, set bail beyond the amounts they did previously. Thus, many more arrestees were detained prior to trial or disposition because of their inability to make bail.

I am fearful that the removal of Judge Duckman will be perceived--wrongly I believe and hope--as a reprisal for what some contend was a lenient (and ultimately tragically unfortunate) bail decision. While I hope that judges will not view Judge Duckman's removal as a threat to their ability to make determinations, including bail decisions, which they believe are fair and appropriate without fear of personal or political consequences, I am not sanguine. Judges, however conscientiously they perform their duties, are merely human. They, like every employee--whether executive or laborer--fear demotion, reassignment or termination. Especially in view of the genesis of this investigation, I believe that the removal of Judge Duckman will have a detrimental effect on judicial independence. [5] A frightened judiciary is not an independent judiciary.

I am frankly unsure of what, if any, weight the Commission should give to the potential impact of its determination on judicial independence. On balance, however, I believe that it is a proper factor for the Commission's consideration. The Commission has a responsibility to take especial care not to intrude on judicial independence any more than required to fulfill its constitutional oversight function. (*See*, Preamble to Rules Governing Judicial Conduct, 22 NYCRR: "...The rules are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.") It should not be blind to the ramifications of its decisions. Concern for judicial independence, while certainly not determinative, weighs in favor of a sanction less severe than removal.

According to the testimony of witnesses for both the Commission and respondent, Judge Duckman has shown outstanding qualities. He is knowledgeable, intelligent, diligent, caring and possesses an unusual empathy and concern for the accused who appear before him. Even though he has committed serious judicial misconduct, in light of all the facts and circumstances in this case, even without any consideration of its impact on judicial independence, I believe the appropriate sanction is censure.

Dated: October 24, 1997

DISSENTING OPINION BY JUDGE THOMPSON

In my view, a jurist who has sat on over 50,000 cases should not be removed for misconduct in only 19 cases. I vote that respondent be censured.

Dated: October 24, 1997

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[5] During oral argument Commission staff counsel maintained that the removal of Judge Duckman would have no effect on the independence of the judiciary. Mr. Stern stated, "I don't see that this should have any effect on any other judge of the Criminal Court because they know, as you will be able to tell them, that within a broad range, they can act in accordance with their own discretion. Some tilt to the left and some tilt to the right. That's all right, that's part of the system, but where you get an extreme like this, beyond the outer limits, it cannot be accepted." (Transcript of oral argument, p. 11).

What concerns me is precisely the effect the removal of Judge Duckman might have on those "extremes." Judges should not have to worry whether their decisions go "beyond" what some political figure or judicial conduct commission believes is "the outer limits." They should feel free to exercise their discretion within the law as they believe is fair and just without fear of personal consequences.

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

W. JOSEPH EMBSER,

a Justice of the Wellsville
Town Court, Allegany County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Honorable W. Joseph Embser, *pro se*

The respondent, W. Joseph Embser, a justice of the Wellsville Town Court, Allegany County, was served with a Formal Written Complaint dated May 13, 1996, alleging that, as an attorney, he mishandled an estate. Respondent filed an answer dated June 4, 1996.

By motion dated October 3, 1996, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct had been established. Respondent opposed the motion by affidavit dated October 22, 1996. The administrator filed a reply dated October 29, 1996. By determination and order dated February 4, 1997, the Commission granted the motion.

The administrator filed a memorandum as to sanction. Respondent neither filed a memorandum nor requested oral argument, but, on March 11, 1997, he submitted a letter challenging the finding of misconduct. The parties were notified that the Commission would consider the letter as an application to reconsider. The administrator filed a response to the application on March 19, 1997.

On March 27, 1997, the Commission denied the application for reconsideration. Thereafter, it considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Wellsville Town Court since 1979. He was acting justice of the Wellsville Village Court from 1966 to 1968. He is a part-time judge who practiced law in Wellsville from 1965 to 1995. He was disbarred by the Appellate Division, Fourth Department, on March 8, 1996, based on the conduct found herein.

2. Respondent drafted a Last Will and Testament for Edward J. Antoon. The will was executed on May 9, 1989, and Mr. Antoon died on September 26, 1989, at age 83.

3. Mr. Antoon's wife, Edna, was named executrix of the estate. Respondent was retained as attorney for the estate in October 1989.

4. Respondent opened an account at Norstar Bank in the name of "Edward J. Antoon Estate, Edna M. Antoon, Executrix." Mrs. Antoon was the signatory, but respondent maintained exclusive control over the checks and the check register of the account. The monthly statements were sent to respondent's law office.

5. On October 24, 1989, Mrs. Antoon gave respondent a General Power of Attorney. Shortly

thereafter, she moved to Ohio to live with relatives.

6. Between October 30, 1989, and April 14, 1993, 50 checks totalling $399,320 were drawn on the estate account and made payable to respondent.

7. There was no express retainer agreement regarding respondent's legal services on behalf of the estate. He never prepared or submitted any billing statements for his legal services, and he never specifically discussed with Mrs. Antoon any of the checks made payable to him.

8. On June 25, 1990, respondent prepared and submitted a Petition to Determine Estate Tax in which he listed his total attorney's fees to complete the estate as $156,575, even though he eventually received a total of $399,320. In the document, respondent reported that he would receive $99,000 in attorney's fees in 1990, even though he had already received that amount when the petition was filed on June 25, 1990. In fact, respondent paid himself an additional $21,000 in 1990, bringing the total for that year to $120,000. Similarly, respondent listed in the petition that he was to be paid $10,555 in 1991; he actually paid himself $82,500.

9. With the petition, respondent and Mrs. Antoon signed under penalty of perjury a Declaration of Executor's Commissions and Attorney's Fees and submitted it to the Internal Revenue Service. It was never amended.

10. Of the 50 checks, the first 17, totaling $174,520, were signed by Mrs. Antoon. Respondent has acknowledged that at least some of them were pre-signed in blank.

11. Between April 4, 1991, and March 13, 1992, respondent issued himself 18 checks, totaling $106,200, and signed by him as power-of-attorney. During this period, all of the other checks drawn on the estate account were signed personally by Mrs. Antoon.

12. Mrs. Antoon died on March 16, 1992. Pursuant to Edward Antoon's will, respondent became successor executor. After Mrs. Antoon's death, respondent issued himself another 15 checks, totalling $118,600. He listed these payments as attorney's fees and executor's commissions.

13. As attorney and sole fiduciary for the estate, respondent failed to obtain court approval for these payments, as required by SCPA 2110, 2111, 2310 and 2311. He received the payments without filing an affidavit of fees and commissions, as required by the Uniform Rules for Surrogate's Court, 22 NYCRR 207.60(a) and (e).

14. Respondent has acknowledged under oath that he experienced financial difficulties during the time that he acted as attorney for the estate. The funds that he received from the estate account were used to meet expenses of his law practice and his personal expenses for himself and his family.

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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Although there was no express agreement between respondent and the executrix as to what his legal fees would be, since Mrs. Antoon signed the Declaration of Executor's Commissions and Attorney's Fees, it can be concluded that she authorized that respondent be paid $156,575 for handling the estate. Nonetheless, respondent paid himself an additional $124,145 without her knowledge or permission before Mrs. Antoon died and an additional $118,600 after she died without obtaining court permission, as required by law. Thus, in violation of his sworn duty as fiduciary to the estate, respondent took a total of $242,745 in unauthorized fees.

In a sworn statement to the IRS, respondent declared in 1990 that his fees would be $156,575. He never amended this, even though he converted an additional $224,745 in attorney's fees and took $18,000 in commissions as successor executor.

These acts constitute gross abuses of the trust placed in him by his client and the state that licensed him to practice law. By his unprincipled conduct as an attorney, he has demonstrated that he lacks the integrity to sit on the bench and judge the conduct of others. (*See, Matter of Boulanger v State Commission on Judicial Conduct*, 61 NY2d 89).

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

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

Judge Luciano, Judge Marshall and Mr. Sample were not present.

Dated: April 2, 1997

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

ROBERT W. ENGLE,

a Justice of the Madison Town Court and
Madison Village Court, Madison County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Neal P. Rose for Respondent

The respondent, Robert W. Engle, a justice of the Madison Town Court, Madison County, was served with a Formal Written Complaint dated May 10, 1996, alleging that he lent the prestige of his office to assist a defendant with a case pending in another court. Respondent filed an answer dated May 31, 1996.

On September 10, 1996, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On September 12, 1996, the Commission approved the agreed statement and made the following determination.

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

2. On May 13, 1995, respondent prepared and signed a letter on judicial stationery and caused it to be sent to Madison County Court Judge William F. O'Brien, III, Madison County District Attorney Donald F. Cerio and Madison County Assistant District Attorney Renee M. Smith. In the letter, respondent requested leniency in the sentencing of James Friers, a defendant whom respondent knew personally. Mr. Friers had pleaded guilty before Judge O'Brien in March 1995 to Driving While Intoxicated and was awaiting sentencing.

3. Respondent vouched for Mr. Friers's good character, questioned the competence of a probation official who had prepared a pre-sentence report on Mr. Friers, disparaged the police officer who had arrested and charged Mr. Friers, urged Judge O'Brien not to impose a jail sentence and vouched for the defendant's credibility and honesty.

4. Respondent repeatedly referred to his judicial office in the letter.

5. In May 1995, respondent drafted and circulated a petition in the Town of Madison which requested "compassion and mercy" for Mr. Friers. He signed the petition, listed his occupation as "town justice" and mailed it in a town court envelope to the District Attorney.

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

Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's flagrant abuse of his judicial office on behalf of Mr. Friers in a criminal action in another court constitutes serious misconduct.

Although respondent appealed to Judge O'Brien on the merits, rather than making a bald request for favoritism, the repeated references to his judicial office violated the proscription that a judge "shall not lend the prestige of judicial office to advance the private interests of the judge or others...." (Rules Governing Judicial Conduct, 22 NYCRR 100.2[C]; *see, Matter of Kiley v State Commission on Judicial Conduct*, 74 NY2d 364; *Matter of Wright*, 1989 Ann Report of NY Commn on Jud Conduct, at 147).

As the Court of Appeals stated in *Matter of Lonschein v State Commission on Judicial Conduct*:

> ...[N]o Judge should ever allow personal relationships to color his conduct or lend the prestige of his office to advance the private interests of others [citation omitted]. Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved [citation omitted]. There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. Thus, any communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office. (50 NY2d 569, at 571-72)

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

Mr. Berger, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present.

Mr. Pope was not a member of the Commission when the vote was taken in this matter.

Dated: February 4, 1997

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

CLARENCE F. GILES, JR.,

a Justice of the Clayton Town Court and
Clayton Village Court, Jefferson County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Coulter, Fraser, Bolton, Bird & Ventre (By Robert F. Coulter) for Respondent

The respondent, Clarence F. Giles, Jr., a justice of the Clayton Town Court and the Clayton Village Court, Jefferson County, was served with a Formal Written Complaint dated October 17, 1995, alleging that he presided in court while under the influence of alcohol. Respondent filed an answer dated December 20, 1995.

By order dated January 9, 1996, the Commission designated Edward S. Spector, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 12, 1996, and the referee filed his report with the Commission on August 6, 1996.

By motion dated August 16, 1996, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion on September 5, 1996. Oral argument was waived.

On September 12, 1996, the Commission considered the record of the proceeding and made the following findings of fact.

Preliminary findings:

1. Respondent has been a justice of the Clayton Village Court since April 1991 and of the Clayton Town Court since October 1994.

2. In 1994, it was respondent's practice to have two or three "scotch manhattans" before dinner every evening. Each drink contained about three ounces of alcohol. He also had an occasional glass of brandy during the evening. He would sometimes agree to conduct unscheduled, off-hours arraignments in court, even though he had consumed alcohol within the hour.

3. Respondent was aware that it is inappropriate for a judge to preside in court while under the influence of alcohol or with the odor of alcohol on the judge's breath.

4. In the week prior to the hearing in this proceeding, respondent consulted a physician about his alcohol consumption and agreed to a program in which he would not drink when he might be called upon to preside in court. "It means that because I'm on duty 24 hours a day, seven days a week, 365 days a year, that I will completely abstain from the use of alcoholic beverages while I am in the County of Jefferson," respondent testified.

As to Charge I of the Formal Written Complaint:

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

As to Charge II of the Formal Written Complaint:

6. On August 6, 1994, respondent arraigned Timothy L. Odett on charges of Burglary, Second Degree, and Criminal Mischief, Fourth Degree.

7. Also on August 6, 1994, respondent arraigned Timothy A. Underwood, Sr., on a charge of Criminal Trespass, Second Degree.

8. Respondent presided over the off-hours arraignments while he was under the influence of alcohol.

As to Charge III of the Formal Written Complaint:

9. On November 17, 1994, respondent arraigned Jeffrey David on a charge of Criminal Contempt, Second Degree. Respondent presided over the off-hours arraignment while he was under the influence of alcohol.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a), 100.3(a)(2) [now 100.3(B)(2)], 100.3(a)(3) [now 100.3(B)(3)] and 100.3(a)(4) [now 100.3(B)(6)], and Canons 1, 2A, 3A(2), 3A(3) and 3A(4) of the Code of Judicial Conduct. Charges II and III of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charge I is dismissed.

A judge is required to make significant decisions at arraignment concerning bail and to advise defendants of critical rights. Litigants and the public can have little faith in the decisions and judgment of a judge who presides while under the influence of alcohol. (*See, Matter of Aldrich v State Commission on Judicial Conduct*, 58 NY2d 279).

While serious, respondent's conduct does not warrant removal. (*Compare, Matter of Aldrich, supra* [judge was intoxicated on one occasion and used vulgar, racial and sexist language and threateningly displayed a knife]; *Matter of Wangler*, 1985 Ann Report of NY Commn on Jud Conduct, at 241 [judge was intoxicated and belligerent in court and at a meeting with court auditors and failed to promptly deposit and remit court funds]).

Respondent has admitted his misconduct and has promised to abstain from the use of alcohol in the future. In view of these circumstances, 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. (*See, Matter of Bradigan*, 1996 Ann Report of NY Commn on Jud Conduct, at 71, 73). 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, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present.

Mr. Pope was not a member of the Commission when the vote was taken in this matter.

Dated: February 4, 1997

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

ROBERT N. GOING,

a Judge of the Family Court, Montgomery County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Honorable Robert N. Going, *pro se*

The respondent, Robert N. Going, a judge of the Family Court, Montgomery County, was served with a Formal Written Complaint dated February 3, 1997, alleging improper demeanor. Respondent filed an answer dated February 24, 1997.

On May 12, 1997, 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), 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 May 22, 1997, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Montgomery County Family Court since January 1, 1995.

2. On May 7, 1996, respondent presided over a visitation proceeding brought by Elmer H. Respondent summarily dismissed the petition on the basis that Elmer had failed to submit to a psychological evaluation. Respondent was under the mistaken impression that he had previously ordered a psychological evaluation of Elmer.

3. Elmer asked for a lawyer. Respondent replied that he was dismissing the petition until Elmer was evaluated "because it appears to me...that you are more than a little nuts."

4. When Elmer objected to the remark, respondent said, "I understand what I have heard with my own ears and it appears to me that you are nuts."

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(B)(3), 100.3(B)(4) and 100.3(B)(6), and Canons 1, 2A, 3A(3) and 3A(4) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By his disparagement of a litigant from the bench, respondent conveyed the appearance of bias and violated his obligation to be patient, dignified and courteous to all those who come before him. Breaches of judicial temperament "impair[ ] the public's image of the dignity and impartiality of courts, which is essential to their fulfilling the

court's role in society." (*Matter of Mertens*, 56 AD2d 456, 470 [1st Dept]).

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

Mr. Berger, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope and Judge Salisbury concur.

Ms. Crotty and Judge Thompson were not present.

Dated: July 18, 1997

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

CHARLES J. HANNIGAN,

a Surrogate and Judge of the County Court,
Niagara County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Stephen P. Shierling for Respondent

The respondent, Charles J. Hannigan, a judge of the County Court and the Surrogate's Court, Niagara County, was served with a Formal Written Complaint dated May 22, 1997, alleging that he made intemperate remarks in two proceedings. Respondent filed an answer dated July 25, 1997.

By motion dated August 4, 1997, and supplemental affidavit dated August 28, 1997, respondent moved for summary determination and dismissal of the Formal Written Complaint. By cross motion dated September 2, 1997, the administrator of the Commission moved for summary determination, a finding that Charge I had been established and dismissal of Charge II. Respondent replied by memorandum dated September 10, 1997. By determination and order dated September 29, 1997, the Commission denied respondent's motion, granted the administrator's motion and determined that Charge I be sustained and that Charge II be dismissed.

Both sides submitted memoranda as to sanction. On October 23, 1997, 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 County Court and Surrogate's Court of Niagara County during the time herein noted.

2. On February 23, 1994, respondent presided at pre-trial plea discussions in People v Tara Mercado, in which the defendant was charged with Assault, First Degree. She was accused of stabbing another woman in the back with a knife.

3. The prosecutor offered a reduction of the charge to Attempted Assault, Second Degree, in exchange for a plea of guilty.

4. Respondent questioned the 19-year-old defendant concerning her residence, education and employment. When Ms. Mercado said that she wasn't working or in school because she had injured her back, respondent replied, "So now you're a full-time what? Nothing, you're a full-time nothing, is that it?"

5. Respondent then questioned Ms. Mercado concerning the circumstances of the stabbing.

During the ensuing colloquy, he made the following remarks:

> THE COURT: Usually they die when the lung collapses. Why don't you go to trial and tell the jury about how you were defending your purity and how this woman was beating up on you, that this was self-defense, why don't you do that? Am I supposed to participate, am I supposed to--oh, you want to plead guilty, oh, what can I do to help you, no. I mean, you elected to make your life into a garbage pit, right?
>
> THE DEFENDANT: No.
>
> THE COURT: Well, I think you're messing it up pretty good so far. You got yourself indicted, you got yourself a baby, and you dropped out, you got kicked out or dropped out of high school. You have no education, you have no work, and you got a bad back. Now, what else can we do for you in this land of opportunity?
>
> THE DEFENDANT: Nothing.
>
> THE COURT: We can give you a jury. You can tell them your tail [sic] of woe. I think you're better off telling them because I don't believe a thing you tell me. You stab somebody three times in the back because they're beating up on you, are you sick?
>
> THE DEFENDANT: I wasn't really defending myself.
>
> * * *
>
> THE COURT: How everything happened, you stabbed her three times in the back, you did it because you're a mean-spirited person.
>
> THE DEFENDANT: No, I'm not.
>
> * * *
>
> THE COURT: Then she stands here and tells me she's defending herself and I really can't--I can't take this stuff anymore. I guess--I guess I'm getting too old or too stupid, maybe I'm not stupid enough, I don't know, go ahead.
>
> MR. GRAFF [the prosecutor]: That's the main reason, Judge, her age, lack of criminal history. Another reason being that the witnesses to the incident are persons that the Court's--
>
> THE COURT: They're trash.
>
> * * *
>
> THE COURT: I don't know. Do we encourage this by saying, oh, we'll give you an E felony? What if we just said win or lose, what the hell do we care anymore, just go to trial. You got a poppycock story you want to tell, go tell it. You want to make your life into a garbage pit, you want to be trash, bring your trash into the courtroom and tell the jury about it....
>
> THE COURT: We give them apartments, we give them tutors, we give them this, we give them that, now we give them pleas. They go out and try to kill people and we call it E felony. What else are we supposed to give you? Pat on the hand? You say you're sorry, it's okay, it doesn't really matter. I mean, you only punctured her lung. It isn't as though you cut her heart out. Nothing really serious. I'll bet you went down to the hospital and said how much did this cost? Gees, I'm sorry I did that, at least let me pay the hospital bills, right? You did that, didn't you? Of course you did. I mean, this is insane. It's getting to be insane. I sit here and listen to this stuff and it's insane. And then she's going to walk in and say put me on probation, Judge, because I don't have any previous felony conviction, and I got a child I got to raise.
>
> MR. CAROSELLA [defense counsel]: There's no--no child, Judge, and she doesn't expect probation as a sentence.
>
> THE COURT: The hell she doesn't.
>
> MR. CAROSELLA: We discussed that, Judge, beforehand.
>
> THE COURT: What's she expect to do, go to state prison down at Bedford Hills, the

real tough one? You think you're tough? They'll eat you up, they'll have you for breakfast.

THE DEFENDANT: I'm not tough.

THE COURT: Well, you got a knife, you stabbed her three times, you damn near killed her, you're tough. God, that's tough. You weren't born trash. How come you turned out that way?

THE DEFENDANT: I'm not trying to be.

* * *

THE COURT: I don't want to do business with you. You're too far gone. There's nothing we can do for you. You're not bright enough. You quit too early, you stopped thinking too early, you let them pour glue on your brain too early.

THE DEFENDANT: I was going back.

THE COURT: Sure, we're all going back, tomorrow, as soon as I get around to it, as soon as I get these things done, I'm going to go back. Right now I'm too busy but I'm going to get back. I actually think that by even sitting down and talking to you that I really condone what you're doing and I don't. I think it's terribly wasteful. You're wasting your life, you're wasting everybody you come in contact with, so why don't you just get your constitutional rights in order, line them up like ducks and use them all, same way you use your constitutional right to leave school, constitutional right to have the community support you, to relax, to lay back, constitutional right to have babies, constitutional right to be stupid, use the rest of them. Hell, you haven't even started using them yet. Okay? Good. Hell, you'll probably get off. Go to trial, you'll probably get acquitted. The garbage they parade in here to talk about you, nobody would believe them anyway. You can probably save your defense, you may not even need it. Your defense of self-defense, you may not even need it. You may not even have to tell the jury this poppycock story that you were telling me. Because the trash you hang around with will probably be unbelievable. By the time they get through testifying, the jury will probably think this girl fell on the knife three times. Okay? So get yourself a trial. Go to trial, get your constitutional rights.

6. Respondent rejected the plea offer and presided over Ms. Mercado's jury trial on July 27, 1994.

As to Charge II of the Formal Written Complaint:

7. 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 then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(3) [now 100.3(B)(3), and Canons 1, 2A and 3A(3) 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. Charge II is dismissed.

Respondent repeatedly referred to a 19-year-old, first-time defendant who had not yet been convicted of any crime, and her witnesses, as "garbage" and "trash." Respondent sarcastically suggested that she "tell the jury about how you were defending your purity...." Even though she told respondent that she was not claiming self defense, respondent continued to refer to that as her defense, called it a "poppycock story," and stated, "I don't believe a thing you tell me." He declared the defendant "not bright enough" and said she had "let them pour glue on your brain too early." He repeatedly disparaged the recipients of public assistance and sarcastically referred to the defendant's "constitutional right to leave school, constitutional right to have the community support you, to relax, to lay back, constitutional right to have babies, constitutional right to be stupid...."

By this intemperate diatribe, respondent abandoned his obligation to be patient, dignified and courteous and conveyed the appearance of bias. (*See*, Rules Governing Judicial Conduct, 22 NYCRR 100.3[B][3]).

It is wrong for a judge to engage in name-calling and dehumanizing remarks, particularly to a litigant. (*See, Matter of Sardino v State Commission on Judicial Conduct*, 58 NY2d 286, 290; *Matter of Trost*, 1980 Ann Report of NY Commn on Jud Conduct, at 153). Even a single instance of intemperate language may be the basis for a finding of misconduct. (*See, Matter of Mahon*, 1997 Ann Report of NY Commn on Jud Conduct, at 104; *Matter of Hanophy*, NYLJ, Apr. 14, 1997, p. 6, col. 1 [NY Commn on Jud Conduct, Apr. 2, 1997]; *Matter of Going*, unreported [NY Commn on Jud Conduct, July 18, 1997]). In addition, a litigant who is the subject of such invective before adjudication of the case may reasonably perceive that the judge is biased.

Because respondent has enjoyed a long and heretofore unblemished tenure on the bench and because this misconduct involved only a single day in that career (*see, Matter of Edwards v State Commission on Judicial Conduct*, 67 NY2d 153, 155; *Matter of Kelso v State Commission on Judicial Conduct*, 61 NY2d 82, 87), we are convinced that a public warning that it not be repeated is sufficient.

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

Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Mr. Berger, Ms. Brown and Mr. Coffey dissent as to sanction only and vote that respondent be censured.

Ms. Crotty was not present.

Dated: December 17, 1997

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

ROBERT J. HANOPHY,

a Judge of the Court of Claims and Acting Justice of the
Supreme Court, 11th Judicial District, Queens County.

APPEARANCES:

Gerald Stern (Alan W. Friedberg) for the Commission
Scheyer & Jellenik (By Stephen R. Jellenik) for Respondent

The respondent, Robert J. Hanophy, a judge of the Court of Claims and acting justice of the Supreme Court, 11th Judicial District, was served with a Formal Written Complaint dated June 26, 1996, alleging that he made undignified, discourteous and disparaging remarks during the sentencing of a criminal defendant. Respondent filed an answer dated October 1, 1996.

On January 17, 1997, 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 30, 1997, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the unified court system during the time herein noted.

2. On March 7, 1996, respondent sentenced Caroline Beale, a citizen of Great Britain who had pleaded guilty to Manslaughter, Second Degree, in connection with the death of her infant child.

3. During the sentencing, respondent read a statement in which he said:

> It is my understanding that Ms. Beale's family has frequently criticized our justice system and the prosecution in this case for being – and I quote – "barbaric and uncivilized in our treatment of the defendant, and our laws which allow the prosecution in the first place."
>
> As to their criticism of our laws, I will say this: With our laws, that mandate the prosecution of people who kill their children, protecting the children rather than excusing the killer, is our primary focus in this country.
>
> I can't fathom characterizing such a goal as either barbaric or uncivilized. Indeed, I believe that any law that grants a blanket exemption from prosecution or punishment to those people who kill their children, when their children are under the age of one, is a law which is primitive and uncivilized.

In other words, granting parents a license to kill their infants harkens to truly uncivilized times. I am proud that our law considers these cases on an individual basis, and both condemns the killing of children, yet attempts to fashion a remedy that meets the ends of justice, as I believe it did in this case.

Baby Doe, once born, became a citizen of the United States of America. Entitled to all the protections that go with citizenship, including life, liberty, and the pursuit of happiness. And I will say to our friends in Britain, God bless America.

4. Respondent also engaged in the following colloquy in open court:

THE COURT: How do you feel about our system of justice?

THE DEFENDANT: It's been fair to me.

THE COURT: "Been fair to me." I think we leaned over backwards. I am going to give you the conditions of probation. I am going to sentence you to your time served, plus five years probation.

That probation is going to be served in Great Britain. That great country that has convicted a great many people on the perjured testimony of their police, allowed them to spend 15 or 17 years in prison. Did everything to see that they remained in prison, even though they knew, or should have known they didn't belong there.

Anyway, I won't let that interfere. You are going to be permitted to go to England. You are to report to the New York City Department of Probation by questionnaire to be received by the Department of Probation the second week of each month. * * *

Further, I am not exonerating the bail. Those two houses that your folks--Ralph Kramden, the guy with the big mouth--has put up for you, they will be held as bail until you successfully complete your probation.

So, Caroline Beale, for the crime of manslaughter in the second degree, you are sentenced to a period of time served, five years probation, with the conditions of the probation I just gave you.

I don't mean to jump on you, Ms. Beale. Okay. I don't mean anything I said to you. Just got under my skin what your mother and father were saying here. And I think they owe an apology to Richard Brown, the DA. * * *

THE DEFENDANT: My mom and dad said to say sorry to you.

THE COURT: They said "to say sorry to you." Well, they don't need to say sorry to me. I guess Dick Brown can talk for himself, the Queens District Attorney, that they owe him an apology. They owe his assistants an apology. They owe the Probation Department the thanks for moving this thing along as quickly.

Normally, on a case like this, it's 19 days to get a probation report. Yours is done in three days. Your father and your mother owe an apology to 38,000 people in blue who investigated.

To say that they acted in the way they did in the papers is inexcusable. Look it, I wish you the best of luck, I really do. ***

Oh, there is another big deal here, $155 surcharge.

MR. DOWD [defense counsel]: Can we have time to pay it, judge?

THE COURT: Pay in pence.

5. Respondent knew that the court proceedings were being videotaped by the British Broadcasting Corporation and other foreign and domestic news media. The sentencing was broadcast on television in Great Britain and, at least in part, on U.S. television. When he made the comments, respondent believed that the

proceedings "were being publicized all over the world," and he knew that a representative of the British government was in the courtroom.

6. Because Ms. Beale's family had criticized her prosecution, respondent called British law "primitive and uncivilized" and implied that it "grants a blanket exemption from prosecution or punishment to those people who kill their children, when their children are under the age of one...." Respondent knew that this statement was not accurate. His only source of knowledge on the subject was defense counsel, who had told respondent that, under British law, such crimes were prosecuted as Manslaughter and that no British judge had sentenced such a defendant to prison in 50 years.

7. Respondent's tone was angry, gruff and vituperative.

8. His remarks about certain defendants who had been incarcerated in Great Britain for many years based on perjured testimony, as depicted in the film "In the Name of the Father", had no relevance to the crime for which Ms. Beale had been convicted.

9. On April 3, 1996, staff counsel wrote to respondent in connection with the investigation of this matter. In a response dated April 18, 1996, respondent acknowledged that his statements during the *Beale* sentencing had been inappropriate and imprudent.

10. In subsequent statements to the Commission, respondent said: a) that he did not believe that his statements were inappropriate and imprudent; b) that he did not regret what he had said; c) that, at the time that he signed his letter of April 18, 1996, he did not think that the remarks were inappropriate and imprudent; and, d) that he had said that they were only because he believed at the time, based on advice that he had received from other judges, that such an acknowledgment would result in a confidential letter of dismissal and caution from the Commission.

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

In sentencing, a judge has great latitude to consider and comment upon the defendant's conduct and character. However, respondent's remarks in Beale concerning the British legal system and the defendant's parents were discourteous, inappropriate and exaggerated.

A judge is required to be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...." (Rules Governing Judicial Conduct, 22 NYCRR 100.3[B][3]). A judge must "be the exemplar of dignity and impartiality...suppress his personal predilections, control his temper and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom." (Rules Concerning Court Decorum of the Appellate Division, Second Department, 22 NYCRR 700.5[e]). In disposing of cases, a judge's remarks can constitute misconduct if they are intemperate, undignified or discourteous. (*See, Matter of Richter*, 42 NY2d [aa], at [dd] [Ct on the Judiciary] [judge angrily challenged a defendant at sentencing to a physical confrontation]; *Matter of Evens*, 1986 Ann Report of NY Commn on Jud Conduct, at 103, 106-07 [judge mentioned jail time and graphically depicted with racial overtones the brutal treatment that a defendant might receive there if he did not pay a fine that the judge had imposed for a minor violation]; *Matter of Bayger*, 1984 Ann Report of NY Commn on Jud Conduct, at 62, 63 [in announcing his disqualification from a case in which the judge had had a personal dispute with the defendant, the judge dispatched the press to the courtroom, then disparaged the defendant]).

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* The Formal Written Complaint charges a violation of a non-existent Section 100.3(A)(3). This is apparently a typographical error. The complaint is hereby amended to reflect the appropriate section.

Out of pique over critical remarks that Ms. Beale's parents had made to the news media, respondent retaliated with angry and vituperative comments, referring to the family's homeland as "primitive and uncivilized" and calling the defendant's father "Ralph Kramden--the guy with the big mouth...." In open court, respondent engaged in hyperbole about the British legal system in ways which he knew misrepresented the law there, even though he was aware that his remarks would be broadcast abroad.

His gratuitous and irrelevant reference to defendants from Northern Ireland who had been sentenced in British courts was mean-spirited and political in nature. By these comments and his insistence that the Beales apologize to the prosecutor and the police, respondent failed to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (Rules Governing Judicial Conduct, 22 NYCRR 100.2[A]).

Compounding this misconduct was respondent's behavior during staff's investigation of this matter. In deciding appropriate sanction, the Commission may consider a judge's failure to recognize the impropriety of the conduct alleged. (*See, Matter of Sims v State Commission on Judicial Conduct*, 61 NY2d 349, at 356, 357; *Matter of Shilling v State Commission on Judicial Conduct*, 51 NY2d 397, at 404).

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

Mr. Berger, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Judge Salisbury and Judge Thompson concur.

Ms. Crotty, Mr. Pope and Mr. Sample were not present.

Dated: April 2, 1997

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

ESTHER F. HOLMES,

a Justice of the Bangor Town Court,
Franklin County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Alexander Lesyk and Donald J. Holland for Respondent

The respondent, Esther F. Holmes, a justice of the Bangor Town Court, Franklin County, was served with a Formal Written Complaint dated August 8, 1996, alleging that she issued a warrant of eviction without any notice to the tenant and without conducting any court proceeding. Respondent filed an answer dated August 20, 1996.

On March 4, 1997, 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 admonished and waiving further submissions and oral argument.

On March 27, 1997, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Bangor Town Court since 1978. She had been the court clerk for 20 years prior to becoming a judge.

2. On October 25, 1995, respondent issued a Warrant of Eviction, directing Denise Judware to vacate premises owned by Sally A. Roberts within two days. No Notice of Petition or Petition had been filed in respondent's court, and respondent had given no notice and no opportunity to be heard to Ms. Judware, as required by RPAPL 731 and 745.

3. Respondent issued the eviction warrant based solely upon the ex parte request of the landlord.

4. Respondent acknowledges that, with her experience as a judge and court clerk, she knew or should have known that to issue a Warrant of Eviction without affording due process to the tenant was improper.

5. After being served with the Warrant of Eviction, Ms. Judware contacted a Legal Aid attorney, who persuaded the sheriff not to proceed with the eviction.

6. Ms. Judware's attorney later wrote to respondent, requesting an opportunity to review respondent's file concerning the eviction. Respondent failed to respond to the inquiry and did not keep any record concerning the Warrant of Eviction or her action against Ms. Judware, as required by UJCA 107 and the Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1) [now 100.3(B)(1)] and 100.3(a)(4) [now 100.3(B)(6)], and Canons 1, 2A, 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.

After hearing only one party, respondent ordered a tenant evicted, even though no court proceeding had been commenced and the tenant had not been given notice or an opportunity to be heard. By depriving the tenant of a fundamental right in such a one-sided and summary fashion, respondent violated the law and compromised her impartiality and integrity. (*See, Matter of Kristoffersen*, 1991 Ann Report of NY Comm on Jud Conduct, at 66).

In mitigation, we have considered that this was an isolated incidence in a long career on the bench and that respondent has been cooperative and contrite in this proceeding. (*See, Matter of Edwards v State Commission on Judicial Conduct*, 67 NY2d 153, 155; *Matter of Lindell-Cloud*, 1996 Ann Report of NY Commn on Jud Conduct, at 91, 92).

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

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

Judge Luciano, Judge Marshall and Mr. Sample were not present.

Dated: May 29, 1997

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

GEORGE B. JENSEN,

a Justice of the Jerusalem Town
Court, Yates County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Donald A. Schneider (Joseph P. Griffiths, Of Counsel) for Respondent

The respondent, George B. Jensen, a justice of the Jerusalem Town Court, Yates County, was served with a Formal Written Complaint dated August 7, 1996, alleging improper demeanor and that he conditioned his disqualification in a case upon the withdrawal of complaints against him. Respondent filed an answer dated August 27, 1996.

On January 28, 1997, 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 pleadings and the agreed upon facts. The Commission approved the agreed statement by letter dated February 3, 1997.

Both parties filed memoranda as to sanction. On March 27, 1997, the Commission heard oral argument, at which respondent appeared by counsel. Although respondent did not appear personally, he was permitted by consent to submit a letter dated March 22, 1997, in lieu of a statement to the Commission. Thereafter, the Commission considered the record of the proceeding and made the following findings of fact.

As to Paragraph 4 of Charge I of the Formal Written Complaint:

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

As to Paragraph 5 of Charge I of the Formal Written Complaint:

2. Respondent has been a justice of the Jerusalem Town Court since 1976.

3. On February 8, 1995, Ronald P. Hart, an attorney representing the defendant in *People v Andrew McNeil* then pending before respondent, moved to have respondent recuse himself from further proceedings in the case.

4. On February 27, 1995, the motion was argued before respondent. During the argument, respondent learned for the first time that complaints had been filed against him with the Commission concerning his conduct at an earlier proceeding in the case. The complaints had been filed by Mr. McNeil and David M. Sweet, Mr. McNeil's college basketball coach, who had been present at the earlier proceeding.

5. Respondent stated that he would recuse himself only if Mr. McNeil and Mr. Sweet would agree to withdraw their complaints to the Commission. Respondent repeated this more than ten times during the course of the argument.

6. Within a month after the argument, respondent recused himself, even though no further proceeding in the case had taken place and even though he had not received a response concerning the terms of his proposal.

As to Charge II of the Formal Written Complaint:

7. Mr. McNeil and two other defendants had been arrested in connection with a disturbance at Keuka College. Respondent presided over preliminary proceedings on May 17, 1994, involving all three defendants, who are black.

8. Several hours after the proceedings had been concluded and after the defendants and their attorneys had left the court, someone asked respondent how he was doing. He responded, "Oh, it's been a rough day—all those blacks in here." Members of the public were present in the courtroom at the time.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(1) [now 100.3(B)(1), and Canons 1, 2A and 3A(1) of the Code of Judicial Conduct. Paragraph 5 of Charge I and Charge II are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Paragraph 4 of Charge I is dismissed.

Respondent's public remark in court conveyed the impression that he had had a stressful day merely because of the race of the defendants who had appeared earlier. Remarks with racial overtones cast doubt on a judge's ability to be impartial in all matters that come before the court. (*Matter of Schiff v State Commission on Judicial Conduct*, 83 NY2d 689, 693; *see also, Matter of Agresta v State Commission on Judicial Conduct*, 64 NY2d 327; *Matter of Ain*, 1993 Ann Report of NY Commn on Jud Conduct, at 51).

Respondent's statement is not as serious as that of Judge Schiff, who made a deliberate and calculated remark intended to offend a particular individual (83 NY2d 689, 692-93) or as that of Judge Agresta, who used an offensive and derogatory word referring to race during a court proceeding with defendants of that race before him (64 NY2d 327, 329).

More troublesome are respondent's relentless efforts in a later proceeding to coerce two grievants to abandon their complaints to the Commission in exchange for a favorable decision on a motion for his recusal. More than ten times, respondent reiterated that he would disqualify himself if the complaints were withdrawn. If they were not, he would continue to hear the case. He made clear that the merits of the defense's claim that he could not be impartial were not a consideration. "The powers and prestige of judicial office are not meant as barter for the advancement of a judge's personal interests." (*Matter of Sullivan*, 1984 Ann Report of NY Commn on Jud Conduct, at 152, 156; *see, Matter of Phillips*, 1990 Ann Report of NY Commn on Jud Conduct, at 145, 149). It is wrong for a judge to attempt to dissuade a grievant from pursuing the legal right to complain about the judge's conduct. (*Matter of Mahar*, 1983 Ann Report of NY Commn on Jud Conduct, at 139, 141). Such behavior constitutes an attempt to obstruct the Commission in its discharge of its lawful mandate. (*See, Matter of Myers v State Commission on Judicial Conduct*, 67 NY2d 550, 554; *Matter of Menard*, 1996 Ann Report of NY Commn on Jud Conduct, at 93).

In *Matter of Sullivan (supra),* the Commission censured a judge who bargained with a litigant, promising to withdraw a judgment that he had improperly entered in exchange for her withdrawal of a complaint against him. In *Matter of Phillips (supra),* the sanction was also censure for a judge who had agreed to grant a dismissal motion if an attorney withdrew from her motion papers criticism of the court. The

censures in both cases were also based on additional misconduct.

In this case, we have considered as mitigating that respondent has conceded his wrongdoing and that he has a long and heretofore unblemished record on the bench. (*See, Matter of Edwards v State Commission on Judicial Conduct*, 67 NY2d 153, 155).

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

Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Mr. Pope and Judge Thompson concur.

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

Judge Luciano, Judge Marshall and Mr. Sample were not present.

Dated: May 29, 1997

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

I respectfully dissent as to sanction only and vote that respondent be removed from office.

Respondent persistently conditioned his decision on a recusal motion upon the withdrawal of complaints to the Commission against him. In so doing, for his own personal ends, he abandoned his obligation to rule on the merits, attempted to coerce the complainants from pursuing their legal rights and interfered with the Commission's discharge of its lawful mandate. Such repeated attempts by a judge to undermine the proper administration of justice mandates, in my view, removal from office. (*See, Matter of Myers v State Commission on Judicial Conduct*, 67 NY2d 550, 554; *Matter of Fabrizio v State Commission on Judicial Conduct*, 65 NY2d 275).

Furthermore, respondent's comment attributing his "rough day" to the race of the persons appearing before him was clearly racist. In 1983, the Commission pronounced, "The law of New York is now clear that racist conduct by a member of the judiciary will not be tolerated." (*Matter of Cerbone*, 1984 Ann Report of NY Commn on Jud Conduct, at 76, 78, accepted, 61 NY2d 93). Surely, by 1995, a racist comment by a judge in his courtroom before members of the public cannot be countenanced.

The proper purpose of the sanction of a judge is, not punishment, but protection of the public from unfit incumbents. (*Matter of Vonder Heide v State Commission on Judicial Conduct*, 72 NY2d 658, 660). In the face of such serious misconduct as is demonstrated in this record, it cannot be considered as mitigating that respondent has a long tenure on the bench. (*See, Matter of Esworthy v State Commission on Judicial Conduct*, 77 NY2d 280, 283).

Respondent has shown that he is not fit to be a judge and should be removed from office.

Dated: May 29, 1997

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

MARDIS F. KELSEN,

a Justice of the Cortlandville Town Court
and McGraw Village Court, Cortland County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Pomeroy, Armstrong, Baranello & Casullo, L.L.P. (By William J. Pomeroy) for Respondent

The respondent, Mardis F. Kelsen, a justice of the Cortlandville Town Court and the McGraw Village Court, Cortland County, was served with a Formal Written Complaint dated May 10, 1996, alleging one charge of misconduct. Respondent filed an answer dated June 28, 1996.

By order dated July 18, 1996, 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 1, 1996, and the referee filed his report with the Commission on February 21, 1997.

By motion dated April 23, 1997, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion on May 12, 1997. The administrator filed a reply dated May 14, 1997. Oral argument was waived.

On May 22, 1997, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the McGraw Village Court since 1980 and of the Cortlandville Town Court since 1985.

2. Prior to December 1991, it was respondent's practice to send to defendants who had pleaded not guilty by mail to traffic offenses a form letter that "required" the posting of $100 bail. The letter also noted, "After due consideration, if you wish to withdraw your plea of not guilty and enter a plea of guilty as charged, send the court...a total of $85.00 to dispose of this matter."

3. On December 19, 1991, the Commission sent respondent a confidential letter of dismissal and caution concerning her use of the form letter. The Commission advised respondent that the practice of requiring defendants who asked for a trial to post bail or change their plea was not authorized by law and "appears to have been designed to coerce guilty pleas, which compromised your impartiality as a judge." The Commission noted that it had decided not to institute formal charges and that, in doing so, it had considered that respondent had asserted that she had ceased the practice.

4. By October 1994, respondent had re-instituted a practice of setting bail in traffic cases when defendants pleaded not guilty by mail. Respondent routinely sent a letter in which she indicated that $100 bail was "requested" and that it "must be" sent within ten days. By this letter, respondent acknowledged at the hearing, she was fixing bail in accordance with the Criminal Procedure Law and would have the authority to commit defendants to jail if they did not post it. Her use of the word "requested" in the 1994 letter, she acknowledged, did not change the fact that she was requiring that bail be posted, as she had by the letter sent prior to 1991.

5. In the 1994 letter, respondent did not indicate that defendants could pay a lesser fine if they wished to change their plea to guilty. However, she did note that they could change the plea if they had "inadvertently signed the not guilty side of the ticket and you wish to enter a plea of guilty as charged...."

6. In the 1994 letter, respondent also advised defendants of the name and address of the prosecutor in the event that "you wish to negotiate a possible amended disposition...."

7. The 1994 letter was sent only to defendants who lived outside of Cortland County and who were unknown to respondent. If they lived in Cortland County or were known to respondent, defendants were not required to post bail.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(1) [now 100.3(B)(1)], and Canons 1, 2A and 3A(1) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint, as amended at the hearing, is sustained, and respondent's misconduct is established.

By routinely setting $100 bail for every defendant who had pleaded not guilty by mail to a traffic charge, respondent failed to follow the law, which requires consideration of a number of personal factors designed to determine whether an individual is likely to return to court. (See, CPL 510.30[2][a]; Matter of Sardino v State Commission on Judicial Conduct, 58 NY2d 286, 289).

More significantly, respondent combined this unauthorized and summary method of setting bail with suggestions that defendants relinquish their demands for trial and, instead, plead guilty. In her first form letter, respondent set, in advance, a lower fine for a guilty plea than the bail required to secure a trial date. A reasonable person could only see this as an inducement to plead guilty. After being criticized by the Commission, respondent altered the form to allow defendants to forego the bail and change an "inadvertent" plea of not guilty.

Both letters give the appearance that the judge is discouraging defendants from exercising their constitutional right to trial and is attempting to coerce guilty pleas. Such conduct undermines the independence and impartiality required of a judicial officer. (See, Matter of Cavotta, 1996 Ann Report of NY Commn on Jud Conduct, at 75). That respondent re-instituted the practice after being warned that it appeared coercive and contrary to law exacerbates her wrongdoing. (See, Matter of Lenney v State Commission on Judicial Conduct, 71 NY2d 456, 458-59).

Respondent contends that, by requiring bail only of defendants from out of the county whom she did not know, she was following the dictates of CPL 510.30. She fails to appreciate that she is contravening the purpose of the law by setting a standard bail and by presuming that all county residents are good bail risks and all others are not. Furthermore, respondent apparently does not recognize that such a practice enhances the likelihood of coercion by imposing a greater burden on defendants who live farther from the court and are less likely to travel in order to contest relatively minor charges carrying the likelihood of only minor penalties.

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

Mr. Berger, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Newton, Mr. Pope and Judge Salisbury concur.

Judge Marshall dissents as to sanction only and votes that respondent be censured.

Ms. Crotty and Judge Thompson were not present.

Dated: July 17, 1997

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DONALD G. PURPLE, JR.,

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

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Honorable Donald G. Purple, Jr., *pro se*

The respondent, Donald G. Purple, Jr., a judge of the County Court and the Family Court, Steuben County, was served with a Formal Written Complaint dated

February 19, 1997, alleging three charges of misconduct. Respondent filed an answer dated March 11, 1997.

On June 23, 1997, 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), 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 July 10, 1997, 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 Steuben County Court and Family Court since January 1, 1971.

2. On April 28, 1996, respondent consumed three beers between 7:00 A.M. and 1:00 P.M. and three manhattans between 1:30 P.M. and 4:00 P.M.

3. At about 4:00 P.M., respondent drove his automobile into a tree and sustained extensive physical injuries. He was charged with Driving While Intoxicated and Reckless Driving.

4. On June 3, 1996, respondent pleaded guilty to Driving While Intoxicated in satisfaction of both charges.

As to Charge II of the Formal Written Complaint:

5. On April 15, 1996, respondent presided over 50 cases during his morning calendar. At noon, he went to the Elk's Club and consumed three glasses of beer. He was aware that his son, Greg, who is the court officer assigned to respondent's court, was also at the Elk's Club and was drinking alcoholic beverages.

6. Respondent left the Elk's Club and returned to his chambers, where he ate a sandwich. At 1:30 P.M., he presided over an ex parte request for a Temporary Order of Protection, the only matter on his afternoon calendar. He was under the influence of alcohol at the time.

7. At sometime prior to 3:00 P.M., respondent learned that his son had been removed from the courthouse by his superiors in the Steuben County Sheriff's Department because he appeared to have been intoxicated.

8. Respondent went to the sheriff's department and confronted Sheriff Jerry Dart and Sgt. Dale Scouten. Respondent demanded to know why his son had been removed from the courthouse. He was upset and angry.

9. Sheriff Dart explained that respondent's son appeared to have been intoxicated. Respondent loudly and angrily stated, "How can you do this to me? Why are you doing this to me? After all the support I've given you and your department, this is the way your deputies treat me."

10. Respondent was intoxicated. Sheriff Dart then ordered that respondent be driven home.

As to Charge III of the Formal Written Complaint:

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

Supplemental finding:

12. Respondent now acknowledges that he is an alcoholic and has been drinking daily for the past 25 years. He has sought treatment for his alcohol problems; he was treated at an inpatient alcohol recovery facility from May 8, 1996, to May 27, 1996, and continued treatment with the Steuben County Alcohol and Substance Abuse Services from June 6, 1996, to November 12, 1996. He maintains that he has not consumed alcohol since April 29, 1996.

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) and 100.2(C), and Canons 1, 2A and 2B 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.

A judge who drinks alcohol and drives violates the law and endangers public safety. (*Matter of Henderson*, 1995 Ann Report of NY Commn on Jud Conduct, at 118). Respondent's failure off the bench to abide by the laws that he is often called upon to apply in court undermines his effectiveness as a judge. (*See, Matter of Wray*, 1992 Ann Report of NY Commn on Jud Conduct, at 77, 80).

By presiding while under the influence of alcohol, he also compromised public confidence in his decisions and judgment. (*See, Matter of Aldrich v State Commission on Judicial Conduct*, 58 NY2d 279).

Moreover, in intervening with the sheriff on his son's behalf, respondent attempted to lend the prestige of his office to advance private interests. (*See*, Rules Governing Judicial Conduct, 22 NYCRR 100.2[C]; *Matter of Wright*, 1989 Ann Report of NY Commn on Jud Conduct, at 147).

Although serious, respondent's misconduct appears to have been the product of alcoholism for which he has subsequently sought treatment. Consequently, we conclude that he need not be removed from office. (*See, Matter of Quinn v State Commission on Judicial Conduct*, 54 NY2d 386, 393-94; *Matter of Bradigan*, 1996 Ann Report of NY Commn on Jud Conduct, at 71, 73). In addition, he has been a judge for more than 26 years, and his conduct has never before been called into question. (*See, Matter of Edwards v State Commission on Judicial Conduct*, 67 NY2d 153, 155).

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

Mr. Berger, Mr. Coffey, Ms. Crotty, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Mr. Goldman was not present.

Ms. Brown was not a member of the Commission when the vote was taken in this matter.

Dated: September 29, 1997

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

WILLIAM J. REDMOND,

a Justice of the Whitehall Village Court,
Washington County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
McPhillips, Fitzgerald & Meyer, L.L.P. (Joseph R. Brennan, Of Counsel) for Respondent

The respondent, William J. Redmond, a justice of the Whitehall Village Court, Washington County, was served with a Formal Written Complaint dated May 3, 1996, alleging two charges of misconduct. Respondent filed an answer dated May 22, 1996.

By order dated June 12, 1996, the Commission designated Laurie Shanks, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on September 10 and 11, 1996, and the referee filed her report with the Commission on January 13, 1997.

By motion dated September 8, 1997, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report and for a determination that respondent be censured. Respondent opposed the motion on October 2, 1997. The administrator filed a reply dated October 14, 1997. Oral argument was waived.

On October 23, 1997, the Commission considered the record of the proceeding and made the following findings of fact.

As to Paragraph 4 of Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Whitehall Village Court since April 1, 1988.

2. On January 22, 1992, respondent imposed a Conditional Discharge of one year upon Kenneth S. Frasier after his conviction on a charge of Petit Larceny. The sentence required Mr. Frasier to complete 100 hours of community service.

3. Respondent notified the Washington County Alternative Sentencing Agency of the disposition. The agency's practice is to notify the sentencing court when the community service has been completed or, if it has not been fulfilled, to advise the court that the defendant should be resentenced.

4. In the summer of 1992, respondent hired Mr. Frasier to paint a portion of his home. Mr. Frasier proposed a sum that he thought was fair for the work, and respondent paid it when the work was done. The sum was paid in cash, and Mr. Frasier gave no receipt.

5. At the time, respondent had received no notice that Mr. Frasier had completed the community service and made no attempt to ascertain whether he had. Mr. Frasier never completed the community service condition of his sentence.

As to Paragraph 5 of Charge I of the Formal Written Complaint:

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

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

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

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

8. On October 20, 1995, respondent testified during the course of the investigation of this matter by Commission staff. Respondent was asked the following questions and gave the following answers.

> Q: Did you, after Mr. Frasier finished painting the house, did you have more conversations with him about anything?
>
> A: No.... I may have met him on the street and said hello.
>
> Q: All right. Have you--Can you think of anything substantive you've talked to him about?
>
> A: No.
>
> Q: Any kind of a transaction or some sort of a service that he could get for you or anything else?
>
> A: No.
>
> * * *
>
> Q: Let me ask you: Did you contact Mr. Frasier about the affidavit?
>
> MR. BRENNAN [respondent's counsel]: Were you there?
>
> A: No.
>
> Q: Did you have--Did you say anything to him about the affidavit?
>
> A: No.

9. After his testimony, further questions were posed by staff in a letter dated December 20, 1995. Respondent replied by letter dated January 2, 1996. In that letter, he acknowledged that he had had a conversation with Mr. Frasier after being notified on September 13, 1995, of the Commission's investigation. During that conversation, respondent asked Mr. Frasier to go to an attorney's office and give an affidavit concerning the circumstances surrounding the painting of respondent's house.

As to Charge II of the Formal Written Complaint:

10. 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 then in effect, 22 NYCRR 100.1, 100.2(a) and 100.5(c)(1) [now 100.4(D)(1), and Canons 1, 2A and 5C(1) of the Code of Judicial Conduct.

Paragraphs 4 and 7 of Charge I of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Paragraphs 5 and 6 of Charge I and Charge II are dismissed.

The law permits a judge, after a hearing, to revoke a Conditional Discharge and re-sentence a defendant who has been found delinquent in complying with the conditions of the sentence. (CPL 410.70[1], [5]). Thus, until respondent had been notified that Mr. Frasier had completed his community service, the criminal proceeding against him might again have come before respondent's court.

Under these circumstances, respondent should not have hired Mr. Frasier to paint his home at a time when he knew or should have known that the one-year term of his conditional discharge had not expired. A judge is prohibited from engaging in "financial and business dealings that...may reasonably be perceived to exploit the judge's judicial position...[or] 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." (Rules Governing Judicial Conduct, 22 NYCRR 100.4[D][1][a], [c]). A

judge should not accept money or services from persons with matters pending before the court. (*See, Matter of Chananau*, 1983 Ann Report of NY Commn on Jud Conduct, at 89, 92; *Matter of Garvey*, 1982 Ann Report of NY Commn on Jud Conduct, at 103, 106).

Furthermore, it is clear that respondent attempted to mislead the Commission when he testified during the investigation and implied that he had had no role in obtaining an affidavit from Mr. Frasier, even though--as he later acknowledged--he had solicited a written statement from him. A judge is "obliged to be candid and cooperative with the Commission." (*Matter of MacAffer*, 2 Commission Determinations 347, at 351). However, in his subsequent letter to Commission staff, respondent provided correct information about his role in obtaining the affidavit from Mr. Frasier.

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

Mr. Berger, Ms. Brown, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur as to sanction.

Judge Newton and Judge Thompson dissent as to Paragraph 7 of Charge I only and vote that that allegation be dismissed.

Judge Marshall dissents as to Paragraph 6 of Charge I and votes that that allegation be sustained and dissents as to sanction and votes that respondent be censured.

Ms. Crotty was not present.

Dated: December 17, 1997

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

LAWRENCE R. RICE,

a Justice of the Maine Town Court and Acting Justice of the
Johnson City Village and Nanticoke Town Courts, Broome County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Levene, Gouldin & Thompson, L.L.P. (By David M. Gouldin) for Respondent

The respondent, Lawrence R. Rice, a justice of the Maine Town Court, Broome County, was served with a Formal Written Complaint dated March 26, 1996, alleging that he exhibited improper demeanor and that he refused to permit attorneys to participate in small claims proceedings. Respondent did not answer the Formal Written Complaint.

On August 30, 1996, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 12, 1996, 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 justice of the unified court system since 1990. He has attended all training sessions required by the Office of Court Administration.

2. On June 30, 1994, respondent arraigned Ethan Haskins on a charge of Assault, Third Degree. The district attorney's office was not represented at the arraignment but had previously informed respondent in writing that it was moving to dismiss the charge based on double-jeopardy considerations.

3. Respondent told the defendant's attorney, Scott Bowen, that his law partner and the prosecutor handling the case had acted improperly and unethically in discussing dismissal of the case in respondent's absence. Respondent said that he was denying the motion because it had been made prior to arraignment and that Mr. Bowen would have to make a motion to the court.

4. Mr. Bowen and his client left the courtroom, but Mr. Bowen returned a short time later to discuss the matter with respondent. Respondent angrily told Mr. Bowen that he had "verbal diarrhea." He demanded to know who Mr. Bowen's "boss" was and told him to leave the courtroom or be held in contempt. As Mr. Bowen, who had run for district attorney in 1987, was leaving the courtroom, respondent said to his court clerk in a voice audible to Mr. Bowen, "Can you imagine that guy as district attorney?"

As to Charge II of the Formal Written Complaint:

5. Before August 1995, respondent refused to permit attorneys to fully participate in representing clients in small claims proceedings before him. Respondent wanted the parties to participate in small claims proceedings and was concerned about attorneys exercising excessive control in the courtroom. He has since learned that participation by attorneys is appropriate and should not be denied.

6. On March 16, 1995, in the small claims trial of *Fraser v Lowell Baldwin dba Quality Homes*, respondent refused to allow the attorney for Mr. Baldwin to participate in the proceeding and threatened to hold the attorney in contempt when he respectfully asserted his right to represent his client.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a), 100.3(a)(2) [now 100.3(B)(2)], 100.3(a)(3) [now 100.3(B)(3)] and 100.3(a)(4) [now 100.3(B)(6)], and Canons 1, 2A, 3A(2), 3A(3) 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.

Respondent's heavy-handed treatment of Mr. Bowen and the attorney in the Baldwin small claims case--in both instances, prompted by misguided notions of the law--violated his duty to be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...." (Rules Governing Judicial Conduct, 22 NYCRR 100.3[B][3]; *see, Matter of Tavormina*, 1990 Ann Report of NY Commn on Jud Conduct, at 164; *Matter of Taylor*, 1983 Ann Report of NY Commn on Jud Conduct, at 197; *Matter of Kaplan*, 1980 Ann Report of NY Commn on Jud Conduct, at 179). It is not inappropriate for counsel to negotiate a disposition outside the presence of the judge, and parties have a constitutional right to representation in a small claims proceeding, as well as all other court matters.

> The judge should be the exemplar of dignity and impartiality. He shall suppress his personal predilections, control his temper and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he shall do so in a firm and polite manner, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues. *Matter of Sena*, 1981 Ann Report of NY Commn on Jud Conduct, at 117, 119, quoting the Rules of the Appellate Division, First Department, 22 NYCRR 604.1(e)(5).

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

Mr. Berger, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present.

Dated: January 31, 1997

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DONALD R. ROBERTS,

a Justice of the Malone
Village Court, Franklin County.

APPEARANCES:
Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Hinman, Straub, Pigors & Manning, P.C. (By Peter L. Rupert) for Respondent

The respondent, Donald R. Roberts, a justice of the Malone Village Court, Franklin County, was served with a Formal Written Complaint dated February 23, 1996, alleging bias and improper demeanor in connection with a number of cases. Respondent filed an answer dated March 26, 1996.

By order dated April 4, 1996, the Commission designated Paul A. Feigenbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 11 and 12, 1996, and the referee filed his report with the Commission on October 25, 1996.

By motion dated November 20, 1996, 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 December 10, 1996. The administrator filed a reply dated December 13, 1996.

On March 27, 1997, 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 Malone Village Court since August 1, 1993. He is not a lawyer but has attended all required training offered by the Office of Court Administration. He was a state trooper from 1966 to 1991.

2. On August 1, 1994, David A. Metz was charged with Assault, Third Degree, in the Village of Malone on the complaint of his wife, Karyn E., who alleged that he had knocked her to the floor, kicked her in the stomach, choked her and again pushed her to the floor as she tried to rise. Ms. Metz claimed that she had been treated at a hospital for bruises.

3. Respondent arraigned Mr. Metz, released him on his own recognizance and verbally ordered him to stay away from the home.

4. A few days later, Ms. Metz came to court and asked respondent to issue an Order of Protection in her favor against her husband. Respondent refused.

5. While the case was pending, respondent received a letter from the District Attorney's Office concerning orders of protection. In connection with the letter, respondent, in a serious tone, said to his court clerk, "...[E]very woman needs a good pounding every now and then."

6. Later in August 1994, respondent said several times to the clerk, Sue Ellen Tupia, that he felt that orders of protection "...were not worth anything because they are just a piece of paper," that they are "a foolish and unnecessary thing," and that they are "useless" and of "no value."

7. Respondent also once said to his fellow judge, Andrew Simays, "I think these orders of protection are a waste of time."

8. On September 11, 1994, Ms. Metz again complained to the police about a domestic dispute involving her husband. She asked that David Metz be removed from their home, but Clyde LaChance, the police officer who responded, said that he could not order Mr. Metz to leave in the absence of an Order of Protection from the court. Ms. Metz then decided to take her children and leave the home.

As to Charge II of the Formal Written Complaint:

9. On March 8, 1994, Kay Glasgow came to respondent's court to pay a fine for her husband, Silas, who had been convicted by respondent of dog-control violations. Ms. Glasgow complained to a court clerk about the amount of the fine and asserted that she should not have to pay it.

10. Respondent emerged from his chambers and loudly and rudely began to criticize Ms. Glasgow in the presence of two court clerks and members of the public. Respondent attacked Ms. Glasgow's management of a bar and accused her of getting "high" from fights that took place there and accused her of letting the dog free in order to spite her husband. When Ms. Glasgow opened her purse to pay the fine from bar receipts that she was planning to deposit in the bank, respondent confronted her and accused her of generating crime by carrying so much cash. His remarks reduced Ms. Glasgow to tears.

As to Charge III of the Formal Written Complaint:

11. In March 1994, a civil claim was filed in respondent's court by a dentist named Gallagher, who was suing Michael Dias for an unpaid bill for services to his wife.

12. Dr. Gallagher had been respondent's dentist for six years, and respondent had been treated about a year before the proceeding. Respondent's wife and five children also were patients of Dr. Gallagher.

13. Mr. Dias appeared before respondent in chambers on his own behalf. Dr. Gallagher was not present but was represented by an attorney.

14. Mr. Dias asked why the dentist was not present. Respondent, who believed that Mr. Dias was from New York City, loudly told Mr. Dias that he was "not from around here and that's not the way we do things around here."

15. Respondent said that he wanted the claim settled.

16. Mr. Dias asked why he was being sued since the services had been rendered to his wife. Respondent replied that Mr. Dias was the "breadwinner" in the family, although he had no knowledge of the family's finances.

17. Mr. Dias insisted that Dr. Gallagher be present and said that he wanted to subpoena him. If he did, respondent said inaccurately, Mr. Dias would have to pay for the dentist's lost earnings for his time in court and would have to pay him a fee as an expert witness.

18. Respondent never told Mr. Dias that Dr. Gallagher was his family dentist, never offered to disqualify himself and never disqualified himself from the case. It was later discontinued.

19. Respondent did not testify candidly at the hearing concerning Dias. Concerning his erroneous statements that Mr. Dias must pay for Dr. Gallagher's time and lost earnings, respondent claimed that this was his first civil case as a judge and that he didn't know proper procedure. When confronted on cross-examination with records of his court, he admitted that he had heard more than a dozen prior civil cases. Respondent also testified at the hearing that, when the case was before him, he had not been conscious that Dr. Gallagher was his own dentist, even though he had been treated by Dr. Gallagher for six years, including a visit about a year prior to the proceeding, and even though

all of respondent's family members were also patients of Dr. Gallagher.

As to Charge IV of the Formal Written Complaint:

20. On April 11, 1994, after waiving her right to counsel, Kimberley McAllister pleaded guilty before respondent to Theft Of Services on a complaint that she had failed to pay a cab fare of $1.50. Respondent sentenced her to a conditional discharge, restitution (which she had already paid) and a $90 surcharge. Ms. McAllister said that she was a social services recipient and agreed to pay the surcharge in bi-weekly installments of $20 each.

21. On April 25, 1994, when the first installment was due, Ms. McAllister came to court but had only $5, which she paid to the court clerk, promising to make the remainder of the payment the following week.

22. The following day, respondent discovered that Ms. McAllister had paid only $5. He became angry and signed an arrest warrant for "failure to pay fine." Ms. McAllister was notified of the warrant by police and turned herself in half-an-hour later.

23. Ms. McAllister was brought to respondent's chambers. He loudly and angrily told her that he had about 300 people who owed fines to the court and that he was going to make "an example" of her. Ms. McAllister was intimidated and began to cry.

24. Respondent summarily sentenced Ms. McAllister to 89 days in jail pending payment of the fine. He did not advise her that she had the right to counsel or to have an attorney appointed by the court if she was unable to afford one, as required by CPL 170.10(4)(a). He knew that she was not employed but did not inquire into her financial status, did not advise her that she had the right to apply to be resentenced if she could not pay and did not conduct a hearing before resentencing Ms. McAllister, as required by CPL 420.10(5).

25. Respondent imposed the 89-day sentence so that he would not have to obtain a presentence report from the probation department.

As to Charge V of the Formal Written Complaint:

26. 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 then in effect, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1) [now 100.3(B)(1)], 100.3(a)(3) [now 100.3(B)(3)] and 100.3(c)(1) [now 100.3(E)(1)], and Canons 1, 2A, 3A(1), 3A(3) and 3C(1)(a) of the Code of Judicial Conduct. Charges I, II, III and IV of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charge V is dismissed.

The record depicts a biased, mean-spirited and bullying judge who, in a number of cases, abandoned his proper role as a neutral and detached magistrate (*see, Matter of Wood*, 1991 Ann Report of the NY Commn on Jud Conduct, at 82, 86).

The Court of Appeals has held:

> The ability to be impartial is an indispensable requirement for a judicial officer. Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property. *(Matter of Sardino v State Commission on Judicial Conduct*, 58 NY2d 286, 291-92)

Respondent's anger at Ms. McAllister's inability to pay her fine prompted him to disregard the law and her fundamental rights and to sentence her to jail on a minor offense in order to make an example of her. Similarly, he lost his temper with Ms. Glasgow when she challenged a fine that he had levied and publicly intimidated and embarrassed her in a manner unbecoming a judge.

(*See, Matter of Tavormina*, 1990 Ann Report of NY Commn on Jud Conduct, at 164).

Respondent's remark that "every woman needs a good pounding every now and then," was intemperate and insensitive to the victims of domestic violence. Taken with his other contemporaneous pronouncements concerning the worth of orders of protection, he cast doubt on his decision in *Metz* to refuse to protect a woman who had required hospital treatment because of the alleged physical abuse of her husband. (*See, Matter of Bender*, 1993 Ann Report of NY Commn on Jud Conduct, at 54; *Matter of Chase*, 1992 Ann Report of NY Commn on Jud Conduct, at 41).

The circumstances of the *Dias* case also portray a partial judge attempting to prejudice the rights of one party to a dispute. Respondent failed to disclose that the plaintiff was his family dentist. (*See, Matter of Fabrizio v State Commission on Judicial Conduct*, 65 NY2d 275, 276-77). He showed favoritism by insisting that the dentist's presence was not required and by attempting to discourage the defendant from calling him. He furthered the appearance of bias by telling the defendant that he was "not from around here and that's not the way we do things around here."

By this conduct, respondent has shown that he poses a threat to the proper administration of justice and is not fit to be a judge. (*See, Matter of Vonder Heide v State Commission on Judicial Conduct*, 72 NY2d 658, 661). Moreover, his lack of candor at the hearing exacerbates his wrongdoing. (*See, Matter of Gelfand v State Commission on Judicial Conduct*, 70 NY2d 211, 216).

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

Mr. Berger, Mr. Coffey, Ms. Crotty, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur as to sanction.

Judge Salisbury dissents as to Charge I only and votes that the charge be dismissed.

Mr. Pope dissents as to Charge II only and votes that the charge be dismissed.

Mr. Goldman dissents as to Charge I and votes that the charge be dismissed and dissents as to sanction and votes that respondent be censured.

Judge Luciano, Judge Marshall and Mr. Sample were not present.

Dated: May 29, 1997

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

JOHN F. SKINNER,

a Justice of the Columbia Town
Court, Herkimer County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Carl G. Scalise for Respondent

The respondent, John F. Skinner, a justice of the Columbia Town Court, Herkimer County, was served with a Formal Written Complaint dated June 13, 1996, alleging that he mishandled two criminal cases. Respondent filed an answer dated July 1, 1996.

By order dated August 5, 1996, 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 October 28, 1996, and the referee filed his report with the Commission on December 20, 1996.

By motion dated January 28, 1997, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. In response, respondent submitted three affidavits on February 14, 1997. The administrator filed a reply dated February 24, 1997. Respondent submitted a "corrected affidavit" by his counsel on March 7, 1997.[1] The administrator replied by letter dated March 24, 1997.

Oral argument was waived.

On March 27, 1997, 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 Columbia Town Court since 1958. He has attended all training sessions required by the Office of Court Administration.

2. Respondent has known Edward Sterling for 40 years, and they are on a first-name basis. Respondent performed the marriage ceremony for Edward and Linda Sterling in 1979. In the late 1970s, Ms. Sterling provided nursing care for respondent's father-in-law, who lived with him. Ms. Sterling testified that she and respondent are personal friends. In 1993, respondent had a heart operation, and he believes that Ms. Sterling visited him every day for two months as he was recuperating. Mr. Sterling has also visited respondent several times at his home. Respondent has described the Sterlings as

[1] Respondent's attempt to supplement the evidentiary record by these affidavits is inappropriate, and they have not been considered in rendering this determination.

"prominent people in our town...very reputable people."

3. On August 24, 1994, Mr. Sterling was charged with Sexual Abuse, Third Degree, in the Town of Columbia on the complaint of a woman who was delivering a newspaper to his home the previous day.

4. Edward and Linda Sterling then went to respondent's home with the appearance ticket that Mr. Sterling had received. Respondent had not yet received any paperwork in connection with the case. He told Mr. Sterling to appear in court as scheduled.

5. On August 30, 1994, Mr. Sterling was arraigned by respondent. Ms. Sterling appeared in court with her husband, but no one else was present. Mr. Sterling was sworn and denied that he was home when the incident was alleged to have occurred. Ms. Sterling also gave an unsworn statement that she had picked up the newspaper on that day.

6. Based solely on these statements and without notice to or hearing the prosecution, respondent dismissed the charge against Mr. Sterling, contrary to CPL 170.45 and 210.45. He failed to record in his docket any reasons for the dismissal, as is required for a dismissal in the interests of justice under CPL 170.40(2).

7. Respondent knew at the time that it was inappropriate for him to dismiss a case without notice to the prosecution and that his dismissal of the charge against Mr. Sterling was "not quite proper."

8. In the course of the proceeding before the Commission, respondent gave testimony that was inconsistent. At the hearing, he testified that Mr. Sterling denied being home when the newspaper was delivered. During the investigation, respondent testified that Mr. Sterling had said that he was home but that he did not touch the woman.

As to Charge II of the Formal Written Complaint:

9. On November 15, 1994, Jesse L. Bullen, who was then 18 years old, appeared before respondent on a charge of Issuing A Bad Check.

10. Respondent looked at a ticket given to him by Mr. Bullen, then asked the defendant whether he would make good on the check.

11. Mr. Bullen agreed, and respondent told him to bring $335 to court the following week. If he didn't come back with the money, he would go to the "crowbar motel," respondent told Mr. Bullen.

12. Respondent never asked Mr. Bullen to enter a plea and never advised him that he had the right to assigned counsel if he could not afford a lawyer, contrary to CPL 170.10(4)(a).

13. Mr. Bullen did not appear the following week, and respondent issued a warrant for his arrest.

14. Two weeks later, Mr. Bullen was arrested and brought to court. He told respondent that he did not have full restitution for the check. Respondent sentenced him to 30 days in jail. He was released after his mother paid the balance of the restitution and fine.

15. Respondent knew at the time that he is required to advise defendants of their right to assigned counsel. Nonetheless, he testified, it was his practice not to advise defendants that they had a right to assigned counsel unless they said that they could not afford a lawyer. "I don't give my town, my county's money away," he testified. "If he asked me to appoint him an attorney, I'll do that."

16. In the course of the proceeding before the Commission, respondent gave inconsistent and evasive testimony concerning *Bullen*. At the hearing, he testified that Mr. Bullen had pleaded guilty to the charge. During the investigation, respondent testified that he had found Mr. Bullen guilty based on his willingness to make restitution. When asked at the hearing to reconcile the different versions, he refused to answer and stated, "No comment."

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

Respondent summarily disposed of two criminal cases without affording both parties the right to be heard, knowing that he was not following the law. In the *Sterling* case, moreover, the circumstances demonstrate that he dismissed the charge as a favor to the defendant and his wife, who were social acquaintances.

Favoritism by a judge is "malum in se misconduct constituting cause for discipline...." (*Matter of Byrne*, 42 NY2d [b], [c] [Ct on the Judiciary]. "It is wrong, and always has been wrong." (*Matter of Byrne, supra,* at [b]). The granting of special consideration is so serious that even a single instance can warrant removal. (*Matter of Reedy v State Commission on Judicial Conduct*, 64 NY2d 299, 302; *but see, Matter of Edwards v State Commission on Judicial Conduct*, 67 NY2d 153, 155).

Respondent also abandoned his proper role as a fair and neutral arbiter when he convicted Mr. Bullen without a plea or trial, thereby ignoring a judge's statutory obligation to advise defendants of their right to assigned counsel and to take the necessary steps to effectuate that right. (*See*, CPL 170.10[4][a]). The courts and this Commission have long abhorred such abuse of defendants' fundamental rights. (See, *Matter of McGee v State Commission on Judicial Conduct*, 59 NY2d 870; *Matter of Sardino v State Commission on Judicial Conduct,* 58 NY2d 286).

Respondent exacerbated his wrongdoing in these two cases by his evasive and disingenuous testimony before the Commission. (*See, Matter of Gelfand v State Commission on Judicial Conduct*, 70 NY2d 211, 216).

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

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

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

Judge Luciano, Judge Marshall and Mr. Sample were not present.

Dated: May 29, 1997

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

LOUIS D. SMITH,

a Justice of the Ellenburg Town Court,
Clinton County.

APPEARANCES:

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

The respondent, Louis D. Smith, a justice of the Ellenburg Town Court, Clinton County, was served with a Formal Written Complaint dated April 17, 1997, alleging that he mishandled a criminal case. Respondent answered the Formal Written Complaint by letter dated May 20, 1997.

On July 28, 1997, 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 September 11, 1997, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Ellenburg Town Court since January 1996. He also served as town justice for two years in the late 1970s.

2. Roger O'Dell, Jr., was charged with Harassment on the complaint of his estranged wife, Carol. The matter was returnable in respondent's court.

3. Before Mr. O'Dell's initial court appearance, respondent spoke with him *ex parte* by telephone. Respondent told Mr. O'Dell that the charge would be adjourned in contemplation of dismissal if he pleaded guilty, then accepted a guilty plea over the telephone without conducting an arraignment, as required by CPL 170.10(1).

4. Respondent did not notify the prosecution or the complaining witness that the defendant had pleaded guilty to the charge or that he intended to grant an adjournment in contemplation of dismissal. Instead, he instructed Ms. O'Dell to appear in court on February 5, 1996, and to bring two of the couple's minor children, who had allegedly witnessed the incident that led to the Harassment charge. This created the reasonable impression to Ms. O'Dell that she and her children would be testifying at trial.

5. On February 5, 1996, respondent called Ms. O'Dell into chambers before the defendant arrived and questioned her concerning the couple's separation. He did not inform her that Mr. O'Dell had pleaded guilty and that no trial would be held.

6. After Mr. O'Dell arrived, respondent talked with him and the complaining witness. He said that Ms. O'Dell needed to be "more understanding" of Mr. O'Dell's job as a truck driver. He told her that it was her responsibility to provide a "nice home" for the defendant, even though the couple did not live together.

7. Respondent still did not tell Ms. O'Dell that the defendant had pleaded guilty, conveying the reasonable impression that he was presiding over a hearing.

8. Even though Mr. O'Dell had already pleaded guilty, respondent required their minor children to answer questions regarding the incident that led to the charge. An emotional confrontation ensued, in which Mr. O'Dell called his children liars.

9. Respondent also questioned the person who had driven Ms. O'Dell to court concerning his relationship with her.

10. Respondent then granted Mr. O'Dell an adjournment in contemplation of dismissal without giving notice to or hearing the prosecution and without obtaining the consent of the prosecution, as required by CPL 170.55(1), and even though Mr. O'Dell had pleaded guilty.

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(C), 100.3(B)(1), 100.3(B)(4) and 100.3(B)(6), and Canons 1, 2A, 2B, 3A(1) and 3B(4) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's extraordinary handling of the *O'Dell* case encompassed a series of legal and procedural errors and improper statements that compromised his impartiality and the proper administration of justice. (*See, Matter of Spiehs*, 1988 Ann Report of NY Commn on Jud Conduct, at 222, 224).

Respondent spoke ex parte with the defendant and, without notice to or hearing the prosecution, disposed of the case over the telephone, granting a disposition that was legally contradictory: a guilty plea and an adjournment in contemplation of dismissal. Even though there was then no need for a trial, he required the complaining witness to come to court and engaged her in an *ex parte* conversation in which he elicited irrelevant, personal information. Then, in a conversation with the O'Dells outside the presence of the prosecution, he made statements indicating sexual bias that were immaterial to the court case, and he unnecessarily questioned the couple's children and a man who had driven the complaining witness to court. Since he had never informed Ms. O'Dell that the case had been disposed of earlier over the telephone, respondent gave her the reasonable impression that he was conducting a hearing. And the adjournment in contemplation of dismissal, without notice to the prosecution or an opportunity to be heard, was also improper. (*See*, CPL 170.55[1]).

A judge should be and appear to be a neutral and impartial arbiter. (*Matter of Sardino v State Commission on Judicial Conduct*, 58 NY2d 286, 290; *Matter of Wood*, 1991 Ann Report of NY Commn on Jud Conduct, at 82, 86). The judge should hear both sides to a dispute in court, then adjudicate issues duly brought by the parties. Even if well-motivated, respondent's misguided attempts to mediate what he apparently perceived as the O'Dells' family problems were outside his proper role as a judge. In his zeal, he violated the law and cast doubt on his ability to be unbiased. (*See, Matter of Edwards*, 1987 Ann Report of NY Commn on Jud Conduct, at 85, 87).

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

Mr. Berger, Ms. Brown, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Mr. Coffey dissents and votes to reject the agreed statement on the basis that admonition would be the appropriate sanction on these facts.

Dated: October 29, 1997

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

CALVIN M. WESTCOTT,

a Justice of the Hancock Town Court,
Delaware County.

APPEARANCES:

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

The respondent, Calvin M. Westcott, a justice of the Hancock Town Court, Delaware County, was served with a Formal Written Complaint dated July 21, 1997, alleging that he attempted to coerce guilty pleas in traffic cases and failed to hold public court sessions as required by law. Respondent filed an answer dated August 9, 1997.

On October 17, 1997, 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 October 23, 1997, the Commission approved the agreed statement and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent, who is not a lawyer, has been a justice of the Hancock Town Court since 1983.

2. Respondent made a practice of receiving ex parte communications from police officers concerning the merits of traffic cases before him, including representations that the actual speed that defendants had been driving was greater than the speed charged.

3. Respondent improperly attempted to settle cases by:

a) before taking any testimony, eliciting explanations for their pleas of not guilty from defendants Waseem Afzal (charged with Speeding on April 20, 1996), James Hanchrow (charged with Speeding on December 27, 1995), John Hennessy (charged with Speeding on December 12, 1995), Jason Long (charged with Speeding on July 25, 1996) and Barbara Rutledge (charged with Failure To Keep Right on January 16, 1996);

b) suggesting to defendants Afzal, Long, Susanna Klein (charged with Speeding on January 11, 1996) and Christine Staeger (charged with Speeding on July 17, 1996) that he had spoken privately with the arresting officers before the trial date;

c) stating to defendants Afzal, Klein, Staeger and Ramon Espinoza (charged with Speeding on May 28, 1996) that he understood that they

had been traveling at higher speeds than those at which they had been charged;

d) informing defendant Espinoza that the arresting officer could augment the charge if the defendant proceeded to a trial rather than pleading guilty;

e) informing defendant Hanchrow that respondent would impose a higher fine if he was convicted after trial than if he pleaded guilty to a reduced charge;

f) permitting arresting officers to sit in a group at a table adjacent to the bench while defendants Afzal, Espinoza, Hanchrow, Hennessy, Rutledge, Daniel Burgos (charged with Speeding on May 24, 1996), Bruce Frank (charged with Speeding on November 25, 1995) and Jaroslov Kormanik (charged with Failure To Stay Within Lane on November 14, 1995) were called before the bench individually; and,

g) refusing, contrary to Vehicle and Traffic Law § 510(4-a)(a), to lift the suspensions that he had placed on the driver's licenses of defendants Frank and Martin Hughto (charged with Speeding on May 11, 1996) after they had appeared in court.

As to Charge II of the Formal Written Complaint:

4. On several occasions in 1996, respondent held court in chambers, excluding the public, contrary to Judiciary Law § 4.

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(B)(4) and 100.3(B)(6), and Canons 1, 2A and 3A(4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A judge has "a duty to conduct himself in such a manner as to inspire public confidence in the integrity, fair-mindedness and impartiality of the judiciary." (*Matter of Esworthy v State Commission on Judicial Conduct*, 77 NY2d 280, 282). By coercing guilty pleas, conducting *ex parte* conferences with arresting officers and showing a predisposition toward the prosecution, a judge abandons this responsibility. (*Matter of McGee v State Commission on Judicial Conduct*, 59 NY2d 870, 871).

In twelve cases, respondent gave the appearance that he was aiding the police and the prosecution by attempting to coerce guilty pleas in traffic cases. He regularly spoke with the police *ex parte* before court and told defendants that he had done so, crediting police statements that the defendants had been driving even faster than the speeds for which they had been charged. Especially coercive were respondent's threats that defendants could incur additional charges or higher fines if they refused to plead guilty.

To question defendants before trial as to why they are pleading not guilty gives the appearance that the judge wants them to waive their right to trial (*see, Matter of Cavotta*, 1996 Ann Report of NY Commn on Jud Conduct, at 75, 78) and carries the potential of eliciting incriminating statements (*see similarly, Matter of Austria*, 1996 Ann Report of NY Commn on Jud Conduct, at 51, 55).

Respondent furthered the appearance that the police were favored in his courtroom and had undue influence over him by allowing them to sit adjacent to the bench in a group, while requiring defendants to stand individually before the judge and the police.

In addition, a judge should not exclude the public from the courtroom. "The sittings of every court within this state shall be public, and every citizen may freely attend the same...." (Judiciary Law § 4; *see, Matter of Cerbone*, 1997 Ann Report of NY Commn on Jud Conduct, at 83, 85-86).

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

Mr. Berger, Ms. Brown, Mr. Coffey, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Ms. Crotty was not present.

December 17, 1997

COMPLAINTS PENDING AS OF DECEMBER 31, 1996

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		14	14	5	4	5	10	52
DELAYS		1	5		1			7
CONFLICT OF INTEREST		3	8	5	2			18
BIAS			2	2	3		1	8
CORRUPTION		1	2				2	5
INTOXICATION			1				2	3
DISABILITY/QUALIFICATIONS								
POLITICAL ACTIVITY		5	3	3			1	12
FINANCES/RECORDS/TRAINING		2	1	5	1			9
TICKET-FIXING				1	1	1		3
ASSERTION OF INFLUENCE		3	1	2	1		1	8
VIOLATION OF RIGHTS		8	11	14	1	2	4	40
MISCELLANEOUS		1	2	1	2	1		7
TOTALS		38	50	38	16	9	21	172

*Matters are "closed" upon vacancy of office for reasons other than resignation. "Action" includes determinations of admonition, 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 1997

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	485							485
NON-JUDGES	173							173
DEMEANOR	156	28	2	3	2			191
DELAYS	53	1						54
CONFLICT OF INTEREST	24	7	3					34
BIAS	84	5	1					90
CORRUPTION	33	1	1					35
INTOXICATION	3	4	1					8
DISABILITY/QUALIFICATIONS	3							3
POLITICAL ACTIVITY	15	5	4	3				27
FINANCES/RECORDS/TRAINING	7	24	15	5	2			53
TICKET-FIXING	1	1						2
ASSERTION OF INFLUENCE	7	13	2	1				23
VIOLATION OF RIGHTS	171	22	7	1	2	1		204
MISCELLANEOUS	16	3		2				21
TOTALS	1231	114	36	15	6	1		1403

*Matters are "closed" upon vacancy of office for reasons other than resignation. "Action" includes determinations of admonition, 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.

ALL COMPLAINTS CONSIDERED IN 1997: 1403 NEW & 172 PENDING FROM 1996

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	485							485
NON-JUDGES	173							173
DEMEANOR	156	42	16	8	6	5	10	243
DELAYS	53	2	5		1			61
CONFLICT OF INTEREST	24	10	11	5	2			52
BIAS	84	5	3	2	3		1	98
CORRUPTION	33	2	3				2	40
INTOXICATION	3	4	2				2	11
DISABILITY/QUALIFICATIONS	3							3
POLITICAL ACTIVITY	15	10	7	6			1	39
FINANCES/RECORDS/TRAINING	7	26	16	10	3			62
TICKET-FIXING	1	1		1	1	1		5
ASSERTION OF INFLUENCE	7	16	3	3	1		1	31
VIOLATION OF RIGHTS	171	30	18	15	3	3	4	244
MISCELLANEOUS	16	4	2	3	2	1		28
TOTALS	1231	152	86	53	22	10	21	1575

*Matters are "closed" upon vacancy of office for reasons other than resignation. "Action" includes determinations of admonition, 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.

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	8608							8608
NON-JUDGES	2430							2430
DEMEANOR	1780	42	737	183	65	69	146	3022
DELAYS	836	2	85	40	12	11	16	1002
CONFLICT OF INTEREST	380	10	319	111	43	18	94	975
BIAS	1137	5	177	33	21	14	17	1404
CORRUPTION	260	2	73	6	23	11	17	392
INTOXICATION	36	4	30	7	5	3	17	102
DISABILITY/QUALIFICATIONS	43		25	2	15	10	6	101
POLITICAL ACTIVITY	180	10	134	112	6	15	15	472
FINANCES/RECORDS/TRAINING	167	26	145	89	88	67	78	660
TICKET-FIXING	21	1	69	155	37	61	159	503
ASSERTION OF INFLUENCE	115	16	90	41	9	6	29	306
VIOLATION OF RIGHTS	1427	30	189	88	35	19	21	1809
MISCELLANEOUS	644	4	217	75	24	37	56	1057
TOTALS	18,064	152	2290	942	383	341	671	22,843

*Matters are "closed" upon vacancy of office for reasons other than resignation. "Action" includes determinations of admonition, 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.