

ANNUAL REPORT

2003

NEW YORK STATE



COMMISSION ON JUDICIAL CONDUCT

**NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT**

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March 1, 2003

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 through December 31, 2002.

Respectfully submitted,

Henry T. Berger, Chair
On Behalf of the Commission

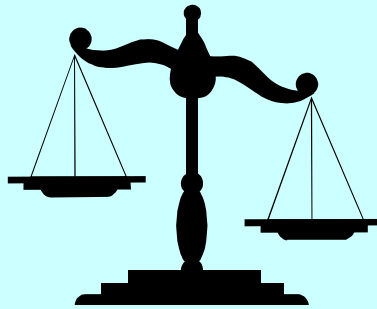
TABLE OF CONTENTS

Introduction to the 2003 Annual Report	1
<i>Bar Graph: Complaints, Inquiries & Investigations Since 1992</i>	1
Action Taken in 2002	2
Complaints Received	2
Pie Chart: Complaint Sources in 2002	2
Preliminary Inquiries and Investigations	3
Formal Written Complaints	3
Summary of All 2002 Dispositions	5
Table 1: Town & Village Justices	5
Table 2: City Court Judges	5
Table 3: County Court Judges	6
Table 4: Family Court Judges	6
Table 5: District Court Judges	6
Table 6: Court of Claims Judges	7
Table 7: Surrogates	7
Table 8: Supreme Court Justices	7
Table 9: Court of Appeals Judges and Appellate Division Justices	8
Table 10: Non-Judges	8
Note on Jurisdiction	8
Formal Proceedings	9
Overview of 2002 Determinations	9
Determinations of Removal	10
<i>Matter of Edmund G. Fitzgerald, Jr.</i>	10
<i>Matter of Howard R. George</i>	10
<i>Matter of Kenneth W. Gibbons</i>	10
<i>Matter of Reynold N. Mason</i>	10
<i>Matter of Timothy C. Tamsen</i>	11
<i>Matter of Roseanna H. Washington</i>	11
<i>Matter of William Watson</i>	11
Determinations of Censure	12
<i>Matter of John B Canary</i>	12
<i>Matter of John E. Cipolla</i>	12
<i>Matter of Robert A. Crnkovich</i>	12

<i>Matter of Michael A. Fiechter</i>	12
<i>Matter of Thomas S. Kolbert</i>	12
<i>Matter of Paula L. Leonard</i>	13
<i>Matter of Richard H. Miller, II</i>	13
<i>Matter of Thomas E. Ramich</i>	13
<i>Matter of Lawrence T. Reid</i>	13
<i>Matter of Peter E. Stelling</i>	14
<i>Matter of Ramona Thwaites</i>	14
<i>Matter of Edward J. Williams</i>	14
Determinations of Admonition	14
<i>Matter of Vincent G. Bradley</i>	14
<i>Matter of John D. Cox</i>	14
<i>Matter of Mark C. Dillon</i>	14
<i>Matter of John J. Elliott</i>	15
<i>Matter of Richard C. Hamm</i>	15
<i>Matter of Edwyn C. Hise</i>	15
<i>Matter of James P. Krauciunas</i>	15
<i>Matter of John B. Nesbitt</i>	15
<i>Matter of Jeffrey R. Werner</i>	15
Dismissed or Closed Formal Written Complaints	16
Matters Closed Upon Resignation	16
Referrals To Other Agencies	16
Update on Two 2001 Determinations	17
Letters of Dismissal and Caution	18
<i>Pie Chart: 2002 Cautions</i>	18
Improper <i>Ex Parte</i> Communications	18
Political Activity	18
Conflicts of Interest	19
Inappropriate Demeanor	19
Poor Administration; Failure to Comply with Law	19
Lending the Prestige of Office to Advance Private Purposes	19
Audit and Control	19
Other Cautions	19
Follow Up on Caution Letters	19
Disregard of a Caution May Be Used in Subsequent Proceedings	19
Commission Determinations Reviewed by the Court of Appeals	20

<i>Matter of Elizabeth A. Shanley</i>	20
<i>Matter of Kenneth W. Gibbons</i>	21
Challenges to Commission Procedures	22
<i>Matter of Spargo et al. v. Commission on Judicial Conduct et al.</i>	22
Observations and Recommendations	24
Improper Delegation of Judicial Authority to Court Attorneys and Others	24
Improper Uses of Court Stationery	25
Recent Amendments to the Rules on Fiduciary Appointments	27
The Commission's Budget	29
Responsible Budget Management	29
Chart: Budget Figures, 1978 to Present	29
Conclusion	31
APPENDIX	
Biographies of Commission Members and Attorneys	35
Referees Who Served in 2002	42
The Commission's Powers, Duties and History	45
Rules Governing Judicial Conduct	57
Text of 2002 Determinations Rendered by the Commission	73
Statistical Analysis of Complaints	
Complaints Pending as of December 31, 2001	205
New Complaints Considered by the Commission in 2002	206
All Complaints Considered in 2002: 1435 New & 188 Pending from 2001	207
All Complaints Considered Since the Commission's Inception in 1975	208
Additional Determinations Inadvertently Omitted from the Hard Copy but Added to the Electronic Copy of the 2003 Annual Report	
Matter of Fitzgerald	209
Matter of Martin	216
Matter of Mason	227

**Commission Activities
In the Year 2002**



**2003 Annual Report
New York State
Commission on Judicial Conduct**

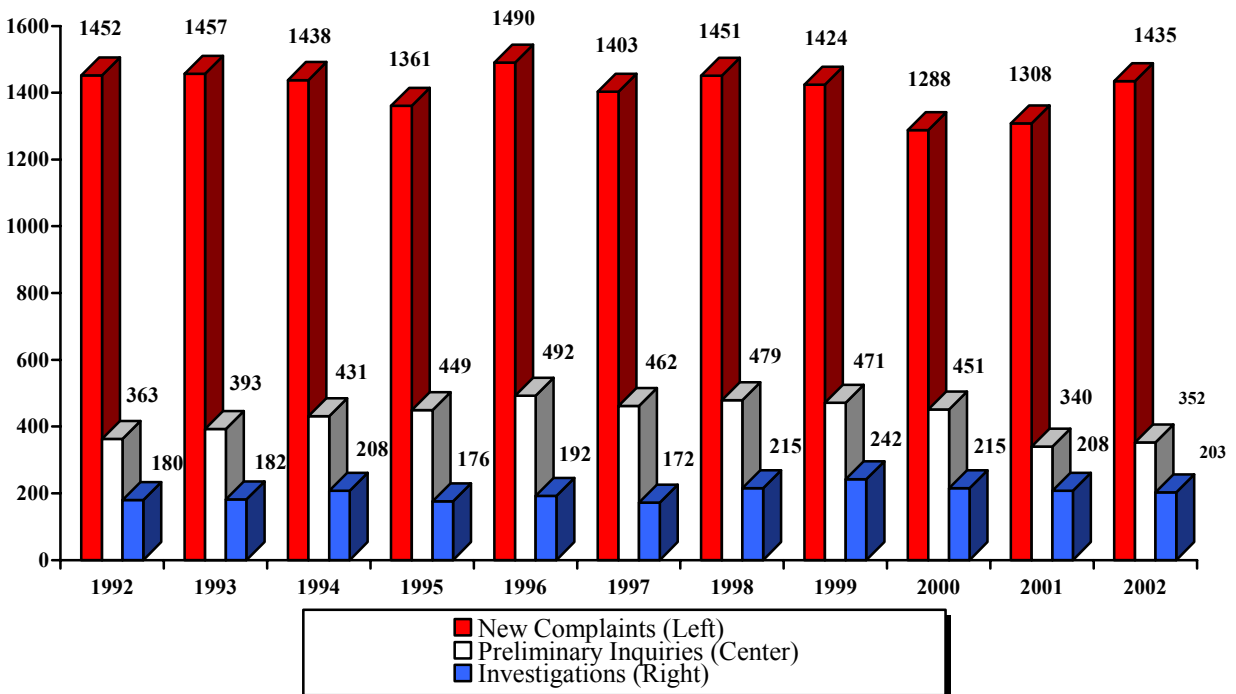
INTRODUCTION TO THE 2003 ANNUAL REPORT

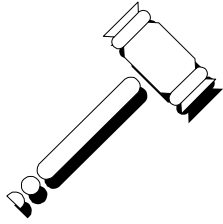
The New York State Commission on Judicial Conduct is the independent agency designated by the State Constitution to review complaints of misconduct against judges of the State Unified Court System, which includes approximately 3,363 judges and justices. The Commission is not part of the Office of Court Administration. The Commission's objective is to enforce high standards of conduct for judges, who must be free to act independently, on the merits and in good faith, but also must be held accountable by an independent disciplinary system, should they commit misconduct. The Rules Governing Judicial Conduct, promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, is annexed.

The number of complaints received by the Commission in the past 11 years has substantially increased compared to the first 17 years of the Commission's existence. Since 1992, the Commission has averaged approximately 1400 new complaints per year, 400 preliminary inquiries and 200 full-fledged investigations. Indeed, in each of the last 11 years, the number of incoming complaints has been more than double the 641 we received in 1978, while our budget has remained flat and our staff has decreased from 63 to 27 in that same period. The Commission's budget is discussed in greater detail at page 29.

This current Annual Report covers the Commission's activities in the year 2002.

Complaints, Inquiries & Investigations Since 1992





Action Taken in 2002

Following are summaries of the Commission's actions in 2002, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

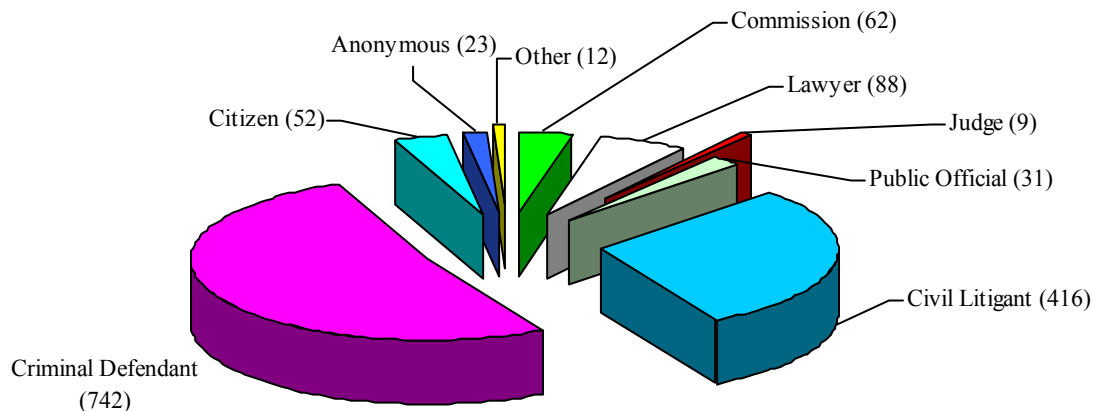
Complaints Received

The Commission received 1435 new complaints in 2002. Preliminary inquiries were conducted in 352 of these, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts. In 203 matters, the Commission authorized full-fledged investigations. Depending on the nature of the complaint, an investigation may entail interviewing witnesses, subpoenaing witnesses to testify and produce documents, assembling and analyzing various court, financial or other records, making court observations, and writing to or taking testimony from the judge.

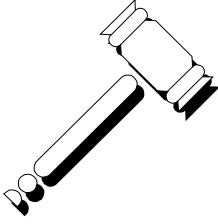
New complaints dismissed upon initial review are those that the Commission

deems to be clearly without merit, not alleging misconduct or outside its 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 disputed judicial rulings or decisions. The Commission is not an appellate court and cannot reverse or remand trial court decisions.

A breakdown of the sources of complaints received by the Commission in 2002 appears in the following chart.



Complaint Sources in 2002



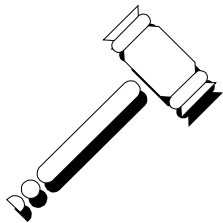
Preliminary Inquiries and Investigations

The Commission's Operating Procedures and Rules authorize "preliminary analysis and clarification" and "preliminary fact-finding activities" by Commission staff upon receipt of new complaints, to aid the Commission in determining whether full investigation is warranted. In 2002, staff conducted 352 such preliminary inquiries, requiring

such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

During 2002, the Commission commenced 203 new investigations. In addition, there were 143 investigations pending from the previous year. The Commission disposed of the combined total of 346 investigations as follows:

- 83 complaints were dismissed outright.
- 59 complaints involving 53 different judges were dismissed with letters of dismissal and caution.
- 8 complaints involving 7 different judges were closed upon the judges' resignation.
- 6 complaints involving 6 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 33 different judges resulted in formal charges being authorized.
- 143 investigations were pending as of December 31, 2002.



Formal Written Complaints

As of January 1, 2002, there were pending Formal Written Complaints in 45 matters, involving 32 different judges. This represents an increase from the 32 matters pending against 26 different judges

at the equivalent point a year earlier. During 2002, Formal Written Complaints were authorized in 47 additional matters, involving 33 different judges. Of the combined total of 92 matters involving 65 judges, the Commission made the following dispositions:

- 35 matters involving 28 different judges resulted in formal discipline (admonition, censure or removal from office).
- 2 matters involving 2 judges resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- 2 matters involving 2 judges were dismissed outright.
- 4 matters involving 3 judges were closed upon the judge's resignation.
- 49 matters involving 30 different judges were pending as of December 31, 2002.

Summary of All 2002 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 – 2186*, ALL PART-TIME

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	108	319	427
Complaints Investigated	12	78	90
Judges Cautioned After Investigation	6	25	31
Formal Written Complaints Authorized	2	33	35
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	4	14	18
Formal Complaints Dismissed or Closed	1	0	1

Note: Approximately 400 town and village justices are lawyers.

TABLE 2: CITY COURT JUDGES – 388, ALL LAWYERS

	<i>Part-Time</i>	<i>Full-Time</i>	<i>Total</i>
Complaints Received	31	115	146
Complaints Investigated	5	15	20
Judges Cautioned After Investigation	1	4	5
Formal Written Complaints Authorized	0	2	2
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	1	3	4
Formal Complaints Dismissed or Closed	1	0	1

Note: Approximately 100 City Court Judges serve part-time.

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

TABLE 3: COUNTY COURT JUDGES – 84 FULL-TIME, ALL LAWYERS

Complaints Received	147
Complaints Investigated	16
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	2

TABLE 4: FAMILY COURT JUDGES – 120, FULL-TIME, ALL LAWYERS

Complaints Received	131
Complaints Investigated	18
Judges Cautioned After Investigation	5
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 5: DISTRICT COURT JUDGES – 47, FULL-TIME, ALL LAWYERS

Complaints Received	18
Complaints Investigated	6
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

TABLE 6: COURT OF CLAIMS JUDGES – 64, FULL-TIME, ALL LAWYERS

Complaints Received	19
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

Note: 46 Judges of the Court of Claims serve as Acting Justices of the Supreme Court.

TABLE 7: SURROGATES – 63, FULL-TIME, ALL LAWYERS

Complaints Received	28
Complaints Investigated	7
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

TABLE 8: SUPREME COURT JUSTICES – 350, FULL-TIME, ALL LAWYERS

Complaints Received	275
Complaints Investigated	45
Judges Cautioned After Investigation	10
Formal Written Complaints Authorized	8
Judges Cautioned After Formal Complaint	1
Judges Publicly Disciplined	3
Formal Complaints Dismissed or Closed	2

**TABLE 9: COURT OF APPEALS JUDGES – 7 FULL-TIME, ALL LAWYERS;
APPELLATE DIVISION JUSTICES – 54 FULL-TIME, ALL LAWYERS**

Complaints Received	30
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	214
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* The Commission reviews such complaints to determine whether to refer them to other agencies.

Note on Jurisdiction

The Commission’s jurisdiction is limited to judges and justices of the state unified court system. The Commission does not have jurisdiction over non-judges, retired judges, judicial hearing officers (JHO’s), administrative law judges (*i.e.* adjudicating officers in government agencies or public authorities such as the New York City Parking Violations Bureau), housing judges of the New York City Civil Court, or federal judges. Legislation that would have given the Commission jurisdiction over New York City housing judges was vetoed in the 1980s.



Formal Proceedings

The Commission may not impose a public disciplinary sanction against a judge 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.

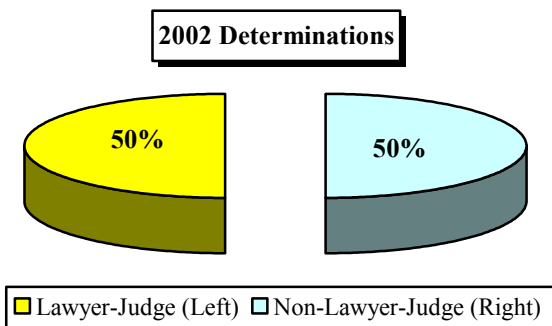
The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and

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.

Following are summaries of those matters that were completed and made public during 2002. The texts of the determinations are appended to this Report.

Overview of 2002 Determinations

The Commission rendered 28 formal disciplinary determinations in 2002: seven removals, 12 censures and 9 admonitions. Fourteen of the 28 respondents disciplined were non-lawyer judges, and 14 were lawyer-judges. Eighteen of the respondents were part-time town or village justices, and ten were judges of higher courts.



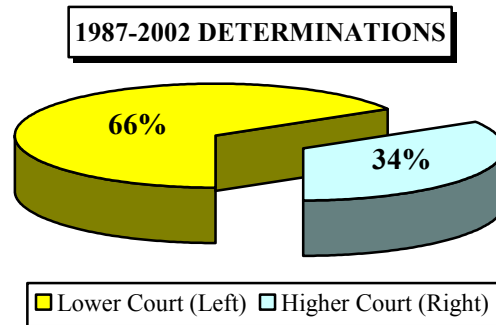
To put these numbers and percentages in some context, it should be noted that, of the 3,300 judges in the state unified court system, approximately 67% are part-time

town or village justices. Approximately 82% of the town and village justices, comprising 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.)

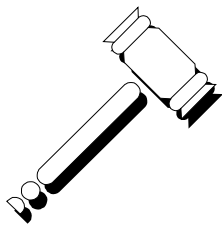
Excluding cases from 1978 to 1982 involving ticket-fixing, which was largely a town and village justice court phenomenon – in larger jurisdictions, traffic matters are typically handled by administrative agencies – the overall percentage of town and village justices disciplined since the Commission’s inception (66%) is virtually identical to the percentage of town and village justices in the judiciary as a whole (67%).

Of course, no set of dispositions in a given year will exactly mirror those percentages. However, from 1987 to 2002,

the number of public determinations, when categorized by type of court and judge, has roughly approximated the makeup of the judiciary as a whole: 184 (about 66%) have involved town and village justices, and 96 (about 34%) have involved judges of higher courts.



Determinations of Removal



The Commission completed seven disciplinary proceedings in 2002 that resulted in determinations of removal. The cases are summarized below. The texts of the determinations are appended.

Matter of Edmund G. Fitzgerald, Jr.

The Commission determined on July 1, 2002, that Edmund G. Fitzgerald, Jr., a Judge of the Yonkers City Court, Westchester County, should be removed for being unqualified to serve as a city court judge after having been disbarred for engaging in various financial improprieties as an attorney.

Judge Fitzgerald requested review by the Court of Appeals, where the case is pending.

Matter of Howard R. George

The Commission determined on February 4, 2002, that Howard R. George, a part-time Justice of the Watertown Town Court, Jefferson County, should be removed for converting money entrusted to

him by a business client, refusing to repay the funds, failing to pay a judgment against him, and testifying falsely about the matter.

Judge George, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Kenneth W. Gibbons

The Commission determined on February 6, 2002, that Kenneth W. Gibbons, a part-time Justice of the Glenville Town Court, Schenectady County, should be removed for advising an attorney that he had just signed a search warrant of the premises of the attorney's client and that the attorney should meet with the client "right away" to "solve the problem."

Judge Gibbons, who is a lawyer, requested review by the Court of Appeals, which accepted the Commission's determination and removed the judge from office.

Matter of Reynold N. Mason

The Commission determined on June 21, 2002, that Reynold N. Mason, a Justice

of the Supreme Court, 2nd Judicial District, Kings County, should be removed for collecting rent on a rent-stabilized apartment without the landlord's consent, putting the funds into his attorney escrow account and using them for personal purposes, failing to cooperate with the Commission's investigation by not responding to six letters seeking his response to questions, and giving evasive, incredible testimony during the investigation.

Judge Mason, who is a lawyer, requested review by the Court of Appeals, where the case is pending.

Matter of Timothy C. Tamsen

The Commission determined on July 2, 2002, that Timothy C. Tamsen, a part-time Justice of the Newburgh Town Court, Orange County, should be removed for misappropriating client funds and altering records as an attorney, for which he had been disbarred.

Judge Tamsen requested review by the Court of Appeals, where the case is pending.

Matter of Roseanna H. Washington

The Commission determined on October 1, 2002, that Roseanna H. Washington, a part-time Judge of the White Plains City Court, Westchester County, should be removed for delays in disposing of numerous small claims cases, failing to report the delays to court administrators, and failing to cooperate with the Commission's investigation by not responding to several letters seeking her response to questions.

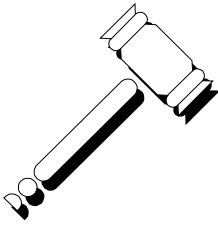
Judge Washington, who is a lawyer, requested review by the Court of Appeals, where the case is pending.

Matter of William Watson

The Commission determined on December 26, 2002, that William Watson, a Judge of the Lockport City Court, Niagara County, should be removed for making improper statements during his campaign for judicial office, including statements that conveyed the appearance of pro-prosecutorial bias, blamed the incumbents for an increase in crime, and used misleading arrest statistics.

Judge Watson, who is a lawyer, requested review by the Court of Appeals, where the case is pending.

Determinations of Censure



The Commission completed 12 disciplinary proceedings in 2002 that resulted in determinations of censure. The cases are summarized below. The texts of the determinations are appended.

Matter of John B. Canary

The Commission determined on December 26, 2002, that John B. Canary, a part-time Justice of the Mayfield Town Court, Fulton County, should be censured for asserting his judicial office on two occasions in connection with his son's arrest and refusing to accept a small claims case out of bias.

Judge Canary, who is not a lawyer, did not request review by the Court of Appeals.

Matter of John E. Cipolla

The Commission determined on October 1, 2002, that John E. Cipolla, a part-time Acting Justice of the Depew Village Court, Erie County, should be censured for asserting his judicial office in a dispute at a club, writing a letter seeking confidential information under false pretenses, and interceding on behalf of a friend's speeding ticket.

Judge Cipolla, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Robert A. Crnkovich

The Commission determined on November 18, 2002, that Robert A. Crnkovich, a part-time Justice of the Byron Town Court, Genesee County, should be censured for making statements endorsing another candidate for judicial office.

Judge Crnkovich, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Michael A. Fiechter

The Commission determined on November 18, 2002, that Michael A. Fiechter, a Judge of the District Court, Nassau County, should be censured for widely disseminating his complaint to the Commission, which contained inaccurate, unsubstantiated allegations denigrating another judge.

Judge Fiechter, who is a lawyer, did not request review by the Court of Appeals.

Matter of Thomas S. Kolbert

The Commission determined on December 26, 2002, that Thomas S. Kolbert, a part-time Justice of the Cheektowaga Town Court, Erie County, should be censured for contacting the police department in connection with his friend's son's arrest, threatening to impose "the maximum sentence" on an individual in connection with an off-the-bench incident.

involving the judge, and issuing a warrant in a case involving his friend.

Judge Kolbert, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Paula L. Leonard

The Commission determined on December 26, 2002, that Paula L. Leonard, a part-time Justice of the Ulster Town Court, Ulster County, should be censured for interfering in a police search of a relative's home and intentionally giving a misleading reason for dismissing a charge.

Judge Leonard, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Richard H. Miller, II

The Commission determined on December 30, 2002, that Richard H. Miller, II, a part-time Justice of the Union Town Court, Broome County, should be censured for presiding over a client's case and cases originating in his court, practicing law in his court, and sending notices threatening arrest to a defendant in a civil case.

Judge Miller, who is a lawyer, did not request review by the Court of Appeals.

Matter of Thomas E. Ramich

The Commission determined on December 27, 2002, that Thomas E. Ramich, a Judge of the Elmira City Court, Chemung County, should be censured for practicing law while a

full-time judge, writing letters to the police seeking *ex parte* information, and failing to disqualify himself in a case after a discussion with the defendant's relative.

Judge Ramich, who is a lawyer, did not request review by the Court of Appeals.

Matter of Lawrence T. Reid

The Commission determined on May 17, 2002, that Lawrence T. Reid, a part-time Justice of the Pavilion Town Court, Genesee County, should be censured for writing an article stating that he would increase fines for trucking-related violations, to discourage drivers from using local routes, and imposing excessive fines based on the original charges, not the charges on which defendants were convicted.

Judge Reid, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Peter E. Stelling

The Commission determined on October 1, 2002, that Peter E. Stelling, a part-time Justice of the Canaan Town Court, Columbia County, should be censured for being convicted of Driving While Intoxicated after a prior conviction for Driving While Ability Impaired.

Judge Stelling, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Ramona Thwaits

The Commission determined on December 30, 2002, that Ramona Thwaits, a part-time Justice of the Jay Town Court, Essex County, should be censured for presiding over cases involving her relatives and a social acquaintance, granting adjournments in contemplation of dismissal without the consent of the prosecution and sitting with a defendant's relatives in a small courtroom to show support for the defendant.

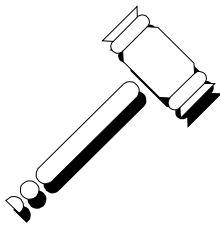
Judge Thwaits, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Edward J. Williams

The Commission determined on May 17, 2002, that Edward J. Williams, a part-time Justice of the Kinderhook Town Court and the Valatie Village Court, Columbia County, should be censured for asking another judge to vacate an order of protection issued against Judge Williams' friend and telling the judge that he himself had vacated such orders without notice to the prosecution.

Judge Williams, who is not a lawyer, did not request review by the Court of Appeals.

Determinations of Admonition



The Commission completed nine disciplinary proceedings in 2002 that resulted in determinations of public admonition. The cases are summarized below. The texts of the determinations are appended.

Matter of Vincent G. Bradley

The Commission determined on October 1, 2002, that Vincent G. Bradley, a Justice of the Supreme Court, 3rd Judicial District, Ulster County, should be admonished for referring to an attorney as a "thief" and a "clam," notwithstanding that the judge had previously been cautioned concerning improper statements.

Judge Bradley, who is a lawyer, did not request review by the Court of Appeals.

Matter of John D. Cox

The Commission determined on December 30, 2002, that John D. Cox, a part-time Justice of the LeRay Town Court, Jefferson County, should be admonished for failing to advise defendants who had not paid their fines of the right to a resentencing hearing and for resentencing the defendants in such cases to jail without a hearing.

Judge Cox, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Mark C. Dillon

The Commission determined on February 6, 2002, that Mark C. Dillon, a Justice of the Supreme Court, 9th Judicial District, Westchester County, should be admonished for telling jurors that he agreed with their verdict and for making

a post-verdict speech in which he excoriated defense counsel and lavishly praised the prosecutors, at a time when he was a candidate for office.

Judge Dillon, who is a lawyer, did not request review by the Court of Appeals.

Matter of John J. Elliott

The Commission determined on November 18, 2002, that John J. Elliott, Surrogate, Oswego County, should be admonished for failing to file his financial disclosure statements in a timely manner in three of the preceding five years.

Judge Elliott, who is a lawyer, did not request review by the Court of Appeals.

Matter of Richard C. Hamm

The Commission determined on October 1, 2002, that Richard C. Hamm, a part-time Justice of the Cobleskill Village Court, Schoharie County, should be admonished for threatening the claimant in a small claims case with arrest in order to enforce a civil settlement.

Judge Hamm, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Edwyn C. Hise

The Commission determined on May 17, 2002, that Edwyn C. Hise, a part-time Justice of the Alexander Town Court, Genesee County, should be admonished for convicting and sentencing a defendant charged with a zoning violation to ten days in jail, without a trial or guilty plea.

Judge Hise, who is not a lawyer, did not request review by the Court of Appeals.

Matter of James P. Krauciunas

The Commission determined on November 18, 2002, that James P. Krauciunas, a part-time Justice of the Ohio Town Court, Herkimer County, should be admonished for improperly asserting his judicial office in connection with his daughter's small claims case, acting in a rude and overbearing manner and threatening to report the conduct of the presiding judge to the Commission.

Judge Krauciunas, who is not a lawyer, requested review by the Court of Appeals. The Court dismissed the request after the judge did not file a brief and record.

Matter of John B. Nesbitt

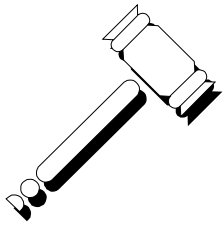
The Commission determined on June 21, 2002, that John B. Nesbitt, a Judge of the County Court, Family Court and Surrogate's Court, Wayne County, should be admonished for sending a letter on his judicial stationery to a school official challenging an administrative determination concerning the judge's son.

Judge Nesbitt, who is a lawyer, did not request review by the Court of Appeals.

Matter of Jeffrey R. Werner

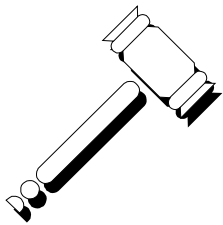
The Commission determined on October 1, 2002, that Jeffrey R. Werner, a part-time Justice of the Newburgh Town Court, Orange County, should be admonished for identifying himself as a judge when he was stopped by the police and charged with Driving While Intoxicated.

Judge Werner, who is a lawyer, did not request review by the Court of Appeals.



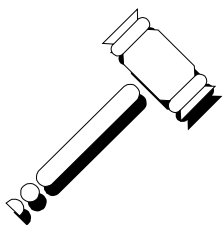
Dismissed or Closed Formal Written Complaints

The Commission disposed of seven Formal Written Complaints in 2002 without rendering public discipline. Three complaints were closed upon the resignation of the respondent-judge. Two complaints were disposed of with a letter of caution, upon a finding by the Commission that judicial misconduct was established but that public discipline was not warranted. In two cases, Formal Written Complaints were dismissed after formal hearings were held.



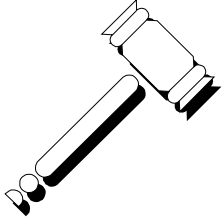
Matters Closed Upon Resignation

Ten judges resigned in 2002 while complaints against them were pending at the Commission. Seven of them resigned while under investigation and three resigned 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-day 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 2002, the Commission referred 43 matters to other agencies. Forty matters were referred 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. One matter was referred to the Office of the State Comptroller. One matter was referred to a District Attorney.



Updates on Two 2001 Determinations

The Commission determined on December 26, 2001, that Larry D. Martin, a Justice of the Supreme Court, Kings County, should be admonished for improperly having asserted the prestige of judicial office by writing two letters on judicial stationery to other judges, seeking favorable sentencing dispositions on behalf of two criminal defendants who were the sons of his long-time family friends. The Commission's determination noted *inter alia* that, in one of the two cases at issue, the Suffolk County Supreme Court Justice presiding disqualified himself after receiving Judge Martin's letter. Judge Martin moved for reconsideration, which the Commission granted. On reconsideration, the Commission reissued its determination, adhering to the admonition and noting that, although the Suffolk County judge disqualified himself, he subsequently accepted a guilty plea from the defendant and imposed sentence.

In last year's annual report, the summary of one Commission determination may have been less than clear with regard to the amount of money involved. The Commission determined on February 8, 2001, that Michael F. Mullen, a Judge of the Court of Claims and an Acting Justice of the Supreme Court, Suffolk County, should be admonished for having used approximately \$4,000 of the \$18,000 in surplus funds that he carried over from his 1996 judicial campaign in subsequent campaigns, rather than having promptly returned the money *pro rata* to his contributors or having otherwise disposed of the funds as required by the Rules Governing Judicial Conduct and numerous Opinions of the Advisory Committee on Judicial Ethics. Judge Mullen refunded the remaining \$14,000 to contributors on a *pro rata* basis in November 1999, after the Commission advised him that it was investigating a complaint.

Letters of Dismissal and Caution



A *Letter of Dismissal and Caution* contains confidential suggestions and recommendations to a judge upon conclusion of an investigation, in lieu of commencing formal disciplinary proceedings. A *Letter of Caution* is a similar communication to a judge upon conclusion of a formal disciplinary proceeding and a finding that the judge's misconduct is established. Cautionary letters are authorized by the Commission's rules, 22 NYCRR 7000.1(l) & (m).

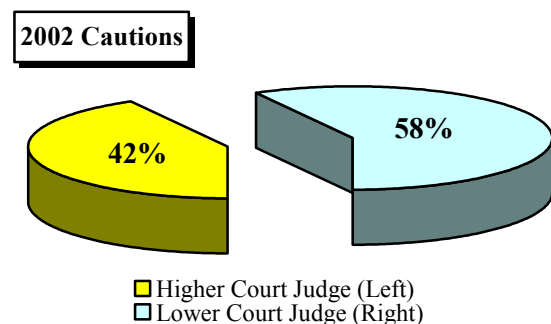
Such cautionary letters have value not only as an educational tool but also because, when warranted, they allow the Commission to address a judge's conduct without making the matter public.

In 2002, the Commission issued 53 Letters of Dismissal and Caution and two Letters of Caution. Thirty-two town or village justices were cautioned, including six who are lawyers. Twenty-three judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct, as the examples below indicate.

Improper Ex Parte Communications.

Three town or village justices were cautioned for having unauthorized *ex parte* communications on substantive matters in pending cases. For example, one met privately with witnesses in a civil case, and another met privately with a crime victim and the defense attorney.

Political Activity. Eight judges were cautioned for improper political activity. The Rules Governing Judicial Conduct prohibit judges from attending political gatherings, endorsing other candidates or otherwise participating in political activities except for a certain specifically-defined "window period" 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, *inter alia* avoiding pledges or promises of conduct if elected, and avoiding misrepresentations of their or their opponent's qualifications. Two judges were cautioned for attending political events at a time when they were not candidates for judicial office. Four judges were cautioned for inaccurate, misleading or undignified statements in their campaign literature.



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 2002, three judges were cautioned for relatively isolated

conflicts of interest, such as failing to disclose that the judge's spouse was represented on an unrelated matter by one of the attorneys appearing in a case before the judge.

Inappropriate Demeanor. Eighteen judges were cautioned for discourteous, intemperate, indecorous or otherwise offensive demeanor toward those with whom they deal in their official capacity, usually in relatively isolated circumstances rather than as part of a discernible pattern.

Poor Administration;
Failure to Comply with Law. Seven judges were cautioned for failing to meet certain mandates of law, either out of ignorance or administrative oversight. For example, five town justices were cautioned for inordinate delays in scheduling or deciding particular cases, typically because of poor records and case management. One town justice was cautioned for setting fines based on the original charge against a defendant, rather than the charge to which the defendant actually pleaded guilty.

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 2002, one judge was cautioned for using judicial letterhead for an affidavit in a private matter.

Audit and Control. Six part-time town or village justices were cautioned for failing to make prompt reports, deposits

and/or remittances to the State Comptroller of court-collected funds, such as traffic fines, after audits by the Comptroller's Office. There was no indication of misappropriated funds, and the judges all took appropriate administrative steps to avoid such problems in the future.

Other Cautions. Seven judges were cautioned for one or two incidents of improperly delegating to a receiver the power to make secondary appointments, such as hiring an attorney, contrary to Part 36 of the Chief Judge's Rules, which requires that the judge make such secondary appointments.

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.

Disregard of a Caution May Be Used in Subsequent Proceedings. In 1999, the Court of Appeals, in upholding the removal of judge who *inter alia* used the power and prestige of his office to promote a particular private defensive driver program, noted that the judge had persisted in his conduct notwithstanding a prior caution from the Commission that he desist from such conduct. *Matter of Assini v. Commission on Judicial Conduct*, 94 NY2d 26 (1999).



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 2002, the Court decided the two matters summarized below.

Matter of Elizabeth A. Shanley

The Commission determined on December 27, 2001, that Elizabeth A. Shanley, a part-time Justice of the Esopus Town Court, Ulster County, should be admonished for (1) misrepresenting her credentials in campaign literature in that she appeared to say she was a graduate of three institutions of higher education when in fact she had attended clerk's training programs that were held there and (2) indicating a pro-prosecution bias by advertising herself as a "law and order candidate." Judge Shanley is not a lawyer.

The Court of Appeals unanimously accepted the Commission's determination and admonished Judge Shanley in an opinion dated July 1, 2002. 98 NY2d 310 (2002). The Court held that it was a serious misrepresentation for her to iden-

tify herself as a "graduate" of legal institutions when in fact she had attended training courses as a court clerk at those institutions.

The Court dismissed the charge pertaining to the judge's reference to herself as a "law and order candidate." The Court held *inter alia* that the Commission did not establish that the judge's judicial impartiality was compromised by her use of the phrase, which is "widely and indiscriminately used in everyday parlance and election campaigns." The Court "decline[d] to treat it as a 'commit[ment]' or a 'pledge [] or promise[] of conduct in office.'" *Id.* at 313.

Matter of Kenneth W. Gibbons

The Commission determined on February 6, 2002, that Kenneth W. Gibbons, a part-time Justice of the Glenville Town Court, Schenectady County, should be removed for advising an attorney that he had just signed a search warrant of the premises of the attorney's client and that the attorney should meet with the client "right away" to "solve the problem." Judge Gibbons is a lawyer.

The Court of Appeals unanimously accepted the Commission's determination and removed Judge Gibbons from office in an opinion dated October 10, 2002. 98 NY2d 448 (2002).

The Court found Judge Gibbons' call to the attorney warranted removal from office even if it was not intended to tip the attorney off to the impending search. *Id.* at 450. The Court stated as follows:

Effective law enforcement and the fair administration of justice command that judges maintain strict confidenci-

ality in connection with the issuance and execution of search warrants. Investigators and the public must have full confidence that judges will maintain secrecy in connection with those and other proceedings requiring confidentiality. By telling the target's attorney of the impending search, petitioner committed a serious breach of trust. Judges are not free to violate that trust, whether motivated by sinister design or by anger.

By informing the attorney of the search warrant, petitioner jeopardized the very legal system he was duty-bound to protect and administer. His conduct therefore goes beyond "simple careless inattention to the applicable ethical standards" and instead manifests an "utter disregard of the Canons of Judicial Ethics," which warrants his removal (*Matter of Steinberg*, 51 NY2d 74, 81, 82 [1980]). *Id.* at 450.



CHALLENGES TO COMMISSION PROCEDURES

Commission staff litigated various procedural issues in 2002. One such issue involved a challenge in federal court brought by a judge against whom the Commission had authorized formal disciplinary charges. The respondent-judge challenged the constitutionality of certain provisions of the Rules Governing Judicial Conduct. The matter is discussed below.

Matter of Spargo et al. v. Commission on Judicial Conduct et al.

On October 17, 2002, United States District Court Judge Lawrence E. Kahn, Northern District of New York, signed an Order to Show Cause with a Temporary Restraining Order, enjoining the Commission from taking any action with respect to a pending Formal Written Complaint against New York State Supreme Court Justice Thomas J. Spargo of Albany County. The TRO effectively postponed a hearing that was scheduled to commence the following Monday in Albany before a referee designated by the Commission.

By commencing federal litigation, Judge Spargo made public that Commission proceedings had been initiated against him. The federal litigation papers include descriptions of and documents from the Commission proceedings.

The Formal Written Complaint against Judge Spargo alleged various violations of the political activity restrictions in the Rules Governing Judicial Conduct. Judge Spargo was charged *inter alia* with making \$5,000 payments to two individuals who supported his nomination at

their parties' judicial nominating conventions in 2001, with participating in a disruptive protest of the 2000 presidential vote recount in Florida, and with distributing items of value, such as coupons for gasoline, coffee and doughnuts, to potential voters. Judge Spargo was also charged with failing to disclose to the parties in criminal cases that he had performed election law services to the District Attorney and was owed \$10,000 for such services.

Judge Spargo's federal action was transferred to US District Court Judge David N. Hurd, who considered the plaintiffs' motion for a preliminary injunction. Judge Hurd entertained oral argument on the issues of law on November 29, 2002, and issued a decision on February 20, 2003.

Judge Hurd held that Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) of the Rules Governing Judicial Conduct are unconstitutional and ordered that the Commission is permanently enjoined and restrained from enforcing those sections. The Commission

was not enjoined from proceeding as to the charge involving Judge Spargo's failure to disclose his relationship with the District Attorney, since that charge cited other sections of the Rules.

While Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) all explicitly involve prohibitions on political activity by judges and judicial candidates, Sections 100.1 and 100.2(A) impose ethical mandates that are not limited to political activity. For example, they require a judge to "respect and comply with the law," and to

observe high standards of conduct in furtherance of the independence, integrity and impartiality of the judiciary. The Commission has relied on Sections 100.1 and 100.2(A) over the years to discipline judges for such off-the-bench conduct as driving while intoxicated or, in the case of part-time judges who practice law, misappropriating law firm or client funds.

The Commission is appealing Judge Hurd's decision.

OBSERVATIONS AND RECOMMENDATIONS

The Commission traditionally devotes a section of its Annual Report to a discussion of various topics of special note or interest that have come to our attention in the course of various investigations. 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.



IMPROPER DELEGATION OF JUDICIAL AUTHORITY TO COURT ATTORNEYS AND OTHERS

It is fundamental to independence, impartiality and integrity of the judiciary for a judge to exercise the powers of office without undue or unauthorized reliance upon non-judges. In a number of cases over the years, judges have been disciplined for actually or effectively ceding certain uniquely judicial functions and duties to others.

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

In 11 admonitions reported in its 1993 Annual Report, the Commission identified an improper practice in which town and village court justices in Cayuga County permitted the local sheriff's office to review and approve bail bonds and sign the judges' names to certificates

of release from incarceration, without review by the judges.

In *Matter of Rider*, 1988 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 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.

From time to time, the Commission has also become aware of situations in which judges have delegated authority to court attorneys or law clerks to act in a manner that creates the appearance that they are judges. While it is not uncommon or inappropriate for a judge to ask a court attorney to conduct conferences with the lawyers or parties in a case and make recommendations, at times such assignments constitute improper delegations of judicial authority. Some court attorneys

take the bench to conduct conferences, or have made express references to “my ruling,” “my cases” or “my decision,” or otherwise convey the impression that they are the judges. Some have acted in a manner that encourages lawyers and parties to call them “Your Honor” or “Judge.”

While a court attorney should know better than to foster such an appearance, it is the judge who is ultimately responsible. A judge is obliged not only to safeguard the independence and integrity of the judiciary but also to “require staff, court officials and others subject to the judge’s direction and control to observe the stan-

dards of fidelity and diligence that apply to the judge...” Section 100.3(C)(2) of the Rules Governing Judicial Conduct. In one situation that recently came to the Commission’s attention, a Family Court Judge permitted a law clerk (or court attorney) to perform quasi-judicial acts, such as advise *pro se* litigants of the right to counsel. In another situation, the Appellate Division, Third Department, held that it was “clearly improper” under law for a judge to appoint his law clerk as a referee in a contested matrimonial proceeding. *Carpenter v. Carpenter*, 278 AD2d 695 (3d Dept 2000).



IMPROPER USES OF COURT STATIONERY

The Commission has commented on this topic in various annual reports, as recently as last year. Insofar as the problem persists, it seems appropriate to do so again.

Section 100.2(C) of the Rules Governing Judicial Conduct mandates *inter alia* that a “judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.”

Over the years, numerous judges have been publicly disciplined for improperly asserting the influence of judicial office and improperly communicating with fellow judges and others on behalf of criminal defendants or civil litigants. It may be personally difficult for a judge to deny the request of a relative or friend who asks for influence or *ex parte* help,

but the judge is obliged to refrain from doing so.

Where the assertion of judicial influence may be manifested in a letter on court stationery from the judge to the person or agency over which influence is sought, it makes no difference that the letter may be marked “Personal & Unofficial.” That qualifying phrase cannot mask the identity of the sender as a judge.

In *Matter of John B. Nesbitt*, reported in this annual report, the Commission admonished a County Court Judge for using his judicial letterhead and envelope to send a letter to a local college program, challenging an administrative ruling concerning the judge’s son. Notwithstanding that the letter was marked “Personal and Unofficial,” its purpose was to invoke the prestige of judicial of-

fice for a private purpose. The Commission's determination stated:

Respondent's judicial stationery lent particular clout to his statements that he had reviewed the matter, that he questioned the legal sufficiency of the school's procedures and that the school should consult an attorney. Using the words "Personal and Unofficial" does not diminish the undeniable impact of such a letter, which inevitably invokes the prestige of the judiciary. Respondent has acknowledged that his use of judicial stationery was intended to influence the recipient to give particular attention to his views simply because of respondent's judicial status. It was improper for respondent to inject his judicial status into a private dispute.

In *Matter of Martin*, 2002 Annual Report, a Supreme Court Justice wrote letters to two judges seeking leniency on behalf of defendants whose families he had known for many years.

In *Matter of MacLaughlin*, 2002 Annual Report, a town justice *inter alia* wrote to a local resident on judicial stationery and threatening legal action on alleged code violations that had not been charged against the individual.

In *Matter of Romano*, 1999 Annual Report, 93 NY2d 161 (1999), a town justice *inter alia* wrote to the town board on judicial stationery, criticizing local police officers with whom he was angry.

In *Matter of McKeon*, 1999 Annual Report, a Supreme Court Justice *inter alia* wrote on judicial stationery to the city's

law department, urging that the hiring of a particular woman be expedited.

In *Matter of Engle*, 1998 Annual Report, a town and village court justice wrote on judicial letterhead to a County Court Judge, seeking leniency for a defendant whom he knew personally.

In *Matter of Hoag*, 1997 Annual Report, a town justice who also worked for a local private club used judicial stationery to make complaints about several individuals who allegedly trespassed on club property.

In *Matter of Freeman*, 1992 Annual Report, a town justice wrote on judicial stationery to support the pistol permit application of a customer of his private business.

In *Matter of Tyler*, 1990 Annual Report, 75 NY2d 525 (1990), a town justice *inter alia* wrote three letters on judicial stationery in connection with personal disputes.

In *Matter of Wright*, 1989 Annual Report, a Supreme Court Justice *inter alia* wrote letters on judicial stationery in support of a friend's lawsuit and employment application.

In *Matter of Zapf*, 1988 Annual Report, a town justice wrote a letter on judicial stationery attempting to coerce payment of a debt.

In *Matter of Wordon*, 1981 Annual Report, a town justice wrote a private collection letter on court stationery to an alleged debtor on behalf of a local hotel.

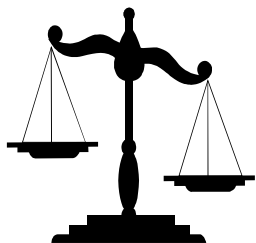
From 1978 to 1985, the Commission disciplined scores of judges, mostly town and village justices, for writing letters on court stationery to other judges, seeking favorable treatment for defendants in traffic (mostly speeding) cases.

In addition to the significant body of case law in this area, the Advisory Committee on Judicial Ethics has issued numerous opinions on the proper and improper uses of judicial letterhead.

For example, while a judge may write a reference letter on behalf of a law school or job applicant if the recommendation reflects the judge's appraisal of the abilities of the applicant (Opinion 88-10), a judge may not voluntarily send a letter to the Probation Department on behalf of

suspended court employee, but may respond to an inquiry from the Department concerning the defendant (Opinion 88-63). While a judge may submit an affidavit of good character for an applicant to the New York bar if it contains an accurate reflection of the judge's opinion (Opinion 88-166), a judge should not write a character reference at the request of a criminal defendant, even if the defendant is the judge's former law clerk (Opinion 89-04).

Where a judge has any doubt about the propriety of sending a particular letter, the prudent course would be to examine the case law and Advisory Opinions and request an opinion from the Advisory Committee.



RECENT AMENDMENTS TO THE RULES ON FIDUCIARY APPOINTMENTS

Part 36 of the Rules of the Chief Judge governs certain fiduciary appointments, such as a guardian or receiver. Among other things, Part 36 limits the number of appointments that any individual may receive in a 12-month period, and it requires the judge to make secondary appointments, such as counsel, rather than delegate such authority to the receiver.

In the wake of a December 2001 report to the Chief Judge by the court system's Special Inspector General for Fiduciary Appointments, and a report by the Chief Judge's Commission on Fiduciary Appointments, Part 36 was recently

amended to make the appointment constraints more stringent.

The new provisions, which were approved by the Court of Appeals and supported by the Presiding Justices of the four Appellate Divisions, *inter alia* disqualify former judges from receiving appointments within their former jurisdictions for two years after leaving the bench. They also disqualify any lawyer who earned more than \$50,000 from court appointments in a single year from receiving any new appointments in the following year.

The new provisions include a requirement that a law firm whose members,

associates and employees have had a total of \$50,000 or more in compensation approved in a single calendar year, report such amounts to the Chief Administrator of the Courts.

The new provisions also specify a range of individuals who would be disqualified from fiduciary appointments, as follows:

- A judge or the relative of a judge within six degrees of relation by blood or marriage (*e.g.* a judge's mother or brother-in-law, son or daughter-in-law) shall not be appointed.
- A judicial hearing officer shall not be appointed in a county where he or she serves.
- A full-time court employee at salary grade JG24 or above shall not be appointed. The spouse, sibling, parent or child of such employee shall not be appointed.
- A chair or executive director (or the equivalent) of a state or county political party shall not be appointed. The spouse, sibling, parent or child of such official, or members, associates, counsel and employees of such official's law firm, shall not be appointed. The prohibition would run while the individual holds such position and for two years after vacating such position.
- A person who served as campaign chair, coordinator, manager, treasurer or finance chair for a candidate for judicial office, shall not be appointed by the judge for whom that service was

performed. The spouse, sibling, parent or child of that person, or anyone associated with the law firm of that person, shall not be appointed. The prohibition would run for two years following the judicial election.

- A disbarred or suspended attorney shall not be appointed.
- A convicted felon shall not be appointed, and a person sentenced for a misdemeanor within five years may not be appointed, unless the Chief Administrator has issued a waiver upon application, or the person has received a certificate of relief from disabilities.
- No receiver or guardian shall be appointed as his or her own counsel, and no person associated with that receiver's or guardian's law firm may be appointed as counsel to that receiver, unless there is a compelling reason to do so.
- No attorney for an alleged incapacitated person shall be appointed as guardian to that person, or as counsel to the guardian of that person.
- No person serving as a court evaluator shall be appointed as guardian to the incapacitated person except under extenuating circumstances that are set forth in writing and filed with the fiduciary clerk as the time of the appointment.



THE COMMISSION'S BUDGET

In numerous recent Annual Reports, we have called attention in this space to the fact that the Commission has been persistently and acutely underfunded and

understaffed, for at least a decade. Our current fiscal year budget of \$2.23 million supports a staff of 25 full-time and two part-time employees, whereas our 1978-79 appropriation of \$1.64 million supported a full-time staff of 63, including 21 lawyers and 18 investigators.

In the current economic environment, in which state government agencies in New York and throughout the country are making significant sacrifices, the Governor's Proposed Budget for FY 2003-04 essentially calls for status quo financing of the Commission, with no new funding.

Responsible Budget Management

Since its inception 28 years ago, the Commission has managed its finances with extraordinary care. In periods of relative plenty, we kept our budget small; in previous 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.

Our record of fiscal prudence was underscored by an exhaustive audit in 1989 by the State Comptroller, which found that the Commission's finances were in order, that our budget practices were all consistent with state policies and rules, and that no changes in our fiscal practices were recommended.

The State Comptroller conducted a follow-up review over a two-month period in 2002, with the same excellent result. The Commission's finances were examined for cash management and accounting controls, payroll management and review, purchasing policies and procedures, and equipment purchasing and management. Although the Commission is not a revenue-producing agency, the Comptroller reviewed our procedures and remittal practices for such minor financial transactions as fulfilling requests for photocopying public records. In all categories, the Commission received the highest possible rating.

A comparative breakdown of the Commission's budget and staff over the years appears on the following page in chart form.

Budget Figures, 1978 to Present

FISCAL YEAR	ANNUAL BUDGET	COMPLAINTS RECEIVED†	NEW INVESTIGATIONS	STAFF ATTORNEYS*	INVESTIGATORS ON STAFF	TOTAL STAFF
1978-79	\$1,644,000	641	170	21	18 f/t	63
≈	≈	≈	≈	≈	≈	≈
1988-89	\$2,224,000	1109	200	9	12 f/t, 2 p/t	41
1989-90	\$2,211,500	1171	195	9	9 f/t, 2 p/t	41
1990-91	\$2,261,700	1184	212	9	8 f/t	37
1991-92	\$1,827,100	1207	197	8	7 f/t	32
1992-93	\$1,666,700	1452	180	8	6 f/t, 1 p/t	26
1993-94	\$1,645,000	1457	182	8	4 f/t, 1 p/t	26
1994-95	\$1,778,400	1438	208	8	4 f/t, 1 p/t	26
1995-96	\$1,584,100	1361	176	8	3 f/t, 1 p/t	21
1996-97	\$1,696,000	1490	192	8	2 f/t, 2 p/t	20
1997-98	\$1,736,500	1403	172	8	2 f/t, 2 p/t	20
1998-99	\$1,875,900	1451	215	9	6 f/t, 1 p/t	27**
1999-2000	\$1,947,500	1426	242	9	6 f/t, 1 p/t	27**
2000-01	\$1,911,800‡	1288	215	9	6 f/t, 1 p/t	27**
2001-02	\$2,113,300	1308	208	9	6 f/t, 1 p/t	27**
2002-03	\$2,230,000	1435	203	9	6 f/t, 1 p/t	27**
2003-04	\$2,266,000≠	--	--	9	6 f/t, 1 p/t	27**

* Number includes Clerk of the Commission, who does not investigate or litigate cases.

** Number includes two part-time staff.

‡ Cost-of-living allowances negotiated mid-year for all State employees resulted in an additional \$137,000 to cover such mandated costs.

† Complaint figures are calendar year (Jan 1 – Dec 31); Budget figures are fiscal year (Apr 1 – Mar 31).

≠ Proposed.



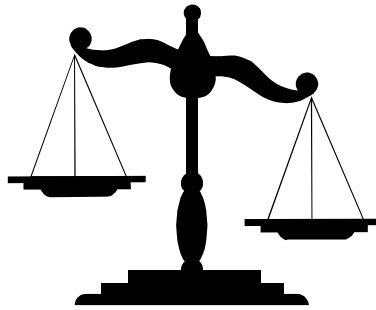
CONCLUSION

Public confidence in the high standards, integrity and impartiality of the judiciary, and in an independent disciplinary system that helps keep judges accountable for their conduct, is essential to the rule of law. The members of the New York State Commission on Judicial Conduct are confident that the Commission's work contributes to that ideal, to a heightened awareness of the appropriate standards of ethics incumbent on all judges, and to the fair and proper administration of justice.

Respectfully submitted,

HENRY T. BERGER, CHAIR
FRANCES A. CIARDULLO
STEPHEN R. COFFEY
LAWRENCE S. GOLDMAN
CHRISTINA HERNANDEZ
DANIEL F. LUCIANO
MARY HOLT MOORE
KAREN K. PETERS
ALAN J. POPE
TERRY JANE RUDERMAN

APPENDIX



Biographies of Commission Members and Attorneys
Roster of Referees Who Served in 2002
The Commission's Powers, Duties & History
Text of the Rules Governing Judicial Conduct
Text of 2002 Determinations
Statistical Analysis of Complaints



2003 Annual Report
New York State
Commission on Judicial Conduct

BIOGRAPHIES OF COMMISSION MEMBERS

There are 11 members of the Commission on Judicial Conduct. The Governor appoints four members, the Chief Judge of the Court of Appeals appoints three members, and each of the four leaders of the Legislature appoints one member.

The Governor's four appointees must include a judge or justice of the unified court system, an attorney, and two who are neither judges nor members of the bar. The Chief Judge's three appointees must all be judges; one must be a justice of the Appellate Division, one must be a town or village court justice, and one must be a judge other than on the Court of Appeals or Appellate Division. The leaders of the Legislature may appoint attorneys or non-attorneys, but they may not appoint judges.

Commission Member	Appointing Authority	Expiration of Term
Henry T. Berger, Esq., <i>Chair</i>	Senate Minority Leader	March 31, 2004
Hon. Frances A. Ciardullo	Chief Judge	March 31, 2005
Stephen R. Coffey, Esq.	Senate President Pro Tem	March 31, 2003
Lawrence S. Goldman, Esq.	Assembly Speaker	March 31, 2006
Christina Hernandez, MSW	Governor	March 31, 2006
Hon. Daniel F. Luciano	Governor	March 31, 2003
Mary Holt Moore	Governor	March 31, 2005
Hon. Karen K. Peters	Chief Judge	March 31, 2006
Alan J. Pope, Esq	Assembly Minority Leader	March 31, 2005
Hon. Terry Jane Ruderman	Chief Judge	March 31, 2004
Vacant	Governor	March 31, 2004

Biographies of the current Commission members appear on the following pages.

Henry T. Berger, Esq., *Chair of the Commission*, is a graduate of Lehigh University and New York University School of Law. He is in private practice in New York City, concentrating in labor law and election law. He is a member of the New York State Bar Association and the Association of the Bar of the City of New York, where he chairs the Special Committee on Election Law. Mr. Berger served as a member of the New York City Council in 1977.

Honorable Frances A. Ciardullo received her B.A. from Cornell University and her J.D. from Syracuse University College of Law, where she was an Editor on the Law Review. She serves part-time as the Schroepfel Town Justice in Oswego County. She has practiced health law for over 20 years, first as a partner in the law firm of Costello, Cooney & Fearon, LLP and presently as staff counsel with the firm of Fager & Amsler. Justice Ciardullo has served as an Adjunct Professor in Health Law for the Syracuse University College of Law, and has served on the teaching faculty for many educational institutions, including the New School for Social Research, Graduate School of Management in the Master's Degree Program in Health Care Administration, the State University of New York Health Science Center, and the Institute for Health Care Ethics in Syracuse, New York. She is a member of the teaching faculty for the New York State Office of Court Administration certification programs for town and village justices throughout the State. Justice Ciardullo is a past president of the Central New York Women's Bar Association and serves on the Board of Visitors of the Syracuse University College of Law.

Stephen R. Coffey, Esq., is a graduate of Siena College and the Albany Law School at Union University. He is a partner in the law firm of O'Connell and Aronowitz in Albany. He was an Assistant District Attorney in Albany County from 1971-75, serving as Chief Felony Prosecutor in 1974-75. He has also been appointed as a Special Prosecutor in Fulton and Albany Counties. Mr. Coffey is a member of the New York State Bar Association, where he serves on the Criminal Justice Section Executive Committee and lectures on Criminal and Civil Trial Practice, the Albany County Bar Association, the New York State Trial Lawyers Association, the New York State Defenders Association, and the Association of Trial Lawyers of America.

Lawrence S. Goldman, Esq. is a graduate of Brandeis University and Harvard Law School. He is in private practice in New York City, concentrating in white-collar criminal defense. 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 President 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 received the outstanding criminal law practitioner awards of the National Association of Criminal Defense Lawyers, 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.

Christina Hernandez, MSW, is a Board Member of the New York State Crime Victims Board, appointed by Governor George E. Pataki in 1995 and again in 2001. She received a Bachelor of Arts from Buffalo State College, a Masters in Social Work Management from the School of Social Welfare, State University of New York at Albany and a Certificate of Graduate Study in Women and Public Policy from the Rockefeller College School of Public Affairs and Policy, State University of New York at Albany. At present she is in the doctoral program at the School of Social Welfare, pursuing a PhD in Social Work. Ms. Hernandez is a former Fellow of the Center for Women In Government. Ms. Hernandez served as a Member of the New York State Commission on Domestic Violence Fatalities and the New York State Police Minority Recruitment Task Force. A native of New York City, she now resides in the Capital Region.

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, as well as a Delegate to the House of Delegates of the New York State Bar Association. Justice Luciano is Chair of the Executive Committee 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 President, 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.

Mary Holt Moore received her B.A. in Classics and the Humanities from Hunter College, her M.A. in Education from the College of New Rochelle, and she attended the Columbia University School of Library Science. She is retired from the New York City Board of Education, where she was named Teacher of the Year by the New York City High School Division of Special Education in 1992. Ms. Moore is active in numerous Irish American organizations and was elected Grand Marshal of the New York City St. Patrick's Day Parade in 1991. Ms. Moore is a member of the Community Advisory Committee of Our Lady of Mercy Hospital. She is a life-long resident of the Bronx, residing with her husband of 50 years, Thomas A. Moore, Deputy Chief of the Fire Department of New York (Retired). She is the mother of eight children and the grandmother of 19.

Honorable Karen K. Peters received her B.A. from George Washington University (*cum laude*) and her J.D. from New York University (*cum laude*; Order of the Coif). From 1973 to 1979 she was engaged in the private practice of law in Ulster County, served as an Assistant District Attorney in Dutchess County and was an Assistant Professor at the State University of New York at New Paltz, where she developed curricula and taught courses in the area of criminal law, gender discrimination and the law, and civil rights and civil liberties. In 1979 she was selected as the first counsel to the newly created New York State Division on Alcoholism and Alcohol Abuse and remained counsel until 1983. In 1983 she was the Director of the State Assembly Government Operations Committee. Elected to the bench in 1983, she remained Family Court Judge for the County of Ulster until 1992, when she became the first woman elected to the Supreme Court in the Third Department. Justice Peters was appointed to the Appellate Division, Third Department, by Governor Mario M. Cuomo on February 3, 1994. Justice Peters has served as Chairperson of the Gender Bias Committee of the Third Judicial District, and on numerous State Bar Committees, including the New York State Bar Association Special Committee on Alcoholism and Drug Abuse, and the New York State Bar Association Special Committee on Procedures for Judicial Discipline. Throughout her career, Justice Peters has taught and lectured extensively in the areas of Family Law, Judicial Education and Administration, Criminal Law, Appellate Practice and Alcohol and the Law.

Alan J. Pope, Esq. is a graduate of the Clarkson College of Technology (BSCEE, *cum laude*, 1976) and the Albany Law School (J.D. 1979). He is a member of the Broome County Bar Association, where he was formerly on the Board of Directors and currently 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 Construction Industry Forum Committee. Mr.

Pope is a member of Binghamton University's Harpur Forum, Broome County Chamber of Commerce, and the Hidy Ochiai Educational Karate Board. Mr. Pope is a past member of the American Society of Civil Engineers and the Broome County Environmental Management Council. Mr. Pope has been a panel speaker for the Broome County Bar Association CLE in 2002 and for Lorman Institute seminars on Construction Liens and Bonds from 1998 to 2002.

Honorable Terry Jane Ruderman graduated *cum laude* from Pace University School of Law. She also holds a Ph. D. in History from the Graduate Center of the City University of New York and Masters Degrees from City College and Cornell University. In 1995, Judge Ruderman was appointed to the Court of Claims and is assigned to the White Plains district. Previously, she served as an Assistant District Attorney and a Deputy County Attorney in Westchester County. Later, she was in private practice. At the time of her appointment to the bench, Judge Ruderman was the Principal Law Clerk to a Supreme Court Justice. Judge Ruderman is a member of the New York State Committee on Women in the Courts, Chair of the Gender Fairness Committee for the Ninth Judicial District and has served on the Ninth Judicial District Task Force on Reducing Civil Litigation Cost and Delay. She is also First Vice President of the New York State Association of Women Judges, Secretary of the Judicial Section of the New York State Bar Association, a board member and former Vice President of the Westchester Women's Bar Association, Vice President of the White Plains Bar Association and a former State Director of the New York State Women's Bar Association. Judge Ruderman also sits on the Alumni Board of Pace University School of Law and the Cornell University President's Council of Cornell Women.

In Memoriam

Honorable Frederick M. Marshall, *Vice Chair of the Commission*, died on September 10, 2002. He attended the University of Buffalo and was a graduate of its law school. He served as Chief Trial Assistant in the Erie County District Attorney's office, Senior Erie County Court Judge, President of the New York State County Judges Association, Supreme Court Justice of the State of New York, and President of the State Association of Supreme Court Justices. Justice Marshall served as Administrative Judge of the Eighth Judicial District and Administrative Justice of the Narcotics Court in the Fourth Judicial Department. He was 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 was 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 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 raised three sons and lived in Orchard Park, New York, and Bradenton, Florida.

BIOGRAPHIES OF 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 was a Fulbright Scholar to Armenia in 1994, teaching graduate courses and lecturing on constitutional law and ethics at the American University of Armenia and Yerevan State University. He serves on the Government Ethics Committee of the Association of the Bar of the City of New York, and has previously served on its Committees on Professional Discipline and Professional and Judicial Ethics. He is on the Board of Directors of the Civic Education Project and served on the Board of Trustees of the United Nations International School from 1999-2001.

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 served as the advisor to the Sutherland High School Mock Trial Team for eight years. He is the Vice President and a past Treasurer of the Pittsford Golden Lions Football Club, Inc. He is an assistant director and coach for Pittsford Community Lacrosse. He is an active member of the Pittsford Mustangs Soccer Club, Inc.

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 has been a judge of the Albany Law School moot court competitions and a member of Albany County Big Brothers/Big Sisters.

Vickie Ma, *Staff Attorney*, is a graduate of the University of Wisconsin at Madison and Albany Law School, where she was Associate Editor of the Law Review. Prior to joining the Commission staff, she served as an Assistant District Attorney in Kings County.

Leena D. Mankad, *Staff Attorney*, is a *cum laude* graduate of Union College and the Syracuse University College of Law, where she was the Associate Director of the Moot Court Honor Society, a Teaching Assistant for first-year students, and Student Prosecutor for the College of Law. Prior to joining the Commission staff, she was in private practice as a civil litigation defense attorney. She is a member of the Order of Barristers and the New York State Bar Association.

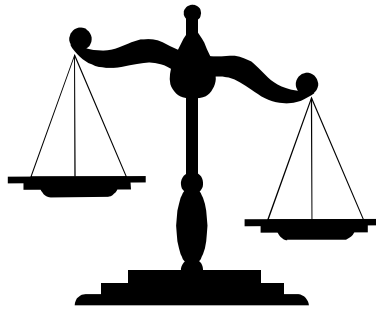
Clerk of the Commission

Jean M. Savanyu, *Clerk of the Commission*, is a graduate of Smith College and the Fordham University School of Law (*cum laude*). She joined the Commission's staff in 1977 and served as Senior Attorney until being appointed Clerk of the Commission in 2000. Prior to joining the Commission, she worked as an editor and writer. Ms. Savanyu teaches in the paralegal program at Marymount Manhattan College.

REFEREES WHO SERVED IN 2002

Referee	City	County
Mark S. Arisohn, Esq.	New York	New York
William I. Aronwald, Esq.	White Plains	Westchester
Roger W. Avery, Esq.	Rochester	Monroe
William C. Banks, Esq.	Syracuse	Onondaga
Joseph A. Barrette, Esq.	Syracuse	Onondaga
Patrick J. Berrigan, Esq.	Niagara Falls	Niagara
A. Vincent Buzard, Esq.	Rochester	Monroe
Jay C. Carlisle, Esq.	White Plains	Westchester
Bruno Colapietro, Esq.	Binghamton	Broome
Robert L. Ellis, Esq.	New York	New York
Vincent D. Farrell, Esq.	Mineola	Nassau
Paul A. Feigenbaum, Esq.	Albany	Albany
David M. Garber, Esq.	Syracuse	Onondaga
Douglas S. Gates, Esq.	Rochester	Monroe
Thomas F. Gleason, Esq.	Albany	Albany
Victor J. Hershdorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
Hon. Janet A. Johnson	White Plains	Westchester
H. Wayne Judge, Esq.	Glens Falls	Warren
C. Bruce Lawrence, Esq.	Rochester	Monroe
Sherman F. Levey, Esq.	Rochester	Monroe
Hon. Herbert J. Lipp	Mineola	Nassau
Richard M. Maltz, Esq.	New York	New York
James C. Moore, Esq.	Rochester	Monroe
Vincent O'Neil, Esq.	Syracuse	Onondaga
Philip C. Pinsky, Esq.	Syracuse	Onondaga
John J. Poklemba, Esq.	Albany	Albany
Peter Preiser, Esq.	Schenectady	Schenectady
Roger W. Robinson, Esq.	New York	New York
Laurie Shanks, Esq.	Albany	Albany
Hon. Felice K. Shea	New York	New York
Milton Sherman, Esq.	New York	New York
Shirley A. Siegel, Esq.	New York	New York
Hon. Richard D. Simons	Rome	Oneida
Robert S. Smith, Esq.	New York	New York
Robert H. Straus, Esq.	New York	Kings
Justin L. Vigdor, Esq.	Rochester	Monroe
Nancy F. Wechsler, Esq.	New York	New York
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

**The Commission's Powers,
Duties & History**



2003 Annual Report
New York State
Commission on Judicial Conduct



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

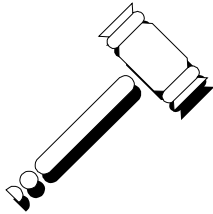
The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of judicial misconduct in New York State. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding their right to decide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

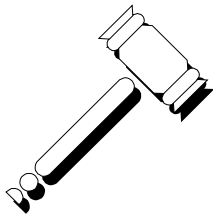
The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one by each of the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and 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 (1997-2001)
Hon. Richard J. Cardamone (1978-81)
Hon. Frances A. Ciardullo (2001-present)
Hon. Carmen Beauchamp Ciparick (1985-93)
E. Garrett Cleary (1981-96)
Stephen R. Coffey (1995-present)
Howard Coughlin (1974-76)
Mary Ann Crotty (1994-1998)
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)
Christina Hernandez (1999-present)

Hon. James D. Hopkins (1974-76)
 Hon. Daniel W. Joy (1998-2000)
 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 (1996-2002)
 Hon. Ann T. Mikoll (1974-78)
 Mary Holt Moore (2002-present)
 Hon. Juanita Bing Newton (1994-1999)
 Hon. William J. Ostrowski (1982-89)
 Hon. Karen K. Peters (2000-present)
 Alan J. Pope (1997-present)
 *Lillemor T. Robb (1974-88)
 Hon. Isaac Rubin (1979-90)
 Hon. Terry Jane Ruderman (1999-present)
 *Hon. Eugene W. Salisbury (1989-2001)
 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 (1990-1998)
 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.

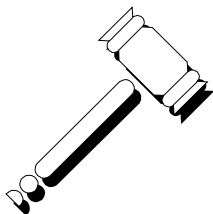
The types of complaints that may be investigated by the Commission include improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off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

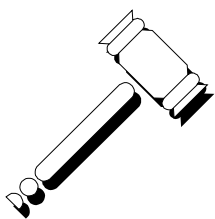
After the Commission authorizes an investigation, the Administrator assigns the complaint to a staff attorney, who works with investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge may be asked to respond in writing to the allegations. In some instances, the Commission requires the appearance of the judge to testify during the course of the investigation. The judge's testimony is under oath, and a Commission member or referee designated by the Commission 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.



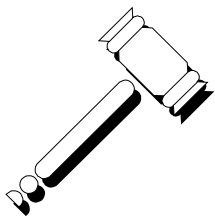
Temporary State Commission on Judicial Conduct

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 that resulted in the following:

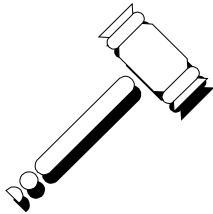
- 15 judges were publicly censured;
- 40 judges were privately admonished;
- 17 judges were issued confidential letters of suggestion and recommendation.

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.

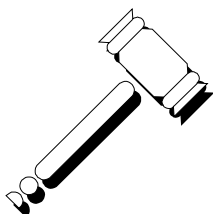


Continuation from 1978 to 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions

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 that 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

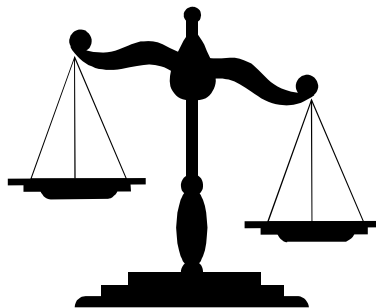
Since January 1975, when the temporary Commission commenced operations, 29,749 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 23,888 (80%) were dismissed upon initial review or after a preliminary review and inquiry, and 5,861 investigations were authorized. Of the 5,861 investigations authorized, the following dispositions have been made through December 31, 2002:

- 819 complaints involving 642 judges resulted in disciplinary action. (See details below and on the following page.)
- 1224 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1134, 64 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 471 complaints involving 337 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 383 complaints were closed upon vacancy of office by the judge other than by resignation.
- 2772 complaints were dismissed without action after investigation.
- 192 complaints are pending.

Of the 819 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.)

- 142 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);
- 244 judges were censured publicly;
- 192 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission.

**Text of the Rules
Governing Judicial Conduct**



**2003 Annual Report
New York State
Commission on Judicial Conduct**

THE RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR PART 100

	Preamble
§100.0	Terminology
§100.1	A Judge Shall Uphold the Integrity and Independence of the Judiciary
§100.2	A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities
§100.3	A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently
§100.4	A Judge Shall so Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations
§100.5	A Judge or Candidate for Elective Judicial Office Shall Refrain from Inappropriate Political Activity
§100.6	Application of the Rules of 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 or-

ganization 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. 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 Ad-

ministrator of the Courts, which may be given upon a showing of good cause.

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

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

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

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

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

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

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

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

- (i) is a party to the proceeding;
- (ii) is an officer, director or trustee of a party;
- (iii) has an interest that could be substantially affected by the proceeding;
- (iv) is likely to be a material witness in the proceeding;

(e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

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

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

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

§100.4. A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS.

(A) Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) detract from the dignity of judicial office; or
- (3) interfere with the proper performance of judicial duties and are not incompatible with judicial office.

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

(C) Governmental, civic, or charitable activities. (1) A full-time judge shall not ap-

pear at a public hearing before an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

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

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

(3) A judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Part.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from this paragraph during the period of such interim or temporary appointment.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the

judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

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

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

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

(c) ordinary social hospitality;

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

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

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

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

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

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

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

(3) Any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from paragraphs (1) and (2) during the period of such interim or temporary appointment.

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

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

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

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

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

(c) No full-time judge shall solicit or receive compensation for extra-judicial activities performed for or on behalf of: (1) New York State, its political subdivisions or any office or agency thereof; (2) a school, college or university that is financially supported primarily by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for a lecture or for teaching a regular

course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties; or (3) any private legal aid bureau or society designed to represent indigents in accordance with Article 18-B of the County Law.

(2) Public reports. A full-time judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

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

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

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

prove 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 fundraising 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.

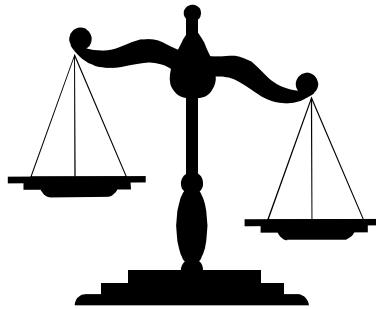
(C) Administrative law judges. The provisions of this Part are not applicable to ad-

ministrative 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.

**Text of the Commission's
2002 Determinations**



**2003 Annual Report
New York State
Commission on Judicial Conduct**

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **VINCENT G. BRADLEY**, a Justice of the Supreme Court, 3rd Judicial District, Ulster County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair¹
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Joseph D. Hill for Respondent

The respondent, Vincent G. Bradley, a Justice of the Supreme Court, Ulster County, was served with a Formal Written Complaint dated December 3, 2001, containing two charges. Respondent filed an answer dated January 7, 2002.

On June 20, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On June 20, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Supreme Court since 1981.

As to Charge I of the Formal Written Complaint:

2. On or about May 25, 2000, the parties in Nosonowitz v. Nosonowitz appeared before respondent for trial in an action for divorce. Prior proceedings between the parties had been held before another judge, and the wife had been represented in the prior proceedings by attorney Martin T. Johnson, but was represented by a new attorney in the proceedings before respondent. Respondent did not know Mr. Johnson and he had never appeared before respondent.

¹ Judge Marshall died on September 10, 2002. The vote in this case was taken on June 20, 2002.

3. On May 25, 2000, the parties and their attorneys agreed to a settlement of the matter and respondent held a discussion on the record with regard to the settlement. During the discussion on the record, respondent stated that the attorneys' fees would have to be paid according to the ratio of the parties' incomes, and then stated of the wife's former attorney:

Now, granted, she has been overcharged by some clam Johnson. Who is he? I want to get a shot at him someday. Where is he?

4. The husband's attorney responded that Mr. Johnson was from Pearl River and had been president of the matrimonial section, and respondent interrupted and said:

I'm putting this on the record. Mr. Johnson is an absolute thief, and you can tell him I said so and you can tell him my phone number and my address. But anyway... And he stole from you, too, because you're going to have to pay a chunk of it. I hope the next time you see him, tell him what I think of him. And you can add your own. So go in there and resolve it.

5. The matter of Mr. Johnson's legal fee was not directly before respondent, except insofar as it constituted a debt which affected the wife's assets, and there was no claim by either of the parties in the proceeding before respondent that the fee was excessive. In March 1999, the wife had entered into a settlement agreement with Mr. Johnson after an arbitration and she had agreed to pay to him a legal fee in the reduced amount of \$17,000.

6. In June 2000, a motion by Mr. Johnson to confirm the arbitration award of his legal fee in the Nosonowitz case was assigned to respondent. In or about August 2000, respondent was assigned to another matrimonial action, Owen v. Owen, in which Mr. Johnson's firm, Johnson and Cohen, appeared as counsel. Respondent neither disclosed to Mr. Johnson or his partner respondent's earlier remarks concerning Mr. Johnson, nor offered to disqualify himself from either matter. It was not until May 2001, after Mr. Johnson became aware of respondent's remarks and complained to the Commission, that respondent disqualified himself from Nosonowitz and Owen.

7. Respondent asserts that he did not intend to personally denigrate Mr. Johnson and that his remarks were intended only figuratively, to convey his impression that the legal fee was exorbitant in relation to the size of the marital estate.

As to Charge II of the Formal Written Complaint:

8. Respondent made the remarks concerning Mr. Johnson, as set forth under Charge I above, notwithstanding that respondent had been cautioned by the Commission, by letter dated May 2, 1996, to refrain from improper public comment and to avoid impropriety, after respondent engaged in the following conduct:

(a) On or about June 21, 1995, respondent spoke to a reporter for the Kingston Daily Freeman newspaper regarding Town of Esopus v. George Kakoullas and Ram of Ulster, Inc., a/k/a The Club, a proposed settlement agreement over which respondent had just presided on June 15, 1995. Respondent stated to the reporter that he was "outraged" at how Town of Esopus

officials had allegedly misrepresented respondent's role in the settlement agreement in the press; referred to the officials as "bald-faced liars"; and stated that the town supervisor had "backed out" of the proposed settlement because of pressure from constituents; and

(b) On or about June 28, 1995, in disqualifying himself from an Order to Show Cause in Town of Esopus v. George Kakoullas and Ram of Ulster, Inc., a/k/a The Club, respondent stated from the bench that the town laws had been changed to accommodate a town official (in an unrelated matter) and suggested that the press "look into" this. Respondent's comments were gratuitous and had nothing to do with the subject matter of the Order to Show Cause. Respondent's comments were intended to retaliate for respondent's perception that town officials had untruthfully characterized respondent's role in the Kakoullas case in the press.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(3), 100.3(B)(6), 100.3(B)(8) and 100.3(E)(1) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent's gratuitous, insulting comments in open court concerning a matrimonial litigant's former attorney (who was not even present at the time) were improper. Referring to the attorneys' fees in the matter, respondent called the attorney "a clam" and "a thief" who "stole" from the parties. Such comments violated well-established ethical standards which require a judge to be dignified and courteous in performing judicial duties (Section 100.3[B][3] of the Rules Governing Judicial Conduct).

Respondent's intemperate comments -- particularly his statement that he would like to "get a shot" at the attorney some day -- also conveyed the appearance that he was biased against the attorney. A judge's disqualification is mandated when the judge's impartiality can reasonably be questioned (Section 100.3[C] of the Rules). Notwithstanding the ethical mandates, respondent failed to promptly recuse himself when the attorney appeared before him shortly afterwards in two matters, one of which was a motion to confirm the attorney's fee in the same case; nor did respondent disclose his recent, prejudicial remarks. Not until months later, after the attorney learned of respondent's comments and made a complaint to the Commission, did respondent disqualify himself in the matters.

Respondent's comments in Nosonowitz are similar in tenor to those for which he was previously cautioned. In the Kakoullas case, even after his statements to a reporter required his disqualification in the case, respondent made gratuitous, prejudicial comments concerning the parties from the bench. As a Supreme Court justice since 1981, respondent should recognize that such statements are inconsistent with the proper role of a judge.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Moore, Judge Luciano and Judge Ruderman concur.

Judge Peters did not participate.

Ms. Hernandez, Judge Marshall and Mr. Pope were not present.

Dated: October 1, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN B. CANARY**, a Justice of the Mayfield Town Court, Fulton County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Edward F. Skoda for Respondent

The respondent, John B. Canary, a Justice of the Mayfield Town Court, Fulton County, was served with a Formal Written Complaint dated November 30, 2001, containing two charges. Respondent filed an answer dated January 10, 2002.

By Order dated January 24, 2002, the Commission designated Michael Hutter, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 16, 18 and 23, 2002, in Fonda, New York. The referee filed his report dated September 19, 2002, with the Commission.

The parties submitted briefs with respect to the referee's report. Oral argument was waived. On November 8, 2002, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Mayfield Town Court, Fulton County, since 1987. He is not an attorney. He has successfully completed all required judicial training sessions.

As to Charge I of the Formal Written Complaint:

2. Respondent has three children, the oldest of whom is Timothy Canary, who was born in 1971 and lives in Gloversville, Fulton County. Timothy Canary has a criminal record, which includes convictions for Petit Larceny, Grand Larceny and Driving While Impaired. He has also received traffic tickets, including for Speeding.

3. On November 5, 1999, Matthew Weise, a Fulton County Deputy Sheriff, issued traffic tickets to Timothy Canary for Speeding (92 miles per hour in a 55-mile per hour zone) on State Highway 29, and for a broken speedometer. The tickets were returnable in the Town of

Mayfield. Deputy Weise issued the Speeding ticket based on his visual observation of Mr. Canary's vehicle and on radar confirmation, and issued the ticket for a broken speedometer based on Mr. Canary's oral admission to him. The tickets were issued in the driveway of Mr. Canary's home, about a mile from where Deputy Weise had initially observed Mr. Canary's vehicle. With his patrol car's flashing lights on, Deputy Weise had followed Mr. Canary from that location to the driveway.

4. When Deputy Weise issued the tickets, he knew that respondent was Mr. Canary's father. Mr. Canary said: "Go ahead and write it. I know too many people in too many powerful positions."

5. A day or two after the tickets were issued, respondent, whose son had told him about the tickets, telephoned Deputy Weise at the Fulton County Sheriff's Department and spoke to him about the tickets. Respondent said that his son had told him that he (Timothy Canary) was going slower than the cited speed, and that respondent believed him. Respondent raised the possibility that Deputy Weise had erred as to the speed of his son's vehicle. An argument ensued when Deputy Weise said that he had confirmed a visual estimate of the speed with radar, and respondent replied in a loud voice, "You can't estimate speeds in the dark" and referred to many cases in his own court where the visual estimates of the speed had been proven faulty. Deputy Weise then handed the telephone to his superior, Sergeant Michael Franko, who spoke to respondent.

6. Respondent told Sergeant Franko that respondent was "not happy" about the ticket issued to his son, that he did not believe the vehicle could travel that fast and that the ticket was ridiculous. Sergeant Franko replied that respondent had been the judge on many of the Sheriff's Department's cases and had never had a problem before and that this case should not be any different. He then told respondent that there was nothing he could do about the ticket and that he would notify his superiors of respondent's displeasure. Respondent said something to the effect that they were always picking on his son.

7. Subsequently, after the other Mayfield Town Justice recused himself with respect to the matter, the charges were transferred to the Broadalbin Town Court. Timothy Canary pleaded guilty to the Broken Speedometer charge in satisfaction of both pending charges with the consent of the Fulton County District Attorney's office.

8. On April 24, 2001, on Route 29 in the Town of Mayfield, Robert Stemmler, a Fulton County Deputy Sheriff, stopped Timothy Canary, who was driving a pickup truck loaded with brush. Respondent had accumulated the brush from yard work he was doing as a favor for a friend, and Timothy Canary was disposing of it. Deputy Stemmler had stopped the truck because the brush had fallen from the truck onto Route 29, creating a traffic obstruction. Deputy Stemmler, who cleaned up the obstruction, wanted the load of brush better secured. Deputy Stemmler did not intend to issue any tickets when he stopped the truck.

9. Upon stopping the truck, Deputy Stemmler asked the driver for his license and registration. Deputy Stemmler realized the driver, Timothy Canary, was respondent's son. He asked Mr. Canary to secure the load of brush and indicated that he would not issue a ticket

because Mr. Canary was the son of the town justice. After some further talk between the two, and after Mr. Canary told Deputy Stemmler that the load of brush was his father's, Mr. Canary cursed Deputy Stemmler and flung the door to the truck open, striking Deputy Stemmler and knocking him into the highway.

10. Deputy Stemmler went back to his patrol car and called his dispatcher, requesting that another patrol car be sent and that respondent be called to take care of the load of brush. Deputy Stemmler then went back to the truck and arrested Mr. Canary, who was standing outside the truck, based on his striking and pushing Deputy Stemmler. Mr. Canary became physically abusive towards Deputy Stemmler and ran away from him. To stop and control him, Deputy Stemmler jumped on Mr. Canary's back and used pepper spray. Deputy Stemmler was unable to get both handcuffs on Mr. Canary, who outweighed the Deputy by 70 or 80 pounds, until an off-duty police officer appeared and assisted.

11. Sergeant Franko, who arrived at the scene, observed Mr. Canary on the ground in front of the truck. Sergeant Franko talked with Deputy Stemmler. Approximately five to ten minutes later, respondent arrived and asked Sergeant Franko what had happened. Sergeant Franko told respondent what Deputy Stemmler had said.

12. Respondent walked over to Deputy Stemmler and confronted him. In close physical contact with Deputy Stemmler, respondent pushed Deputy Stemmler, swore at him and shouted, "What the hell happened here? There isn't a mark on you." Respondent further said to the Deputy, "I've got your number now," that any tickets they wrote would be "thrown out," that this was "bullshit" and that they were always picking on his kid.

13. Sergeant Franko intervened and told respondent to "stop," implying that arrests might be in order if respondent did not stop. Respondent walked away and Deputy Stemmler was escorted away by an off-duty Deputy Sheriff.

14. Timothy Canary was taken by ambulance to a hospital, escorted by Sergeant Franko. At the hospital, respondent asked Sergeant Franko if his son was going to be arrested and when Sergeant Franko said, "Yes," respondent objected and said, "You can't do that."

15. After being treated at the hospital, Timothy Canary was escorted by Sergeant Franko to the Fulton County Sheriff's Department's booking room at the station. Respondent was permitted to remain at his request. Timothy Canary was charged with Assault, Second Degree on a police officer, Resisting Arrest, and two counts of Unsecured Load.

16. After the booking procedures were completed, respondent asked Sergeant Franko, when they were alone together, if his son's attorney had spoken to Sergeant Franko about keeping the arrest out of the newspapers. When Sergeant Franko said, "No," respondent said, "Then, I am officially requesting that you keep it out of the paper." Sergeant Franko replied that the Sheriff's Department would be criticized if they were to keep the arrest of the son of a town justice out of the paper, to which respondent said, "Things get squashed all the time." Arrests would be kept out of the papers if they were not recorded on the Sheriff's Department's blotter, where they were usually recorded, thereby preventing the media from acquiring information

about arrests. When Sergeant Franko refused respondent's request, respondent left angrily.

17. The charges against Timothy Canary were prosecuted by the Saratoga County District Attorney's Office. Mr. Canary pleaded guilty to Resisting Arrest.

18. After Deputy Stemmler submitted a complaint to the Commission concerning respondent's conduct, the Commission wrote to respondent on June 20, 2001, requesting his appearance to give testimony concerning the allegations. The Commission's letter enclosed a copy of the complaint of Deputy Stemmler, which included his and the other officers' official reports of the incident on April 24, 2001.

19. Upon receipt of the Commission's letter, respondent telephoned Fulton County Undersheriff Thomas Daggett. Respondent told the undersheriff that he had just received some paperwork from the Commission and accused Sergeant Franko and Deputy Stemmler of lying under oath in their reports.

As to Charge II of the Formal Written Complaint:

20. Elder Douglas Kampfer and his wife, Barbara Kampfer, reside on Kunkle Point Road in the Town of Mayfield. Elder Kampfer is a Mormon minister, a Melchizedek priest in the Church of Jesus Christ of Latter-Day Saints. He holds himself out as a paralegal. He has no degree or schooling as a paralegal.

21. On February 9, 2001, a vehicle ran over and killed the Kampfers' pet geese on or near Kunkle Point Road. After ascertaining with much difficulty from the State Police the identity of the driver of the vehicle, Kathy Baker, Elder Kampfer spoke with a State Trooper about bringing a criminal charge against Ms. Baker under New York's animal cruelty law, known as Buster's Law. The trooper said that since he did not know much about the law, he would have to speak with respondent about the matter.

22. Subsequently, the trooper spoke with respondent, and respondent told the trooper that although he did not know much about the law, he did not think that it applied to barnyard animals, such as geese. Respondent did not instruct the trooper not to file any charges against Kathy Baker or otherwise suggest that such charges should not be filed.

23. Afterwards, the trooper spoke with Elder Kampfer about his conversation with respondent.

24. No criminal charges were filed by Elder Kampfer or the trooper in connection with the death of the geese.

25. On February 12, 2001, Elder Kampfer contacted Sherill Gallup, the other Mayfield Town Justice, to obtain small claims forms so that he could commence a small claims action against Kathy Baker. Judge Gallup said that he did not have any forms and he referred Elder Kampfer to respondent.

26. Elder Kampfer drove to respondent's farm to obtain the forms. Respondent's

wife, who is his court clerk, gave the forms to Elder Kampfer. Elder Kampfer filled out the forms, asserting a claim against Kathy Baker in the amount of \$85.00 for her destruction of the geese, and gave the completed forms to respondent's wife for filing purposes, along with a check for \$10.00 for the filing fee.

27. On February 28, 2001, respondent wrote a letter to Elder Kampfer and his wife, stating that he was returning the small claims form and the filing fee to them, "due to a conflict of interest." Respondent believed that he could not preside impartially because, in connection with an earlier matter involving a daughter of the Kampfers, respondent had given a document to Mrs. Kampfer attesting to her presence in court, which respondent believed Mrs. Kampfer, or someone on her behalf, had altered, and respondent had sought unsuccessfully to have Mrs. Kampfer charged criminally for the alteration. Respondent had discussed this matter with OCA's Judicial Resource Center.

28. Elder Kampfer then contacted the Judicial Resource Center, inquiring how a judge could refuse to accept a small claims court filing as respondent had done. He was advised to send the small claims form and filing fee back to respondent, which he did. Subsequently, the Judicial Resource Center contacted respondent. Respondent then accepted the small claim for filing, as well as a counterclaim against the Kampfers, and scheduled both matters for trial on April 17, 2001.

29. On April 17, 2001, the hearing date set for the claim and counterclaim, the Kampfers appeared in court, but the defendant, Kathy Baker, did not. A few days earlier respondent had granted an adjournment at Ms. Baker's request due to her inability to appear because she would be out of town. Respondent did not notify the Kampfers of the adjournment.

30. On April 18, 2001, Elder Kampfer filed *pro se* for an action for a declaratory judgment in Supreme Court, seeking a declaration that, *inter alia*, respondent was not allowed to give an adjournment without notification to the other party.

31. Respondent then wrote a letter to Elder Kampfer, stating that he was recusing himself from hearing the small claims action because of the commencement against him of the declaratory judgment action. Respondent did not transfer the small claims action to the other Mayfield Town Justice. No further judicial action has been taken with respect to the action.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(3) and 100.3(B)(4) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above facts, and respondent's misconduct is established.

The record establishes that on two separate occasions respondent angrily intervened with police authorities in connection with the arrest of his son, abusing his judicial status in repeated attempts to have the charges dismissed.

With respect to the earlier incident, it was improper for respondent to call the arresting

officer and angrily dispute the traffic tickets issued to respondent's son. Stating that he was "not happy" about the tickets, respondent argued with the officer and his superior, labeling the charges "ridiculous" and asserting that the cited speed was inaccurate. Pointedly, and in a loud voice, respondent inappropriately invoked his judicial status, referring to cases in his court where the officer's estimate of the speed had been proved wrong. Although there was no explicit request for special consideration, the clear import of respondent's advocacy was that the charges should be dismissed. His conduct could only be perceived as intimidating and constituted an improper assertion of influence to advance private interests, in violation of Section 100.2(C) of the Rules Governing Judicial Conduct. See *Matter of LoRusso*, 1988 Ann Rep 195 (Comm'n on Jud Conduct, June 29, 1987); *Matter of Crosbie*, 1990 Ann Rep 86 (Comm'n on Jud Conduct, Sept 8, 1989).

In another episode, some 17 months later, respondent's intervention in his son's arrest produced an unseemly display of aggression and intimidation. As the referee found, respondent confronted and pushed the arresting officer, shouted and used profanity while questioning the officer's conduct, vowed that the charges would be "thrown out," and told the officer, "I've got your number now." At the hospital, respondent again objected to his son's arrest, and at the station house, he "officially" requested, as a "favor," that the arrest be kept out of the papers. Respondent's grossly injudicious behavior and blatant assertion of influence were indefensible. Throughout the entire incident, respondent, "although off the bench remained cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable to others" (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]), and his conduct seriously detracted from the dignity and integrity of the judiciary. Respondent's subsequent call to the Undersheriff to accuse the deputies of lying about the incident continued the pattern of intimidation, poor judgment and insensitivity to the high ethical standards required of judges.

Respondent's misconduct was not an isolated episode of poor judgment, but a series of acts which provided opportunities, regrettably not taken, for respondent to reflect upon his conduct and restrain himself from further misdeeds.

Respondent demonstrated bias in his handling of the Kampfner matter by returning the small claims form when it was initially filed, by adjourning the hearing without notifying the Kampfners, and by finally recusing himself without reassigning the case. As the referee concluded, respondent's conduct "amounted to an unjustified refusal to hear the claim on its merits due to his personal dislike of the Kampfners." Respondent's conduct violated the requirement that every judge must not only be impartial, but act "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*, 58 NY2d 286, 290-91 (1983). Such conduct undermines public confidence in the fair and impartial administration of justice.

Although respondent's lack of self-control and insensitivity to the appearances created by his actions are troubling, we have concluded that his misbehavior does not irretrievably damage his effectiveness on the bench. To the extent that his actions were prompted by concern for his son, especially in the second incident when he was called to the scene and observed his son's

distress, his parental instincts mitigate, but do not excuse, the serious lapses depicted in this record. *See Matter of Edwards*, 67 NY2d 153, 155 (1986).

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. Moore was not present.

Dated: December 26, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN E. CIPOLLA**, an Acting Justice of the Depew Village Court, Erie County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair²
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Duke, Holzman, Yaeger & Photiadis, LLP (By Gregory P. Photiadis) for Respondent

The respondent, John E. Cipolla, an Acting Justice of the Depew Village Court, Erie County, was served with a Formal Written Complaint dated July 31, 2001, containing three charges. Respondent filed an answer dated September 17, 2001.

By Order dated October 1, 2001, 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 January 28, 2002, in Buffalo, New York, and the referee filed his report dated April 30, 2002, with the Commission.

The parties submitted briefs with respect to the referee's report. On June 20, 2002, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been an acting Village Justice for the Village of Depew since March 1999.
2. Respondent has attended and successfully completed all required training sessions for justices, where he received instruction on the Rules Governing Judicial Conduct. He also attended the State Magistrates Association meeting in 1999, where he was provided additional instruction on the Rules Governing Judicial Conduct.
3. Respondent is a law school graduate who has not been admitted to the Bar of the State of New York.

² Judge Marshall died on September 10, 2002. The vote in this case was taken on June 20, 2002.

4. In December 1999, respondent was a principal and vice president of Bella Vista Group, Inc., a real estate business owned by respondent's family, where he was also regularly employed.

As to Charge I of the Formal Written Complaint:

5. On December 3, 1999, respondent and Michelle Spahn, who had been dating for a few months, went to dinner to celebrate respondent's birthday. They drove in Ms. Spahn's vehicle. After dinner, respondent drove them in Ms. Spahn's vehicle to a comedy club located in Amherst, New York.

6. While on the way to the comedy club, Ms. Spahn spoke with her sister by telephone, an act which irritated respondent, who told Ms. Spahn that she should pay more attention to him. Upon arriving at the comedy club, Ms. Spahn asked respondent to return the vehicle keys to her. Respondent refused to do so, and walked into the club.

7. Ms. Spahn refused to go into the showroom with respondent after he refused to return her keys. Inside the club she again asked respondent for the keys to her vehicle and he again refused. Respondent entered the showroom without Ms. Spahn.

8. Ms. Spahn complained to several employees of the club that respondent had refused to return her car keys and asked for help in getting the keys returned to her. Several employees became involved on Ms. Spahn's behalf, including the club's doorman, Kevin Schadel. When Mr. Schadel asked respondent, who was sitting alone in the showroom, to return Ms. Spahn's keys, respondent produced and displayed an identification card and badge that identified him as the Village of Depew acting judge. Respondent also stated that he was an acting judge.

9. In his verified answer, respondent stated that he "admits identifying himself as a judge in response to a request for identification." Mr. Schadel had not asked respondent for identification.

10. At the time he identified himself as a judge, respondent was aware of his obligation not to assert the prestige of judicial office in connection with a personal dispute.

11. Respondent refused to return Ms. Spahn's vehicle keys and stated that the vehicle was his. That statement was untrue.

12. In his verified answer, respondent stated that he refused to return Ms. Spahn's keys "because Ms. Spahn had been consuming alcohol and was, in respondent's opinion, unable to safely operate a motor vehicle." At the hearing, respondent retracted any claim that Ms. Spahn was unable to safely operate a motor vehicle due to the consumption of alcohol.

13. Respondent refused twice more to return Ms. Spahn's vehicle keys when Mr. Schadel asked him to do so. The third time Mr. Schadel asked him to return the keys, respondent indicated that he would come to the lobby to address the issue. Instead, respondent left the showroom by a back door and hurried to Ms. Spahn's vehicle.

14. Ms. Spahn ran after respondent into the parking lot and asked him again for the keys. Respondent again refused to return the keys and told Ms. Spahn to get into the car if she wanted a ride. Ms. Spahn did not get into the car, and respondent drove away without her.

15. As this incident was occurring, Ms. Spahn was becoming physically upset and began to cry. Club employees had suggested that Ms. Spahn call the Amherst police, and she agreed. The Amherst police arrived at the club after respondent had left.

16. Respondent drove Ms. Spahn's vehicle to his home, leaving the vehicle in the driveway with the keys in the vehicle. He then went to the home of a friend.

17. The Amherst police took Ms. Spahn to respondent's home, where she retrieved her car.

18. On or about December 6, 1999, Ms. Spahn filed a criminal complaint with the Amherst Police Department against respondent for the unauthorized use of her vehicle. The complaint was dismissed.

As to Charge II of the Formal Written Complaint:

19. On December 3, 1999, at about 11:30 AM, respondent sent a letter by facsimile transmission on the letterhead of Bella Vista Group, Inc., to the United States Drug Enforcement Administration ("DEA"). Respondent's letter sought to confirm Ms. Spahn's prior employment with DEA and that she had left the agency "on good terms," and requested any other relevant information as to Ms. Spahn's "character in accepting a high-level security position."

20. Respondent's December 3 letter to DEA falsely represented that Bella Vista Group had a job application from Ms. Spahn.

21. At the time that respondent sent the letter to DEA, respondent knew that Ms. Spahn had not applied for any position of employment with Bella Vista Group, Inc. Ms. Spahn had not asked respondent for assistance in securing employment and had not requested that she be considered for employment by Bella Vista Group, Inc.

22. Respondent, who had dinner with Ms. Spahn on December 3, 1999, did not inform Ms. Spahn that he had sent the letter to DEA and never showed Ms. Spahn a copy of the letter.

23. DEA subsequently informed respondent in writing that it could not release the requested information because Ms. Spahn was suing that agency. After his relationship with Ms. Spahn had ended and after receiving DEA's response, respondent withdrew his request for information.

24. Respondent acknowledged that sending the December 3, 1999, letter to DEA was a "mistake" and that there was "no excuse" for sending it.

As to Charge III of the Formal Written Complaint:

25. On September 16, 1999, Michelle Spahn was charged with Speeding in the Town of Amherst. She mailed to the court a plea of not guilty and received a letter from the court dated October 29, 1999, scheduling her appearance for December 6, 1999.

26. During the course of their dating relationship, Ms. Spahn advised respondent about her Speeding ticket and told respondent that she was scheduled to appear in the Amherst Town Court on December 6, 1999. On several occasions, Ms. Spahn asked respondent if he could help her. Respondent told Ms. Spahn that he knew Amherst Town Justice Samuel Maislin, who would probably be scheduled to preside over her case.

27. Before Ms. Spahn appeared in court on December 6, 1999, respondent telephoned Judge Maislin, identified himself by name and told Judge Maislin that his girlfriend had received a Speeding ticket and that he wanted to take care of it for her. Respondent asked about the fine and was advised that the fine would be \$100. Respondent was on “friendly” terms with Judge Maislin, although there is no evidence in the record that Judge Maislin knew that respondent was a judge.

28. Although Ms. Spahn had not pleaded guilty to any charge, her Speeding ticket was reduced to a charge of violating Section 1201(a) of the Vehicle and Traffic Law, a parking violation; a guilty plea was entered; and a fine of \$100 was assessed. Respondent went to Judge Maislin’s private law office and gave Judge Maislin a \$100 bill in payment of Ms. Spahn’s fine.

29. Before going to court on December 6, 1999, Ms. Spahn was unaware of respondent’s conduct with respect to her ticket, although respondent told her that she did not have to go to court because her ticket had been taken care of. Ms. Spahn did not believe respondent and appeared in the Amherst Town Court on the scheduled date.

30. When Ms. Spahn appeared in court on December 6, 1999, an assistant district attorney told Ms. Spahn that her Speeding ticket had been reduced to a non-moving violation, and Ms. Spahn observed a \$100 bill clipped to the court case folder.

31. Prior to that time, Ms. Spahn had not spoken about the disposition of her case with the police officer who issued the ticket, the assistant district attorney or the presiding judge; nor had she entered a guilty plea.

32. Ms. Spahn waited in court for two hours to find out what had happened. When her case was not called, she questioned the court clerk about the case and overheard the presiding judge tell the clerk that “that one’s been taken care of.”

33. Respondent knew that it was improper for him to attempt to fix a traffic ticket for a friend, although he testified that, at the time, he did not realize he was doing anything wrong in contacting Judge Maislin. At the hearing, respondent acknowledged that his conduct with respect to Ms. Spahn’s ticket was wrong.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.4(A)(1) and 100.4(A)(2) of the Rules Governing Judicial Conduct. Charges I, II and III of the Formal Written Complaint are

sustained, and respondent's misconduct is established.

Both on and off the bench, judges are held to standards of conduct "much higher than for those of society as a whole." Matter of Kuehnel v. Comm'n on Jud Conduct, 49 NY2d 465, 469 (1980). Even wholly personal conduct may be subject to discipline, especially when it relates to the judge's honesty and integrity or reflects adversely on the judiciary as a whole. *See, e.g., Matter of Miller*, 1997 Annual Report 108 (Comm'n on Jud Conduct) (judge was censured, in part, for sending anonymous, harassing mailings concerning an individual with whom she had had a personal relationship); Matter of Smith, 1995 Annual Report 137 (Comm'n on Jud Conduct) (judge was censured, in part, for engaging in an angry, physical confrontation at a street fair); Matter of Mazzei v. Comm'n on Jud Conduct, 81 NY2d 568, 572 (1993) (judge was removed for filing two fraudulent credit card applications in the name of his deceased mother). A judge is obligated at all times to act in a manner that promotes public confidence in the integrity of the judiciary, to avoid even the appearance of impropriety and to conduct his or her extra-judicial activities so as not to detract from the dignity of judicial office (Sections 100.2[A] and 100.4[A][2] of the Rules Governing Judicial Conduct).

In the instant case, respondent's conduct in a series of off-the-bench incidents showed poor judgment and insensitivity to the high ethical standards incumbent on judges. The record establishes that respondent improperly asserted his judicial office to advance his private interests, wrote a letter to a federal agency seeking personal information about an individual under false pretenses, and interceded on behalf of another to obtain a favorable disposition in a traffic case. Such conduct affects public confidence in the integrity of the judiciary, even though it is unrelated to a judge's performance on the bench.

Respondent's gratuitous reference to his judicial office during the incident at the comedy club inappropriately interjected his judicial status into a private dispute. The ethical rules explicitly prohibit a judge from lending the prestige of judicial office to advance the judge's private interests (Section 100.2[C] of the Rules). As the referee concluded, respondent's conduct was a blatant attempt to use his identity as a judge to gain advantage in the dispute, which was provoked by respondent's own boorish, bullying behavior in refusing to return the car keys to the car's owner. Compounding the impropriety, respondent invoked his judicial status at least in part to lend credibility to a statement (that the car belonged to him) that was patently untrue. Respondent's unseemly, dishonest, public misbehavior detracted from the dignity of his judicial office and elevated personal impropriety to judicial misconduct.

Respondent's letter to the Drug Enforcement Administration (DEA) was deceptive and dishonest. Sending such a letter, which requested personal information about an individual under false pretenses, was highly improper, notwithstanding that the letter made no reference to respondent's judicial position. As the Court of Appeals has stated:

Judges personify the justice system upon which the public relies to resolve all manner of controversy, civil and criminal. A society that empowers judges to decide the fate of human beings and the disposition of property has the right to insist upon the highest level of judicial honesty and integrity. A judge's conduct that departs from this high standard erodes the public confidence in our justice

system so vital to its effective functioning. Matter of Mazzei, *supra*, 81 NY2d at 571-72.

It was also inappropriate for respondent to intervene in his friend's Speeding case by contacting the presiding judge. The absence of a specific request for special consideration is irrelevant, since a communication from one judge to another on behalf of a friend's pending case necessarily taints the proceeding with favoritism. See Matter of Edwards v. Comm'n on Jud. Conduct, 67 NY2d 153, 155 (1986). In the instant matter, even if the resulting reduction would have been available without respondent's intervention, it can scarcely be doubted that respondent's friend's ticket received extraordinary treatment as a result of his discussion with the presiding judge, with whom respondent was on "friendly" terms: the matter was adjudicated as a result of a phone call, prior to the scheduled court appearance, without a guilty plea; and respondent personally paid the fine at the law office of the presiding judge. Such conduct seriously undermines public confidence in the fair and proper administration of justice.

Viewed in its totality, respondent's conduct is indefensible. Moreover, we are also troubled by the inconsistencies in respondent's explanations of the incident at the comedy club and by the dishonesty reflected in his letter to DEA. While respondent's misconduct is serious, we have concluded that it does not irretrievably damage his effectiveness on the bench. This is so, in part, because respondent's misconduct was largely personal in nature and occurred over a brief period during his first year on the bench.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Moore, Judge Luciano, Judge Peters and Judge Ruderman concur.

Ms. Hernandez, Judge Marshall and Mr. Pope were not present.

Dated: October 1, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN D. COX**, a Justice of the LeRay Town Court, Jefferson County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Gary W. Miles for Respondent

The respondent, John D. Cox, a justice of the LeRay Town Court, Jefferson County, was served with a Formal Written Complaint dated July 31, 2001, containing one charge. Respondent filed an answer dated August 30, 2001.

On October 30, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On November 8, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the LeRay Town Court since January 1, 1978. He is not a lawyer. He has attended and successfully completed all required training sessions for judges.

2. In People v. Lyle Hughes, in which the defendant had been convicted on December 9, 1998, of violating Sections 240.20 (Disorderly Conduct) and 240.26 (Harassment) of the Penal Law, both violations, and sentenced to pay a \$300.00 fine, respondent re-sentenced the defendant to 15 days in jail on January 13, 1999, for failing to pay the \$300.00 fine and surcharge, without advising him of his right to apply for a re-sentencing hearing in the event that he was unable to pay the fine and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. The jail sentence imposed by respondent on January 13, 1999, was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction 13 months earlier. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the

unpaid fine and surcharge. Prior to the re-sentencing proceeding, respondent had contacted the defendant and requested, without success, that he pay the unpaid fine. The defendant had been represented by counsel during earlier stages of the proceeding but respondent took no steps to notify the defendant's counsel of the re-sentencing proceeding as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant paid the \$300.00 fine at the jail immediately after being re-sentenced and was released on the same day.

3. In People v. Lynn Makowecki, in which the defendant had been convicted on November 4, 1998, of violating Section 1192.1 of the Vehicle and Traffic Law (Driving While Ability Impaired, a violation), and sentenced to pay a \$200.00 fine, respondent re-sentenced the defendant to 30 days in jail on January 18, 1999, for failing to pay the \$200.00 fine and surcharge, without advising the defendant of her right to apply for a re-sentencing hearing in the event that she was unable to pay the fine and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. The sentence imposed by respondent on January 18, 1999, was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction 14 months earlier. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. Respondent had contacted the defendant prior to the re-sentencing proceeding and requested, without success, that she pay the unpaid fine. The defendant had been represented by counsel during earlier stages in the proceeding, but respondent took no steps to notify the defendant's counsel of the re-sentencing proceeding as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant paid the \$200.00 fine at the jail immediately after the re-sentencing and was released the same day.

4. In People v. Brently Knaus, in which the defendant had been convicted on March 10, 1997, of violating Section 240.26 (Harassment) of the Penal Law and sentenced to pay a \$200.00 fine, respondent re-sentenced the defendant to 15 days in jail on July 6, 1999, for failing to pay the \$200.00 fine and surcharge without advising him of his right to apply for a re-sentencing hearing in the event that he was unable to pay the fine and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. The sentence imposed by respondent on July 6, 1999, was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction, more than 26 months earlier. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. Respondent had contacted the defendant prior to the re-sentencing and requested, without success, that he pay the unpaid fine. The defendant had been represented by counsel during earlier stages in the proceedings, but respondent took no steps to notify the defendant's counsel of the re-sentencing proceeding as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant paid the \$200.00 fine at the jail immediately after being re-sentenced and was released on the same day.

5. In People v. Ronald Katz, in which the defendant was convicted on June 18, 1997, of violating Sections 1192.1 (Driving While Ability Impaired) and 1102 (Failure To Obey A Police Officer) of the Vehicle and Traffic Law, both violations, respondent re-sentenced the defendant to jail on September 8, 1999, for failing to pay a \$400.00 fine and surcharge, without advising the defendant of his right to apply for a re-sentencing hearing in the event that he was

unable to pay the fine and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. The sentence imposed by respondent was statutorily authorized and commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. Respondent had contacted the defendant prior to the re-sentencing and requested, without success, that he pay the unpaid fine. The defendant had been represented by counsel during earlier stages in the proceeding, but respondent did not notify the defendant's attorney about the re-sentencing proceeding as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant paid the \$400.00 fine at the jail immediately after the re-sentencing and was released the same day.

6. On or about April 14, 1999, Dale Snyder was convicted of Attempted Endangerment Of A Child, Third Degree, a misdemeanor, and sentenced by respondent to pay a fine and surcharge totaling \$595.00. In May 1999 Mr. Snyder wrote to respondent advising him that he was financially incapable of paying the fine and surcharge. Respondent extended the period in which the defendant was required to pay the fine until August 25, 1999, but the defendant paid no portion of the fine and surcharge. On September 22, 1999, the defendant was brought before respondent on a bench warrant and respondent re-sentenced him to 89 days in jail, a sentence that was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction five months earlier. Respondent re-sentenced the defendant to jail without advising him of his right to apply for a re-sentencing hearing in the event that he was financially unable to pay the fine and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. The defendant had been represented by counsel during earlier stages of the proceedings. Respondent took no steps to notify counsel about the re-sentencing proceeding as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant served 59 days in jail.

7. On or about January 11, 1999, Richard A. Welsh was convicted of two counts of Issuing A Bad Check and sentenced by respondent to pay a fine and restitution totaling \$422.77. The defendant failed to pay the fine and restitution and was brought before respondent on a bench warrant on September 24, 1999. The defendant was at that time in jail in connection with an unrelated felony matter pending in County Court. The defendant advised respondent that he was financially incapable of paying the fine and restitution, and respondent re-sentenced him to 89 days in jail, a sentence that was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction eight months earlier. Respondent re-sentenced the defendant to jail without advising him of his right to apply for a re-sentencing hearing in the event that he was financially unable to pay the fine and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and restitution. The defendant served the 89 days in jail in connection with the re-sentencing concurrent with the time he was being held in custody in connection with the felony matter. The defendant was being represented by counsel in connection with the felony matter. The defendant's counsel was notified by the police of the

defendant's arrest on the bench warrant and arrived in court after the re-sentencing had been completed.

8. On or about February 8, 1999, Vicky A. Brow was convicted of Criminal Use Of A Device and sentenced by respondent to pay a fine and restitution totaling \$500.00. The defendant had waived her right to counsel and was not represented during any part of the proceeding. In April 1999 the defendant advised respondent that she was financially incapable of paying the entire fine and restitution. Respondent established a payment schedule in which the defendant was to pay \$100.00 toward the fine in April and May 1999 and required to make bi-weekly payments of \$50 to \$75 toward restitution beginning on May 28, 1999. The defendant paid \$40.00 on May 3, 1999, but made no further payments despite repeated requests by respondent. The defendant was brought before respondent on a bench warrant on January 3, 2000, and re-sentenced to 89 days in jail, a sentence that was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction, nearly eleven months earlier. Respondent re-sentenced the defendant to jail without advising her of her right to apply for a re-sentencing hearing in the event that she was financially unable to pay the fine and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and restitution. The defendant spent 55 days in jail in connection with the re-sentencing.

9. On December 14, 1998, Jamal Phillipus was convicted of Speeding and sentenced to pay a fine and surcharge totaling \$130.00. The defendant waived his right to counsel and was not represented by counsel during any part of the proceeding. The defendant did not pay the fine and surcharge, and respondent issued an order on March 30, 1999, directing the Commissioner of Motor Vehicles to suspend the defendant's driver's license. The defendant did not thereafter respond to the license suspension order. On February 29, 2000, the defendant appeared before respondent in connection with an unrelated felony charge and was committed to jail in lieu of bail. Respondent also re-sentenced the defendant to 15 days in jail in connection with his failure to pay the \$130.00 fine and surcharge. The re-sentence imposed by respondent was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction, more than one year earlier. Respondent re-sentenced the defendant to jail without advising him of his right to apply for a re-sentencing hearing in the event that he was financially unable to pay the fine and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the fine and surcharge. The defendant served nine days in jail in connection with the re-sentencing concurrent within the time that he continued to be held in custody in connection with the felony matter.

10. As set forth in Schedule A, between November 24, 1998, and April 17, 2000, in four criminal cases involving misdemeanors and violations, in which the defendants did not pay the fines and surcharges imposed by respondent after conviction, respondent re-sentenced the defendants to jail without advising the defendants of their right to apply for a re-sentencing hearing in the event that they were unable to pay the fine, and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Each sentence was

commensurate with the sentence that respondent could have imposed at the time of the defendants' convictions. Respondent included in each revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. In each case, respondent had contacted the defendant prior to re-sentencing and requested, without success, payment of the unpaid fine. Each of these defendants had waived the right to counsel and was not represented by counsel at any stage of the proceeding. Two of the defendants were released from jail on the day that they were re-sentenced after paying their fines and surcharges at the jail. Two of the defendants paid their fines and surcharge the day after they were re-sentenced and were released from jail.

11. As set forth in Schedule B, in six Vehicle and Traffic and Environmental Conservation cases between January 9, 1999, and February 8, 2000, in which the defendants did not pay the fines and surcharges imposed by respondent after conviction, respondent re-sentenced the defendants to jail without advising the defendants of their right to apply for a re-sentencing hearing in the event they were unable to pay the fine, and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Each sentence was commensurate with the sentence that respondent could have imposed at the time of the defendants' convictions. Respondent included in each re-sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. In each case, respondent had contacted the defendant prior to re-sentencing and requested, without success, that the defendant pay the unpaid fine. Each of these defendants waived the right to counsel and was not represented during any stage in the proceeding. George Buckner, who had been convicted of Driving While Ability Impaired, a violation, was incarcerated for two days before he paid his \$460.00 fine and surcharge and was released from jail. Jamie Hartwell, who had been convicted of Driving While Intoxicated, a misdemeanor, was incarcerated for six days before he paid his \$673.00 fine and surcharge and was released from jail. Marvin Hayes, who had been convicted of Aggravated Unlicensed Operation, Third Degree, a misdemeanor, and Speeding, was incarcerated for nine days before he paid his \$320.00 fine and surcharge and was released from jail. The other three defendants (Washington, Anderson and Isaac) paid their outstanding fines and surcharges at the jail on the day they were re-sentenced and were released.

12. In none of the cases in which the defendants had been previously represented by counsel did the defendants request counsel in connection with their re-sentencing.

13. At the time respondent re-sentenced the above defendants to jail, he was unaware of Section 420.10 of the Criminal Procedure Law. Respondent, a non-lawyer, had not been instructed about the provisions of Section 420.10 of the Criminal Procedure Law during his attendance at the annual judicial training classes. As a consequence of these proceedings, respondent has taken affirmative action to include this subject in the judicial training course curriculum.

14. Respondent was also unaware that those defendants who had been represented by counsel in connection with the underlying convictions were entitled to have counsel present at the re-sentencing proceeding pursuant to Criminal Procedure Law Section 170.10(3). Since learning in April 2000 of the requirements of this statute, respondent has regularly advised

defendants of their right to a hearing prior to re-sentencing and has held such a hearing when requested. He has also advised such defendants of their right to counsel at the re-sentencing and does not proceed if a defendant, who had previously been represented by counsel, appears without counsel.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and 100.3(B)(6) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By re-sentencing defendants to jail who did not pay the fines imposed by respondent while failing to hold a re-sentencing hearing or to advise the defendants of their right to apply for such a hearing, respondent failed to "be faithful to the law" and failed to provide the defendants with a full opportunity to be heard according to law, as required by Sections 100.3(B)(1) and 100.3(B)(6) of the Rules Governing Judicial Conduct. The Criminal Procedure Law provides that when a defendant can be imprisoned for failure to pay a fine, the judge must advise the defendant of the right to apply for re-sentencing and that, after re-sentencing, if the defendant is unable to pay the fine, the court must either adjust the terms of payment or lower the amount of the fine or revoke the sentence (CPL §420.10[3], [5]). As a result of respondent's failure to comply with statutory procedures, some defendants were summarily incarcerated for lengthy periods in violation of their rights, even after they had informed respondent that they were financially incapable of paying the fines he had imposed.

Every judge, lawyer or non-lawyer, is required to be competent in the law and to insure that all those with a legal interest in a proceeding have a full opportunity to be heard according to law. Sections 100.2(A) and 100.3(B)(1) of the Rules; *Matter of Curcio*, 1984 Ann Rep 80 (Comm'n on Jud Conduct, March 1, 1983). As a judge since 1978, respondent should be familiar with basic statutory procedures.

In mitigation, respondent, a non-lawyer, had not been instructed about the requirements of Section 420.10 of the Criminal Procedure Law during his judicial training classes and was unaware of the provision. To be sure, every judge has a fundamental obligation to ensure that a defendant facing incarceration has been afforded the full panoply of statutory rights, and it is patently unjust to incarcerate a defendant who may simply be too poor to pay a fine. However, respondent's failure to comply with the particular requirements pertaining to resentencing procedures does not, in our view, constitute such an egregious violation of basic, fundamental rights that it casts doubt on his fitness to continue to serve as a judge. *Compare, Matter of McGee*, 59 NY2d 870 (1984). Respondent's attempts to get the defendants to pay the unpaid fines, in one case setting an extended payment schedule, suggest a sincere effort to obtain compliance without resorting to incarceration. Since learning in April 2000 of the requirements of this statute, respondent has regularly advised defendants of their rights as required and has held a hearing prior to resentencing when requested. Moreover, as a consequence of these proceedings, respondent has taken affirmative action to include this subject in the judicial training curriculum. We conclude that these mitigating factors, viewed in their totality, demonstrate that admonition, rather than a more severe sanction, is appropriate.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. Moore was not present.

Dated: December 30, 2002

SCHEDULE A

Defendant	Conviction	Date of Original Sentencing	Date of Re-sentence	Re-sentence/ Amount Owed	Date of Release
Ramona Kirklin	PL 190.05-1 (misd)	08/03/98	11/24/98	30 days/ \$147	11/24/98
James Isaac	PL 190.05 (misd)	05/24/99	07/06/99	30 days/ \$401	07/06/99
Kerri Phelps	PL 240.20 (viol)	07/08/98	01/23/00	15 days/ \$300	01/24/00
Robert Concepcion	PL 190.05 (misd)	12/28/98	04/17/00	89 days/\$200	04/18/00

SCHEDULE B

Defendant	Conviction	Date of Original Sentencing	Date of Re-sentence	Re-sentence/ Amount Owed	Date of Release
George Buckner	VTL 1192.1 (viol) VTL 1110A (viol)	12/06/98	01/09/99	15 days/\$460	01/11/99
Jamie Hartwell	VTL 1192.3 (misd) VTL 1180b (viol)	11/16/98	01/09/99	89 days/\$673	01/15/99

Levi Washing- ton	VTL 509.1 (viol) VTL 375.2a3 (viol)	02/22/99	04/14/99	10 days/\$85	04/14/99
Daniel Anderson	NYCRR- ENC 55.3b (viol)	12/07/98	04/22/99	10 days/\$100	04/22/99
James Isaac	VTL 1192.1 (viol) VTL 1102 (viol)	04/14/99	07/06/99	30 days/\$460	07/06/99
Marvin Hayes	VTL 511(1)(A) (misd) VTL 1180d (viol)	10/05/99	02/28/00	15 days/\$320	03/08/00

CONCURRING OPINION BY JUDGE CIARDULLO, WHICH MR. COFFEY JOINS

This Commission’s publications state that it “does not act as an appellate court” and “does not review the judicial decisions or alleged errors of law.” *E.g.*, 2002 Annual Report at p. 51. It is not easy, however, to distinguish between what constitutes judicial misconduct and what constitutes a mere error of law. Egregious violations of basic fundamental rights, such as failing to set bail in misdemeanor cases (*Matter of LaBelle*, 79 NY2d 350 [1992]) or convicting a defendant without a trial or plea (*Matter of Maxon*, 1986 Ann Rep 143 [Commn on Jud Conduct, Dec 12, 1985]); *Matter of Hise*, 2003 Ann Rep 143 [Commn on Jud Conduct, May 17, 2002]), are errors of law, but such failures also raise an issue of a judge’s unfitness to perform his or her duties. Thus, these matters fall within the realm of misconduct. Likewise, errors of law that suggest either an intentional disregard of legal principles, bias, incompetence or insensitivity to the proper role of a judge also rise to the level of misconduct and, hence, require the Commission to act (*E.g.*, *Matter of Reeves*, 63 NY2d 105, 110-11 [1984]).

Beyond these examples, however, it is not clear where the line should be drawn between “errors of law” and judicial misconduct. This case illustrates the point. From everything that appears in the record, respondent is a diligent and conscientious public servant. There is no suggestion that respondent acted out of malice or bias, or that he is incompetent to perform the duties of a judge. In all the cited cases, defendants were incarcerated for the same reason: they failed to pay fines and/or restitution imposed by the court after other attempts to gain compliance had been exhausted. In each case, respondent imposed a jail sentence without complying with the requirements of the Criminal Procedure Law sections 170.10(3), 420.10 (3) and (5).

Was respondent's ignorance of these complex statutory Criminal Procedure Law provisions an "egregious violation of basic fundamental rights"? Our judicial system permits non-lawyer justices, and newly-elected lay justices take the bench after having completed a course of five or six days of mandated training. They cannot be expected to learn in three weekends what law school teaches in three years. The State also requires that all town and village justices complete 12 hours of additional training per year but an overburdened Unified Court System can only provide limited training resources. Lay justices can receive assistance if they ask, but they cannot be expected to ask if they do not know that an issue of law has presented itself. One could persuasively argue that under such a system, lay justices cannot reasonably be expected to have mastered every statute, regulation or legal principle.

While I sympathize with respondent's mistakes, I join in the majority opinion for the reason that respondent's many years of experience on the bench should have alerted him that these defendants could not be summarily incarcerated without affording them certain procedural rights. It should have been obvious to respondent that incarceration implicates a defendant's fundamental rights. In my view, respondent, at a minimum, had a duty to make full inquiry as to proper legal procedure prior to resorting to this ultimate sanction. Therefore, I concur in the majority opinion.

Dated: December 30, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROBERT A. CRNKOVICH**, a Justice of the Byron Town Court, Genesee County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Honorable Robert A. Crnkovich, *pro se*

The respondent, Robert A. Crnkovich, a Justice of the Byron Town Court, Genesee County, was served with a Formal Written Complaint dated March 4, 2002, containing one charge. Respondent filed an answer dated April 23, 2002.

On June 20, 2002, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On September 19, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Byron Town Court, Genesee County, since January 1, 1980.
2. In the fall of 2001, respondent recorded a publicly broadcasted radio advertisement endorsing Joseph Filio, a candidate for Batavia Town Court in the November 2001 election. Respondent stated:

The Town of Batavia residents will be electing a new Town Justice. I have known Joe Filio and his family all my life. As a Genesee County Deputy he was always prepared for any trial in my court. He was well liked, very calm in all matters and did a very thorough job. I think he would be a well-qualified person for the Justice position in the Town of Batavia.

3. In the fall of 2001, respondent authorized Mr. Filio to print in a campaign advertisement respondent's full statement of endorsement from the radio advertisement. The printed advertisement identifies respondent as Byron Town Justice.

4. In the fall of 2001, respondent sent a letter to the editor of the Batavia Daily News, which was published on November 1, 2001, repeating the text of his radio statement and identifying respondent as Byron Town Justice.

5. Respondent was aware that he was prohibited from endorsing candidates for political office.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5 (A), 100.5(A)(1)(d) and 100.5(A)(1)(e) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

The ethical standards prohibit a judge from participating in the campaign of another candidate for public office or publicly endorsing a candidate (Sections 100.5[A][1][d] and 100.5[A][1][e] of the Rules Governing Judicial Conduct). Respondent's public statements on behalf of a candidate for another judicial office clearly constituted an improper political endorsement. *See Matter of Cacciatore*, 1999 Ann Rep 85 (Comm'n on Jud Conduct, Feb 6, 1998); *Matter of Decker*, 1995 Ann Rep 111 (Comm'n on Jud Conduct, Jan 27, 1994). By his endorsement, respondent interjected himself into the political campaign of another and lent the prestige of judicial office to advance the interests of the candidate, a long-time acquaintance.

Respondent's misconduct was not an isolated episode. By recording his statement for the radio, sending it to a newspaper and specifically authorizing the candidate to use the endorsement in a campaign advertisement, respondent ensured that his endorsement would be widely disseminated.

Every judge, lawyer or non-lawyer, has an obligation to learn and abide by the Rules Governing Judicial Conduct. *Matter of VonderHeide*, 72 NY2d 658, 660 (1988). As a judge since 1980, respondent should have recognized that his statements endorsing a judicial candidate were prohibited by the ethical rules.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Judge Peters, Mr. Pope and Judge Ruderman concur.

Dated: November 18, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MARK C. DILLON**, a Justice of the Supreme Court, Westchester County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorabile Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission
Mark F. X. Ryan for Respondent

The respondent, Mark C. Dillon, a justice of the Supreme Court, Westchester County, was served with a Formal Written Complaint dated October 31, 2000, containing two charges. Respondent filed an answer dated January 8, 2001.

By Order dated May 14, 2001, the Commission designated Honorable Leon B. Polsky as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 19, 2001, and the referee filed his report with the Commission on September 19, 2001.

The parties submitted briefs with respect to the referee's report. On December 20, 2001, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charges I and II of the Formal Written Complaint:

1. Respondent served as an appointed County Court judge, Westchester County, from June 1997 through December 1997. Prior to that time, respondent had served as a justice of the Yorktown Town Court from 1987 to 1997. In the fall of 1997 he was a candidate for election to a full term as a County Court judge, in a general election scheduled for November 4, 1997. Respondent was not elected in November 1997 and left the bench on December 31, 1997.

2. In November 1999 respondent was elected to the Supreme Court, Westchester County, and he returned to the bench in January 2000.

3. Respondent was assigned to the case of People v. Darryl Holland, in which the defendant was charged with first degree murder. The case was tried over several weeks and resulted in a transcript exceeding 4,600 pages. On October 28, 1997, the jury returned a verdict of guilty on three counts of murder and one count of robbery. Before that date, the Holland case

had been the subject of ongoing press attention. Respondent was aware that the press was present or likely to be present in the courtroom on October 28, 1997, when the verdict was announced.

As to Charge I of the Formal Written Complaint:

4. On October 28, 1997, after the jury announced the verdict in the Holland case, there was an emotional display by a juror, and respondent called a recess in order to allow the jurors to compose themselves. After a brief recess, the jurors returned to the courtroom, and the jury was polled. Respondent then addressed the jurors and made the following remarks, a portion of which were reported in the local press:

I want you all to sleep well tonight because -- while my opinion probably isn't worth anymore or less than anyone else -- I agree with your verdict.

I think the verdict you've rendered in this case is consistent with the evidence that I saw from the witnesses and from the documents and from the stipulations.

As to Charge II of the Formal Written Complaint:

5. On October 28, 1997, after respondent excused the jury in the Holland case, he held a court proceeding in which *inter alia* he scheduled sentencing, ordered a pre-sentencing report, discussed bail, heard post-verdict applications and advised the victim's family of their right to be heard at sentencing. Respondent also chastised defense counsel and lauded the police and prosecution with remarks that in part were reported in the local press. Respondent said the following:

THE COURT: I have some other comments which pertain to the case which has nothing to do with the sentencing phase of the case.

Beginning with the opening statements at the trial, the prosecutor claimed to the jury -- and I think ultimately proved to the jury -- that the people that were involved in the investigatory stage of this case were -- and I'm paraphrasing -- honest, hard-working and dedicated and earnest individuals and also in the opening statement of the defense counsel, the defense counsel argued that the police lied; that there were violations of the constitution; that there were conspiracies amongst the police and between the police and the Assistant District Attorneys and, of course, those were opening statements.

We then heard evidence in the case and in my view the evidence that was produced in this courtroom throughout the month of October supported the arguments that had been made by Mr. McCarty on behalf of the Prosecution; but did not in any way support the rather scurrilous allegations that were made by the defense in its opening statement.

MR. TRAYNOR: I object to that.

THE COURT: You may object, but I think this is worth saying. It is time that some judges speak out; that there are too many cases where persons who are facing a mountain of evidence will either try to blame the victim, that didn't happen here, or to allege misconduct on the part of the police and prosecutors –

MR. TRAYNOR: I object to that.

THE COURT: – and certainly allegations of misconduct is appropriate, if there is some evidence. I don't think it is appropriate in cases such as this where there is absolutely no evidence of misconduct on the part of police and prosecutors.

My view of the evidence is that these police and prosecutors were in fact dedicated individuals, so dedicated to their jobs, in fact, that they slept in some cases at the Mount Vernon Police Department in their offices instead of going home to their families in order to remain hot on the leads of the case. Assistant District Attorneys coming into the police department at 1:30 in the morning in order to provide the legal advice that is sought from them by the police department.

These individuals, according to the evidence that I saw, were honest, intelligent, hard-working individuals and like the Canadian Mounties, “They got their man,” but they did it in the way that the law asks them to do it.

To the extent that reputations have been attacked or tarnished, the Court takes this opportunity to restore the reputations of the following individuals who I'm going to identify by name and who I think an apology is owed to – although I don't expect an apology would be given – to Mount Vernon Detective Arthur Glover, Mount Vernon Detective Michael Rotunda, Mount Vernon Detective Donte Barrera, Mount Vernon Detective Mora, the Mount Vernon Police Department, generally speaking, Assistant District Attorney Robert Neary, Chief Deputy Frank Donahue, the Assistant District Attorney's Office [sic], generally speaking, and Assistant District Attorney [sic] Jeanine Pirro.

All of those names we heard in one fashion or another within the context of which I speak during the course of this trial.

Anything further for the record?

MR. TRAYNOR: Yes, Judge, I was precluded from calling a number of witnesses to the trial, so I object to the Court now making that statement regarding the reputations being tarnished.

Additional findings:

6. During the sentencing proceeding in Holland, Assistant District Attorney James McCarthy remarked that respondent had exhibited patience toward defense counsel and had conducted a fair trial.

7. On appeal to the Appellate Division, Second Department, defense counsel did not raise any issues of judicial misconduct. The Appellate Division unanimously affirmed the conviction on January 24, 2000. Leave to appeal to the Court of Appeals was denied.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(B)(1), 100.3(B)(3) and 100.3(B)(9) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent's comments at a post-verdict proceeding violated established ethical standards and constituted an unacceptable display of partiality.

Respondent's excoriation of defense counsel was clearly inappropriate and reveals a lack of understanding and respect for the role of defense counsel. Respondent's comments were gratuitous and unrelated to any issue before the court at that time. The focus of respondent's wrath was the purported "scurrilous allegations" against the police and prosecutors in defense counsel's opening statement, yet neither that statement nor any other portions of the record cited by respondent in this proceeding warrant the excessive, demeaning diatribe respondent delivered. Defense counsel's criticisms of the police and prosecutors were (apart from an obscure reference to the District Attorney) legitimate arguments for a defense attorney who was setting the stage for a challenge before the jury to the voluntariness of a crucial videotaped confession. The suggestion by respondent that the defense attorney should apologize to the police and prosecutors, whom respondent lavishly praised and singled out by name, was entirely inappropriate. Any such apology might have undermined the defendant's case on appeal. The gratuitous remark, "although I don't expect an apology would be given" was insulting and snide. Respondent's conduct violated established ethical standards requiring a judge to act in a manner that upholds public confidence in the integrity and impartiality of the judiciary and to treat lawyers with courtesy, dignity and patience (Sections 100.2 and 100.3[B][3] of the Rules Governing Judicial Conduct).

Respondent's prefatory comment, "It is time that some judges speak out" suggests that he was fully conscious of delivering an extraordinary, partisan speech. The fact that respondent made these statements in a publicized case shortly before an election in which both he and the

District Attorney were candidates raises a question as to whether his comments were motivated by political concerns. See Matter of Brennan (NY Commn on Jud Conduct, Feb. 8, 2001). As a judge, respondent has an obligation to avoid even the appearance of impropriety (Section 100.2 of the Rules). His highly charged, pro-prosecutorial comments violated that standard and conveyed the impression that he was using a judicial proceeding for political grandstanding. Respondent undoubtedly knew, or should have known, that his comments would be publicized, and he should have been sensitive to the appearance created by his remarks. It is troubling that respondent fails to recognize that his comments were improper.

Respondent's comments expressing his agreement with the jury's verdict were also improper. The ethical standards prohibit a judge from commending or criticizing a jury for their verdict, other than in a court order or opinion in a proceeding. Section 100.3(B)(9) of the Rules; Matter of Cunningham, 1995 Ann Report of NY Commn on Jud Conduct at 109; see also Section 15-4.3 of the ABA Standards (Criminal Justice Section). Respondent's commentary about the verdict was not in a court order or opinion, but was a gratuitous expression of his personal views. Respondent's avowed purpose in making the comments – to allay the apparent emotionalism of jurors after the verdict was delivered – does not justify his inappropriate comments. No matter how stressful the proceedings, a judge must remain neutral in the presence of a jury, and jurors should receive neither criticism for their verdict nor reassurance that they acted correctly.

Respondent challenges the Commission's jurisdiction to consider his conduct prior to his assuming his current judicial office. Although respondent's misconduct occurred in 1997, shortly before he left office as a County Court judge, the Commission has jurisdiction to impose discipline. It is well-established that a judge can be disciplined for misconduct that occurred during a prior term of office, notwithstanding that the judge, after leaving office, did not serve as a judge for several years and later assumed a different judicial office. Matter of Bailey v. Comm on Jud Conduct, 67 NY2d 61 (1986).

We do not agree with the dissenter's position that the fact that this conduct occurred four years ago justifies a lesser sanction. At the time of these events respondent had been a County Court judge for only a few months but had previously served for ten years as a town justice. He had been entrusted to try an extremely serious case in which the top charge was murder in the first degree. That the trial was highly charged and emotional exacerbates, rather than mitigates, respondent's behavior.

We note that respondent has previously received a warning concerning his violation of the ethical rules. In 1989 respondent received a confidential letter of dismissal and caution concerning improper conduct during his campaign for judicial office.

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

As to Charge I, Mr. Berger, Judge Marshall, Judge Ciardullo, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur. Mr. Pope dissents and votes that the charge be dismissed.

As to Charge II, all concur.

As to the sanction, Mr. Berger, Judge Marshall, Mr. Goldman, Ms. Hernandez, Judge Peters and Mr. Pope concur. Judge Ciardullo, Judge Luciano and Judge Ruderman dissent as to the disposition and vote that respondent be issued a letter of caution.

Mr. Coffey was not present.

Dated: February 6, 2002

DISSENTING OPINION BY JUDGE CIARDULLO

While I concur with the conclusion that respondent's conduct as to both Charges I and II violated the ethical rules, I believe that the sanction should be mitigated by the fact that the judge's conduct occurred four years ago and appears to be an isolated incident of misbehavior on the bench. I also note that the judge's comments, while improper, occurred in the context of a highly charged murder trial and a courtroom setting that was particularly emotional. Accordingly, I respectfully dissent and vote that the appropriate disposition is a letter of caution.

Dated: February 6, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN J. ELLIOTT**, Surrogate, Oswego County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Emil M. Rossi for Respondent

The respondent, John J. Elliott, Surrogate, Oswego County, was served with a Formal Written Complaint dated July 24, 2002, containing one charge. Respondent filed an answer dated August 19, 2002.

On October 30, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On November 8, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Judge of the Surrogate's Court, Oswego County, since June 1, 1988.
2. Respondent failed to file his financial disclosure statement for the year 2000 with the Ethics Commission for the Unified Court System (hereinafter "Ethics Commission") until on or about January 2, 2002, more than seven months after May 15, 2001, the time required by Section 73 of the Public Officers Law and Section 40.2 of the Rules of the Chief Judge, notwithstanding that the Ethics Commission had sent him a Notice To Cure dated June 6, 2001, and a Notice of Delinquency dated June 29, 2001. In his response dated December 8, 2001, to a letter from the Commission dated November 7, 2001, inquiring about the reason for his failure to file his financial disclosure statement within the time required by law, respondent attributed some of his delay to the effect of the September 11, 2001, tragedy and his concern about his daughter who was about "a mile and a half" from the World Trade Center in New York City. Respondent recognizes that the events of September 11, 2001, do not provide an acceptable excuse for his

having failed to file his financial disclosure statement for the year 2000 within the time required by law.

3. Respondent failed to file his 1997 financial disclosure statement by May 15, 1998, as required by Section 73 of the Public Officers Law and Section 40.2 of the Rules of the Chief Judge, until after he had received a Notice To Cure from the Ethics Commission dated June 16, 1998. Respondent filed his 1997 financial disclosure statement on July 1, 1998.

4. Respondent failed to file his 2001 financial disclosure statement by May 15, 2002, as required by Section 73 of the Public Officers Law and Section 40.2 of the Rules of the Chief Judge, until after he had received a Notice To Cure from the Ethics Commission dated June 4, 2002. Respondent filed his 2001 financial disclosure statement on June 11, 2002.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(C)(1) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

The Legislature and the Chief Judge have determined that financial disclosure by judges serves an important public function (*see* Jud Law §211[4] and Rules of the Chief Judge §40.2), and it is the duty of every judge to file the required reports promptly. The Ethics Commission has an obligation to review such statements before they become public records, and any delay in filing violates the law and effectively withholds information from the public.

In three of the past five years, respondent failed to file his financial disclosure statements by the required date and eventually filed the required disclosure only after the Ethics Commission had sent him a Notice To Cure reminding him of his obligation. Respondent's delays in filing the required statements ranged from a few weeks (for the 1997 and 2001 reports) to more than seven months for his 2000 report.

Respondent's tardiness with respect to the 2000 report is particularly noteworthy. After receiving a Notice To Cure dated June 6, 2001, which served notice that his disclosure statement was overdue, respondent still failed to file the required report and was sent a Notice Of Delinquency on June 29, 2001; on November 7, 2001, the Commission also wrote to respondent about the delayed report. Yet, not until the following January, a delay of more than seven months, did respondent comply with the reporting requirement. With respect to respondent's explanation attributing some of his delay to the effect of the September 11, 2001, tragedy, we note that his financial statement was already nearly four months overdue by that date and that respondent has acknowledged that his explanation does not provide an acceptable excuse for a seven- month delay.

Respondent's conduct demonstrates an inattention to his administrative responsibilities, in violation of Section 100.3(C)(1) of the Rules Governing Judicial Conduct. Although this behavior does not reflect on respondent's performance on the bench, it is misconduct that warrants public discipline. *See Matter of Russell*, 2001 Ann Rep 121 (Comm'n on Jud Conduct, Oct 31, 2000).

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. Moore was not present.

Dated: November 18, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MICHAEL A. FIECHTER**, a Judge of the District Court, Nassau County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission
Spinola & Mirotznik, P.C. (By Joseph P. Spinola) for Respondent

The respondent, Michael A. Fiechter, a Judge of the District Court, Nassau County, was served with a Formal Written Complaint dated February 14, 2002, containing one charge. Respondent filed an answer dated February 27, 2002.

By Order dated April 8, 2002, the Commission designated Robert L. Ellis, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 7 and 8, 2002, in New York City, and the referee filed his report dated August 14, 2002, with the Commission.

On August 30, 2002, the Administrator of the Commission, respondent's counsel and respondent entered into a Stipulation, agreeing that the Commission make its determination based upon the referee's findings of fact and conclusions of law, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On September 19, 2002, the Commission approved the stipulation and made the following determination.

1. Respondent has served as a judge of the District Court, Nassau County, since 1997, when he was appointed and subsequently elected to that position.
2. According to statute, the Board of Judges of the Nassau County District Court is comprised of the 26 judges of the court and the Presiding Judge is the individual elected from Nassau County's First District.
3. In November 2000, then-Presiding Judge Ira J. Raab was elected to the Supreme Court and, upon his ascension to that post in January 2001, the position of Presiding Judge of the District Court became vacant. Nassau County Administrative Judge Edward G. McCabe

attempted to fill the vacancy by naming District Court Judge George R. Peck to the post, notwithstanding that Judge Peck was elected from the Third and not the First District.

4. In February 2001, District Court Judge Jonathan S. Kaiman and a co-plaintiff, Nassau County Legislator Joseph Scannell, commenced a lawsuit against Judge McCabe, the Board of Judges and others (hereinafter “the lawsuit”). The lawsuit *inter alia* alleges: (1) that Judge McCabe did not have the authority to designate Judge Peck to succeed Judge Raab as Presiding Judge of the District Court, (2) that certain Board of Judges meetings were being held in private, contrary to laws requiring that such meetings be held in public; and (3) that it was contrary to law and public policy for the Board of Judges to participate in the selection of the Executive Director of the Nassau County Traffic and Parking Violations Agency.

5. The lawsuit sought to enjoin the Board of Judges from making the Traffic and Parking appointment and to nullify actions taken by the Board of Judges at meetings that did not comport with the Open Meetings Law.

6. The lawsuit was filed in Nassau County and was transferred by Administrative Judge McCabe to Supreme Court, Suffolk County.

7. The lawsuit addressed issues of statutory construction, local governance and constitutional law.

8. That branch of the lawsuit contesting Justice McCabe’s attempt to name a new Presiding Judge was discontinued when the Nassau County Executive and Legislature filled the vacancy by naming Denise Sher as District Court Judge from the First District, which by operation of law made her the Presiding Judge of the Board of Judges. Justice McCabe was therefore dropped as a defendant.

9. The remaining issues of the lawsuit are pending.

10. On March 1, 2001, respondent wrote a one-page letter of complaint to the Commission, with numerous attachments, alleging that the lawsuit constituted a “political attack” on a colleague (*i.e.*, Judge Peck) who was then running for re-election, an attack on the integrity of “the Board of Judges generally,” and an attack on “Republican members of the Board specifically.” Respondent also took issue with Newsday articles that discussed the lawsuit and quoted Judge Kaiman.

11. The March 1 letter was not sent to any recipient other than the Commission.

12. The Commission dismissed respondent’s complaint.

13. On May 17, 2001, respondent wrote a seven-page letter to the Commission, with numerous attachments, seeking reconsideration of the dismissal of his initial complaint, commenting extensively on the lawsuit, *inter alia* calling it “meritless” and “frivolous,” and accusing Judge Kaiman of various acts of misconduct, as follows:

(a) “Judge Kaiman falsely accused Republican Judges of dishonesty and illegality in

performing the duties of the Board of Judges” (Emphasis in original);

(b) “Whether Judge Kaiman lacked the mental capacity to do the [legal] research or chose to do it out of partisan animosity toward Republican judges, or both, is an issue, it is most respectfully submitted, that is worth the time of the Commission”;

(c) “It is not unreasonable to assume that after reading the lies spouted by Judge Kaiman in the local newspaper,... [anyone affiliated] with the Republican Party had better settle quickly [in Judge Kaiman’s court]”;

(d) “The Democratic Party enjoys a very friendly relationship with the local daily newspaper on Long Island.... It is submitted that the law suit instituted by Judge Kaiman and the newspaper interview given by him were specifically designed to exploit the special relationship with the local press and advance [his] political ambitions... and to cause political damage to Republican Judges who must run for election in Nassau County”;

(e) “It is respectfully submitted that the Commission’s summary dismissal of the complaints filed by the undersigned and other Judges against Judge Kaiman will leave Republican and Conservative Judges on Long Island with an impression that Judge Kaiman is also the beneficiary of a ‘back room deal’”;

(f) [Judge Kaiman’s] “meritless lawsuit... [makes] disparaging remarks about Judge George Peck [and]... is frivolous if based on an undisputedly meritless legal theory”;

(g) “The baseless accusations against Judge Peck, who is up for re-election this year, are as politically motivated as Judge Kaiman’s lawsuit...”; and

(h) “The Commission can do nothing about simple-minded partisan political hacks victimizing Republican public officials on and off the bench by using a hostile partisan and unprincipled press. But when a sitting Judge behaves in this manner, it is respectfully submitted that the Commission is obliged to act.”

14. Respondent sent copies of his May 17 letter to 12 State Senators and all 89 full-time judges in Nassau County.

15. Despite respondent’s claims in the May 17 letter that the Kaiman lawsuit is “meritless,” he concedes that at least portions of the Kaiman lawsuit are valid, *i.e.*, that a meeting of the Board of Judges was required by UDCA §2406 to be public.

16. The Commission considered respondent’s letter of May 17 and adhered to its earlier decision to dismiss his complaint.

17. At the time respondent disseminated his May 17 letter to 12 State Senators and 89 judges and to the date of the hearing in this matter, Judge Kaiman’s lawsuit was and is still pending.

18. Respondent's letters of March 1 and May 17 are the only complaints that have been filed at the Commission by anyone against Judge Kaiman.

19. Respondent's assertions in his May 17 letter and in his testimony about the purported "lies spouted by Judge Kaiman" in a Newsday article describing the lawsuit on February 27, 2001, are not substantiated by the article.

20. Respondent's letter of May 17 is not marked "confidential," does not contain any reference to being confidential, does not indicate the purpose for which respondent disseminated it to State Senators and judges and was not accompanied by an explanatory cover letter.

21. Among respondent's purposes in disseminating his letter was to publicize his critical views about Judge Kaiman.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(8) and 100.4(A)(2) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

Judges are held to higher standards of conduct than the public at large and, upon assuming the bench, surrender certain rights and must refrain from certain conduct that may be permissible for others.

By widely disseminating his letter to the Commission, which contained inaccurate, unsubstantiated allegations denigrating a fellow judge, respondent engaged in conduct that detracted from the dignity of judicial office and violated the above-cited ethical provisions. Respondent should have recognized that such conduct was prohibited and would reflect adversely on the judiciary.

After the Commission had dismissed his complaint against another District Court judge, respondent wrote a seven-page letter to the Commission seeking reconsideration of his allegations and again accusing the other judge of various acts of misconduct related to a lawsuit the judge had filed and to remarks attributed to the judge in the press. By sending a copy of the letter to 89 judges and 12 State Senators, respondent ensured that his "*ad hominem* broadside," as the referee characterized respondent's statements, would reach a wide audience. It is clear that the purpose of the letter was not merely to ask the Commission to reconsider his complaint, but to publicize his vitriolic allegations, which the Commission had already considered and dismissed.

As the referee concluded, respondent's letter consisted of "partisan personal and political attacks," included numerous inaccuracies, and was written "without the reasonable factual and legal inquiry required under the circumstances." The tone of the letter was not merely critical, but vituperative and insulting. Such conduct was unprofessional and serves to bring the judiciary into disrepute. See *Matter of Holtzman*, 78 NY2d 184, 191 (1991).

In addition, by commenting extensively on the pending lawsuit commenced by the other

judge, respondent violated a specific rule proscribing judges from making public comment about a pending or impending proceeding (Section 100.3[B][8] of the Rules Governing Judicial Conduct).

We emphasize that this determination should not be viewed as punishing a judge for making a complaint to the Commission. Indeed, it is not only appropriate but obligatory for a judge to take appropriate action upon receiving information “indicating a substantial likelihood that another judge has committed a substantial violation” of the ethical rules (Section 100.3[D][1] of the Rules). Respondent’s gratuitous dissemination of allegations that had been dismissed by the Commission served no salutary purpose but merely provided a wider audience for his unseemly, *ad hominem* diatribe. Such conduct is properly the subject of discipline, as respondent recognizes in his acceptance of misconduct and the stipulation of censure.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Judge Peters, Mr. Pope and Judge Ruderman concur.

Dated: November 18, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **HOWARD R. GEORGE**, a Justice of the Watertown Town Court, Jefferson County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Gary W. Miles for Respondent

The respondent, Howard R. George, a justice of the Watertown Town Court, Jefferson County, was served with a Formal Written Complaint dated March 30, 2000, containing three charges. Respondent filed an amended Answer dated May 12, 2000.

By Order dated June 21, 2000, the Commission designated A. Vincent Buzard, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 6, May 30 and June 25, 2001, and the referee filed his report with the Commission on October 2, 2001.

Commission counsel filed a brief with respect to the referee's report. No brief was filed by respondent's counsel. Oral argument was waived. On December 20, 2001, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge III of the Formal Written Complaint:

1. Respondent has been a justice of the Watertown Town Court, Jefferson County since 1985. He is not a lawyer.
2. Since 1979, respondent has operated a private investigations agency, H. R. George Associates.
3. Sometime in 1994 or 1995 Mark Osmundson became a client of respondent's private investigations business. In connection with his professional relationship with respondent, Mr. Osmundson began working for respondent's private investigations agency in an exchange-for-services arrangement.

4. In or about October 1995, Mr. Osmundson was incarcerated at the Jefferson County Jail in connection with his violation of an Order of Protection involving his wife.

5. In or about October 1995, Mr. Osmundson sent respondent three second-party checks, totaling \$537.25, and asked respondent to make seven specific payments for him while he was in jail. The three checks, which were payable to Mr. Osmundson, included: an unemployment check for \$300.00 from the State of New York dated September 12, 1995; a check for \$236.50 from the Jefferson County Sheriff's Department dated September 27, 1995; and a check for \$.75 from the Peoples Telephone Company dated September 13, 1995.

6. The seven payments that Mr. Osmundson requested respondent to make on his behalf included: \$52.13 for cable television service; \$18.07 to the Village of Philadelphia for electric service; \$10.00 to Sterling Bank for payment on a credit card; \$210.00 to Sears; \$83.77 to NYNEX for telephone services; \$26.58 to Cellular One for wireless telephone service; and \$50.00 to the Jefferson County Sheriff's Department for deposit into Mr. Osmundson's account at the Jefferson County Jail.

7. The three checks sent by Mr. Osmundson were received at respondent's home/office. Respondent's secretary, Roxanne O'Jeda, gave the three checks to respondent. At respondent's direction, his secretary sent Mr. Osmundson a letter agreeing to accept the checks and to use the proceeds to make the seven specified payments.

8. Respondent endorsed and cashed the three checks totaling \$537.25 that he had received from Mr. Osmundson.

9. Respondent did not make any of the seven specified payments he had agreed to make on Mr. Osmundson's behalf.

10. Respondent never instructed his secretary to make the payments for Mr. Osmundson, and she did not do so. Respondent never returned Mr. Osmundson's checks to his secretary or gave her any of the proceeds.

11. Respondent converted the \$537.25 in proceeds from Mr. Osmundson's three checks to his own personal use.

12. After being released from jail, Mr. Osmundson, upon learning that the specified payments had not been made as he had requested, approached respondent and repeatedly requested that he repay the \$537.25. Respondent refused to return the funds to Mr. Osmundson.

13. On April 10, 1996, Mr. Osmundson commenced a small claims action in the Watertown City Court against respondent seeking damages for respondent's failure to return the \$537.25. On October 31, 1996, a decision was issued in Mr. Osmundson's favor against respondent in the amount of \$543.09. On January 23, 1997, a transcript of judgment was issued, naming Mr. Osmundson as the judgment creditor and respondent as the judgment debtor.

14. Mr. Osmundson sent respondent three letters, dated November 18, 1996, May 1, 1997, and June 30, 1997, requesting that respondent pay the judgment. Respondent did not

respond to Mr. Osmundson's repeated requests to pay the judgment.

15. On March 16, 1998, and March 30, 1998, the Jefferson County Sheriff's department served respondent with an information subpoena from Mr. Osmundson seeking information about respondent's financial assets. Respondent never responded to Mr. Osmundson's information subpoena.

16. On or about April 8, 1998, Mr. Osmundson commenced a contempt proceeding in the Watertown City Court against respondent in connection with respondent's failure to respond to the information subpoena.

17. On or about May 15, 1998, Mr. Osmundson and respondent appeared in the Watertown City Court in connection with the contempt proceeding Mr. Osmundson had commenced. At the proceeding, the presiding judge found respondent to be in contempt of court and indicated that if respondent did not pay Mr. Osmundson's judgment within three days, respondent would be fined \$100 and could be incarcerated. The presiding judge indicated that respondent could purge himself of the contempt findings by paying the judgment within three days.

18. Respondent paid the judgment within three days of the proceeding on May 15, 1998.

19. Respondent's testimony at the hearing concerning his conversion of Mr. Osmundson's money was false and lacked candor in numerous pertinent respects.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2(A) of the Rules Governing Judicial Conduct. Charge III of the Formal Written Complaint is sustained, and respondent's misconduct is established. Charges I and II are not sustained and are dismissed.

Respondent's conversion of funds entrusted to his care constitutes egregious misconduct. His behavior violates fundamental ethical standards and is intolerable in one who holds a position of public trust.

After accepting checks totaling \$537.25 from a client and employee of his private investigations business, for the express purpose of using the funds to pay the client's bills while the client was in prison, respondent endorsed and cashed the checks, converted the funds to his personal use, never paid any of the client's bills as requested and refused to return the funds despite the client's repeated requests. Even when the client was compelled to commence legal proceedings in an effort to get his money back, respondent refused to return the funds and engaged in a lengthy campaign of obstruction and delay. He failed to pay the judgment that was entered, failed to respond to three letters asking him to pay the judgment, and failed to respond to an information subpoena that was duly served upon him. Respondent finally repaid the money well over two years after he was first requested to do so, and only after being held in contempt and warned by the court that he could be incarcerated if he did not pay the judgment.

Respondent's misconduct as depicted in this record clearly transcends the failure to pay a

lawful debt or judgment, which might be mitigated by his strained financial circumstances during this period. His acceptance of money from an individual who, from jail, was attempting to meet his financial obligations placed respondent in a relationship of trust, requiring him to exercise particular care in the handling of his fiduciary responsibility. Respondent flagrantly violated that trust.

We agree with the referee that respondent's testimony at the hearing not only demonstrates an utter failure to recognize the injustice to his client, which was amply demonstrated by the documentary evidence, but was false and lacking in candor in material respects. To conceal his misconduct, respondent concocted a patently false story that after accepting and endorsing the checks, he gave the checks to his secretary because he did not want to be involved with the client, whom he repeatedly disparaged. His testimony not only was contradicted by the credible testimony of his secretary, but was illogical, inconsistent and unworthy of belief. Respondent's claims that he never received the client's letters requesting repayment, that he offered to repay the funds, that he returned the completed information subpoena and that he was not held in contempt also indicate a lack of candor, which compounds his misconduct. Matter of Conti v. Comm on Jud Conduct, 70 NY2d 416, 418 (1987); Matter of Murphy v. Comm on Jud Conduct, 82 NY2d 491, 495-96 (1993). As the referee stated, false testimony is an assault on the legal system. Such conduct is antithetical to the role of a judge, who is sworn to uphold the law and seek the truth. *See* Matter of Myers v. Comm on Jud Conduct, 67 NY2d 550, 554 (1986).

The public can have no confidence in a judicial officer who engages in such behavior. As the Court of Appeals has stated:

Standards of conduct on a plane much higher than for those of society as whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function. Matter of Kuehnel v. Comm on Jud Conduct, 49 NY2d 465, 469 (1980)

By his actions, respondent has demonstrated that he is unfit for judicial office.

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

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

Mr. Berger, Judge Marshall, Judge Ciardullo, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Coffey was not present.

Dated: February 4, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **KENNETH W. GIBBONS**, a Justice of the Glenville Town Court, Schenectady County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Roche, Corrigan, McCoy and Bush (by Robert P. Roche) for Respondent

The respondent, Kenneth W. Gibbons, a justice of the Glenville Town Court, Schenectady County, was served with a Formal Written Complaint dated October 31, 2000, containing one charge. Respondent filed an Answer dated November 15, 2000.

By Order dated January 2, 2001, the Commission designated William C. Banks, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 10, 2001, and the referee filed his report with the Commission dated September 6, 2001.

The parties submitted briefs with respect to the referee's report. On December 20, 2001, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Glenville Town Court, Schenectady County since 1995.

2. Respondent is an attorney who was admitted to practice in 1993. He is a sole practitioner with an office at his home in Glenville. From 1996 to September 1997, respondent was employed as an associate in the law firm of Kingsley and Towne, one of the principals of which was James Towne, Jr. Although respondent was asked to leave the firm, the parting was amicable, and since that time, respondent has referred at least one case to Mr. Towne and Mr. Towne has referred clients to respondent.

3. Alphonse Rullo, the proprietor of Capitaland, a car dealership in Glenville, has been a client of Mr. Towne for many years. Respondent was aware that Capitaland was Mr. Towne's client. While respondent was employed at Kingsley and Towne, he did some work on a matter involving Capitaland and on the estate of Mr. Rullo's mother.

4. In June 2000, after Mr. Towne told respondent that he was having difficulty getting a building permit for Capitaland, respondent placed a call to the town building department to expedite the issuance of a building permit for Capitaland's renovations.

5. On July 25, 2000, at 5:50 PM, respondent signed a search warrant for the premises of Capitaland on the application of the Department of Environmental Conservation (DEC). The warrant application, which was sworn to before respondent by the presenting officer, alleged that Capitaland permitted an unauthorized hauler to transport and dispose of hazardous substances, particularly ethylene glycol, an antifreeze, from Capitaland's underground storage tanks. The search warrant authorized the DEC and the attorney general's office to sample the liquids found in the tanks, to dye-test the drains and to seize documentary evidence pertaining to the transportation or disposal of ethylene glycol and other liquid wastes of Capitaland.

6. After signing the search warrant and completing court business, respondent left the court and, shortly thereafter, telephoned Mr. Towne's law office from his car, using his cell phone. Respondent left a message on Mr. Towne's voice mail, asking him to call respondent either on his cell phone, if Mr. Towne was still in the office, or at respondent's home.

7. When respondent arrived home, he placed a second telephone call to Mr. Towne's home and left a message on his answering machine, asking Mr. Towne to "give me a call sometime this evening."

8. Mr. Towne, who was on a fishing trip in Maine at the time, was notified by his wife that respondent had called and left a message for Mr. Towne to call him that evening. At approximately 7:50 PM that evening, Mr. Towne returned respondent's calls. Respondent did not know that Mr. Towne was out of the area.

9. In their brief telephone conversation, respondent told Mr. Towne that there was a problem with ethylene glycol on the Capitaland premises, that respondent had just signed a search warrant for the Capitaland premises at the request of the DEC, which was looking for a toxic substance, and that Mr. Towne should have a meeting with his client right away in order to solve the ethylene glycol problem.

10. Respondent knew that the search warrant would be executed shortly.

11. Following his conversation with respondent, Mr. Towne immediately reported the conversation to attorneys and sought advice as to his obligations with respect to the matter. Mr. Towne did not notify his client of the impending search.

12. The search warrant signed by respondent was executed on the morning of July 27, 2000. Samples taken from the underground tanks were found not to be hazardous, and Capitaland was not charged as a result of the search.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(6) and 100.3(B)(10) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By notifying an attorney that he had just signed a search warrant for premises of the attorney's client, respondent engaged in egregious misconduct that was inconsistent with the fair and proper administration of justice.

The record establishes that within minutes of signing the warrant, respondent attempted to contact the attorney, left two urgent telephone messages for the attorney to return the calls and, in the ensuing conversation, imparted the highly confidential information that he had just signed a search warrant against the attorney's client at the request of the DEC and that the client had an ethylene glycol problem. Respondent's extraordinary, *ex parte* communication jeopardized the integrity of the DEC's search since, as the DEC officer testified, potential problems could have been concealed on short notice. His unauthorized disclosure of the search warrant was contrary to the ethical rules (Sections 100.3[B][6] and 100.3[B][10] of the Rules Governing Judicial Conduct) and was also a potential violation of the Penal Law (*see* Penal Law §195.05 [Obstructing Governmental Administration]; Penal Law §205.50 [Hindering Criminal Prosecution]; Penal Law §195.00 [Official Misconduct]). Moreover, by advising the attorney of the search warrant, respondent placed the attorney in an ethical quandary and seriously compromised the attorney's ability to represent his client.

Respondent's misconduct is not mitigated by his claim that he had no intent to disclose the search warrant when he placed the calls and that he contacted the attorney only because, having recently done a favor for the attorney and his client, he was angry that the client now had "a problem with ethylene glycol." That very "problem" was the subject of the search warrant, and having placed two urgent telephone calls to discuss the subject, respondent cannot minimize his responsibility by claiming that disclosure of the search warrant just "slipped out," as he testified at the hearing. He is fully responsible for his actions and his words. Moreover, even respondent's version of the incident depicts a judge who lacks judicial temperament and an understanding of his judicial role: he assumed the client's guilt upon reading the search warrant application; he disclosed highly confidential information because he was angry and "lost control"; and he wanted to tell the attorney to meet with his client immediately to "solve the problem" which was the subject of the warrant. Even without a specific reference to the search warrant, that message would have been a serious breach of his ethical duties.

Respondent's misconduct cannot be viewed as a momentary lapse of judgment. Between his first call to the attorney and the actual conversation, respondent had approximately two hours to consider what he wanted to say and to recognize that he should say nothing whatsoever pertaining to the subject. His persistence in attempting to contact the attorney, and the opportunity he had for reflection, suggest a determined, deliberate decision to convey the message that was conveyed.

Respondent's misconduct was inexcusable and cannot be attributed to inexperience or ignorance. As a judge since 1995 and an attorney, respondent had no doubt that the search warrant was confidential and that disclosing it to the attorney was absolutely prohibited.

The effectiveness of the judicial system is dependent upon the public's trust in the integrity of the judiciary. Respondent's unauthorized disclosure of confidential information acquired in his judicial capacity was a perversion of the judicial process, and the fact that the

attorney did not act upon the information should not inure to respondent's benefit. Such conduct seriously distorted his role as a judge and irredeemably damages public confidence in the integrity of his court. While the extreme sanction of removal "is not normally to be imposed for poor judgment, even extremely poor judgment," in this case respondent's misconduct "transcends poor judgment" and is "truly egregious." Matter of Sims v. Comm on Jud Conduct, 61 NY2d 349, 356 (1984); Matter of Steinberg v. Comm on Jud Conduct, 51 NY2d 74, 81 (1980); Matter of Mazzei v. Comm on Jud Conduct, 81 NY2d 568, 572 (1993). His misconduct constitutes a serious breach of the public trust which demonstrates that he is unfit for judicial service.

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

Mr. Berger, Judge Marshall, Judge Ciardullo, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Coffey was not present.

Dated: February 6, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RICHARD C. HAMM**, a Justice of the Cobleskill Village Court, Schoharie County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Hiscock & Barclay (By Stephen H. Volkheimer) for Respondent

The respondent, Richard C. Hamm, a Justice of the Cobleskill Village Court, Schoharie County, was served with a Formal Written Complaint dated June 17, 2002, containing one charge. Respondent filed an answer dated July 11, 2002.

On September 5, 2002, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 19, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Cobleskill Village Court, Schoharie County, since 1999. He is not an attorney. He has attended and successfully completed all required training sessions sponsored by the Office of Court Administration.

2. On or about December 18, 2001, the small claims case of Sperbeck v. Brown came before respondent. After the parties agreed that the defendant owed \$200 to the claimant, respondent prepared and had the litigants sign a stipulation of settlement in which respondent included the provision that if payment of \$200 was not made to the claimant by the defendant, Mr. Brown, by December 22, 2001, before 7:00 P.M., "a warrant will be issued for Mr. Brown's arrest." Mr. Brown paid the claimant on December 21, 2001.

3. Respondent knew when he prepared the stipulation of settlement that the law did not authorize the arrest of a litigant in a civil suit to enforce a civil settlement. Respondent did not intend to issue a warrant for Mr. Brown's arrest if Mr. Brown failed to make the payment, but

included the warrant provision in the stipulation of settlement solely to intimidate Mr. Brown so that he would comply with the stipulation.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2 (C) and 100.3(B)(1) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By threatening a small claims defendant with arrest in order to enforce a civil settlement, respondent abused his judicial power and knowingly flouted the law. *See Matter of Mayville*, 1985 Annual Report 180, 194 (Comm'n on Jud Conduct). Despite knowing that he lacked authority to arrest a civil litigant for non-payment of a settlement, respondent included the warrant provision in a stipulation of settlement, thereby conveying the false impression that non-payment of the settlement was a criminal matter. Respondent has acknowledged that his sole purpose in including the warrant provision was to intimidate the defendant into complying with the settlement. Undeniably, the threat was coercive, and by including it in the stipulation of settlement respondent lent his judicial imprimatur to a threat that he knew was unenforceable.

Public confidence in the integrity and impartiality of the judiciary is essential to the administration of justice. By his conduct, respondent violated his obligation to discharge his judicial duties in a fair and judicious manner and created the appearance that the claimant was in special position to influence him, contrary to Sections 100.2 and 100.3(B)(1) of the Rules Governing Judicial Conduct.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Judge Peters, Mr. Pope and Judge Ruderman concur.

Dated: October 1, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **EDWYN C. HISE**, a Justice of the Alexander Town Court, Genesee County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Michael M. Mohun for Respondent

The respondent, Edwyn C. Hise, a justice of the Alexander Town Court, Genesee County, was served with a Formal Written Complaint dated November 14, 2001, containing one charge. Respondent filed an answer dated November 27, 2001.

On February 28, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On May 9, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Alexander Town Court since January 1, 1999. He has attended and successfully completed all required training sessions for judges.
2. On or about June 27, 2000, respondent presided over People v. Denny Rhodes, in which the defendant, who had been issued an appearance ticket dated May 20, 2000, was charged with Accumulating Junk on Property in Excess of Thirty Days, a violation of Section 405(C) of the Alexander Town Code.
3. Respondent advised the defendant of the charge against him and of his right to an attorney. The defendant indicated that he wished to proceed without an attorney and pleaded not guilty to the charge. After pleading not guilty, the defendant acknowledged that his property

needed to be cleaned up.

4. Following his discussion with the Zoning Enforcement Officer, the defendant advised respondent of what actions he would take to clean up his property. Respondent scheduled the defendant to return to court to discuss his actions in cleaning up the property.

5. On or about September 16, 2000, respondent received a letter from the Zoning Enforcement Officer indicating that the defendant had not yet cleaned up the property. The defendant was issued a notice to appear in court.

6. On or about October 17, 2000, the defendant appeared before respondent without counsel. Respondent advised the defendant that the Zoning Enforcement Officer had advised the court by letter that the defendant had not cleaned up his property. The defendant acknowledged that he had not cleaned up his property.

7. Respondent convicted the defendant of the original violation notwithstanding that the defendant had pleaded not guilty, had not changed his plea to guilty and had not been provided with a trial in the matter.

8. Respondent fined the defendant \$350.00 and sentenced him to ten days in jail.

9. Respondent convicted the defendant, fined him \$350.00 and sentenced him to jail because he believed that the defendant's statements during the arraignment about agreeing to "clean up" his property and bring it in conformance with Town Code regulations constituted an implied admission of guilt.

10. Respondent acknowledges that it was improper to find the defendant guilty on his acknowledgment that he had not cleaned up his property without either a trial or a formal guilty plea, especially since (a) the defendant was unrepresented by counsel and (b) respondent intended to sentence the defendant to a fine and a ten-day jail sentence. Respondent recognizes that a defendant has a right to a trial in the absence of a formal plea of guilty, and has stipulated that he will be careful not to engage in such conduct again.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and 100.3(B)(6) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent violated fundamental statutory procedures in convicting and imposing a ten-day jail sentence on an unrepresented defendant. After the defendant had pleaded not guilty to the charge, respondent convicted him without a trial, relying on the defendant's incriminating statements at the arraignment. The defendant had never changed his plea to guilty and never waived his guaranteed right to a trial.

It is the responsibility of every judge, lawyer or non-lawyer, to maintain professional competence in the law and to ensure that every defendant, especially a defendant who is facing the loss of liberty, is afforded basic procedural due process. See Matter of Christie, 2002 Ann

Rep of NY Commn on Jud Conduct __; Sections 100.2(A) and 100.3(B)(1) of the Rules Governing Judicial Conduct. A judge who convicts a defendant without a trial or a knowing, voluntary guilty plea does not comply with the law and denies the defendant the opportunity to be fully heard. Matter of McGee v. State Commn on Jud Conduct, 59 NY2d 870, 871 (1983); Matter of Schneider, 1991 Ann Rep of NY Commn on Jud Conduct 71; Section 100.3(B)(6) of the Rules.

Respondent's misconduct shows basic ignorance of fundamental legal principles and warrants public discipline. See Matter of Maxon, 1986 Ann Rep of NY Commn on Jud Conduct 143, in which a non-lawyer town justice was admonished for convicting and fining a defendant in a traffic case without a trial. Here, where the defendant was sentenced to a ten-day term in jail, the effect of respondent's abrogation of the defendant's rights was particularly harmful. In mitigation, the conduct of respondent, a non-lawyer who had served less than two years as a judge, is limited to a single instance and respondent has vowed not to engage in such conduct again.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Marshall was not present.

Dated: May 17, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **THOMAS S. KOLBERT**, a Justice of the Cheektowaga Town Court, Erie County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Taheri and Todoro, P.C. (by Michael S. Taheri) and Joel L. Daniels for Respondent

The respondent, Thomas S. Kolbert, a Justice of the Cheektowaga Town Court, Erie County, was served with a Formal Written Complaint dated July 2, 2002, containing three charges. Respondent filed an answer dated July 17, 2002.

On October 30, 2002, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts, agreeing that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On November 8, 2002, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Cheektowaga Town Court, Erie County since April 1989.

As to Charge I of the Formal Written Complaint:

2. On or about December 20, 1999, after Cheektowaga Police Officer Richard Ford attempted without success to serve a warrant of arrest issued by Cheektowaga Town Justice Ronald Kmiotek on Valentine Bakowski, who had been charged with Issuing A Bad Check, a violation of Section 190.05(1) of the Penal Law, and Petit Larceny, a violation of Section 155.25 of the Penal Law, respondent contacted the Cheektowaga Police Department, identified himself as "Judge Kolbert" and spoke with the dispatcher. Respondent asked about the warrant for the defendant and was told that the defendant had not been arrested. Respondent advised the dispatcher that the general practice used by the police and court in cases involving an arrest warrant issued for a local resident was to first contact the defendant and permit him the opportunity to appear in court without being arrested.

3. Respondent advised the dispatcher that he had been told that the defendant was attempting to pay the amount claimed, and advised the dispatcher that the police should not serve the warrant but that an appearance ticket should be issued for the defendant. The dispatcher related respondent's request to the police officer who was handling the case. The officer executed the warrant six days later.

4. Respondent had been asked by a friend to intervene in the police attempt to execute the warrant, and respondent advised his friend that he would do so.

As to Charge II of the Formal Written Complaint:

5. In January 1999 the Town of Cheektowaga Highway Department plowed snow off the street in front of respondent's personal residence and into respondent's driveway. Respondent was disturbed by the actions of the snowplow operator and motioned to Christopher Kowal, the Town Highway Superintendent who was driving down the street, to come over to respondent.

6. Respondent angrily complained to Mr. Kowal about the snowplow operator. Respondent told Mr. Kowal that if Mr. Kowal or the snowplow operator were to appear in respondent's court, respondent would impose the maximum sentence on them.

7. Respondent recognizes that his reference to his authority to impose sentences upon defendants constituted the assertion of his judicial office in connection with a personal dispute. Respondent did not, thereafter, impose such maximum sentences as he had warned. Respondent asserts that he was angry because of the snowplow operator's irresponsible driving of the snowplow on a street where children were playing. There is evidence that the source of respondent's anger was the operator's plowing of the snow in front of respondent's residence and into his driveway. Although the reason for respondent's anger at the snowplow driver is in dispute, respondent recognizes that regardless of his motivation, his statements to Mr. Kowal were improper.

As to Charge III of the Formal Written Complaint:

8. On or about December 15, 2000, respondent was presented with an application for a warrant of arrest for the defendant in *People v. Thomas Stadler*, in which the defendant was charged with multiple violations of the Town of Cheektowaga Housing Code.

9. The property that was the subject of the alleged code violations was leased by respondent's personal friend who had complained to the Town Housing Inspector about the alleged violations. Respondent had visited his friend at the property on a number of occasions prior to the proceeding and knew that the property was in poor condition. Respondent would have disqualified himself from the proceeding before issuing the warrant had he recognized that the property involved was the same property at which his friend resided. Had respondent reviewed the papers, he believes he would have noticed that his friend resided at the property. Respondent acknowledges that the failure to adequately review the documents supporting the warrant application would not be an excuse for his failure to disqualify himself.

10. Respondent failed to disqualify himself from *People v. Thomas Stadler* and issued the warrant for the defendant's arrest.

11. Respondent did not arraign the defendant after his arrest, had no further involvement in *People v. Thomas Stadler*, and disqualified himself from the matter after later being told that the case involved the property at which his personal friend resided.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C) and 100.3(E)(1) of the Rules Governing Judicial Conduct. Charges I through III of the Formal Written Complaint are sustained insofar as they are consistent with the above facts, and respondent's misconduct is established.

In three separate incidents, respondent engaged in conduct that violated well-established ethical standards and undermined the fair administration of justice.

On and off the bench, judges are held to standards of conduct "much higher than for those of society as a whole." *Matter of Kuehnel*, 49 NY2d 465, 469 (1980). Every judge is obligated to act in a manner that promotes public confidence in the integrity of the judiciary and to avoid even the appearance of impropriety (Section 100.2[A] of the Rules Governing Judicial Conduct). Judges are also prohibited from lending the prestige of judicial office to advance the private interests of the judge or others (Section 100.2[C] of the Rules).

By contacting the police department at the request of a friend and advising a dispatcher that the police should issue an appearance ticket to a defendant, rather than serve an arrest warrant, respondent intervened in a pending proceeding and used the prestige of judicial office in an attempt to advance the private interests of others. Invoking his judicial status by identifying himself as a judge, respondent acted as the defendant's advocate, lecturing the dispatcher about procedures and advising him that the defendant was attempting to pay the amount claimed. Respondent's conduct was a blatant assertion of influence for personal purposes, which is clearly prohibited by the ethical standards. *See Matter of LoRusso*, 1988 Ann Rep 195 (Comm'n on Jud Conduct, June 29, 1987); *Matter of Crosbie*, 1990 Ann Rep 86 (Comm'n on Jud Conduct, Sept 8, 1989). As the Court of Appeals has stated:

[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. 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. 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. [Citations omitted.] *Matter of Lonschein*, 50 NY2d 569, 571-72 (1980)

Respondent's threatening reference to his judicial authority in his confrontation with the highway superintendent was also improper. By stating that he would impose the maximum sentence if the superintendent or snowplow operator appeared in his court, respondent inappropriately interjected his judicial office into a personal dispute and conveyed the impression that he was prepared to use his judicial authority as a weapon to retaliate against individuals because of personal grievances. Although respondent never acted on his threat, even the suggestion of such conduct seriously diminishes public confidence in the integrity of the judiciary and the fair administration of justice.

It was also improper for respondent to issue a warrant charging code violations on property leased by respondent's friend, especially since respondent's friend had complained about the alleged violations. Handling such a case creates an appearance of impropriety, which is prohibited by Section 100.2 of the Rules. As respondent has acknowledged, his failure to adequately review the documents in the matter does not excuse his failure to disqualify himself.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. Moore was not present.

Dated: December 26, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JAMES P. KRAUCIUNAS**, a Justice of the Ohio Town Court, Herkimer County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Honorable James P. Krauciunas, *pro se*

The respondent, James P. Krauciunas, a Justice of the Ohio Town Court, Herkimer County, was served with a Formal Written Complaint dated November 20, 2001, containing one charge. Respondent filed an answer dated January 23, 2002.

By Order dated January 8, 2002, the Commission designated Steven Wechsler, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 26, 2002, in Utica, New York, and the referee filed his report dated July 1, 2002, with the Commission.

The parties submitted briefs with respect to the referee's report. Oral argument was waived. On September 19, 2002, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Ohio Town Court since 1997. He is not an attorney. He has attended and successfully completed all required training sessions for judges and, at all times relevant herein, he has been familiar with the Rules Governing Judicial Conduct.

2. On or about April 9, 2001, respondent appeared at the Whitestown Town Court, Oneida County, while court was in session, to file a small claims court action. Respondent had already filled out the notice of claim form, which he obtained from his own court, and had listed himself and his daughter, Kassandra, as co-claimants. The claim was against Kassandra's landlady, Lois Finegan, for \$88, consisting of a \$40 security deposit, \$38 for a damaged art project and \$10 in court costs.

3. On April 9, 2001, respondent spoke with Whitestown Town Justice Christ Alexander, who was at the bench, so that Judge Alexander could determine whether he had any

conflict of interest and could hear the case. In their discussion concerning the parties to the claim, respondent acknowledged that his daughter was over the age of 18, that she was the lessee of the apartment and that she paid the rent directly to the landlady. Judge Alexander ruled that respondent could not be a co-claimant. During his discussion with Judge Alexander, respondent referred to his own judicial status.

4. On April 9, 2001, respondent was rude and argumentative with the Whitestown Town Court clerk. Respondent first insisted upon using his own small claims court form, although the court's procedure was to enter the information into the computer and then generate the form. Respondent also argued with the court clerk about the postage for mailing the notice to the defendant; respondent repeated two or three times that the postage was included in the filing fee and stated that he knew this because he was a judge in Herkimer County. Respondent spoke in an elevated voice and in a demeaning manner. At one point, Judge Alexander intervened because respondent was so hostile.

5. Respondent mailed the notice of the small claim to the defendant and commenced the suit in his daughter's name, hoping that the defendant would settle it. The small claims hearing was set for May 14, 2001.

6. On May 14, 2001, respondent and his daughter appeared in the Whitestown Town Court, as did the defendant, Ms. Finegan. At the outset of the proceeding, respondent argued with Judge Alexander, in an elevated voice, that he had sent a letter to the court requesting a "change of venue" based upon Judge Alexander's alleged bias against respondent; the court never received that letter. Respondent had no legal basis for a change of venue, and his factual bases were spurious.

7. Because of respondent's hostile demeanor on April 9, Judge Alexander had decided in advance to tape record the proceedings in *Krauciunas v. Finegan* scheduled for May 14, 2001, and the proceedings were recorded.

8. At the May 14, 2001, proceeding, after Judge Alexander informed respondent that he was denying respondent's request for a change of venue, respondent announced that he was not going to try the case, that he was "not ready" and that he wanted to "discontinue" it and start it in another court, notwithstanding that the defendant was present and ready.

9. Judge Alexander told respondent that he would dismiss the case if respondent was not ready. Respondent argued, "I'm going to discontinue it...without prejudice" and "there's a difference between dismissing it and discontinuing it." Respondent also argued again that he should have been named a claimant.

10. Judge Alexander asked respondent's daughter to answer questions. When Judge Alexander asked Ms. Krauciunas if she wished to continue or withdraw the matter, respondent said, "Well, I am going to speak for my daughter." Judge Alexander stated that respondent's daughter was of age, that respondent was not an attorney and that if respondent's daughter wanted an attorney, he would adjourn the proceeding. Respondent argued, "She doesn't need an attorney. She can have someone helping her that's not an attorney in Small Claims."

11. Judge Alexander informed respondent that he could speak to his daughter but could not speak for her. Respondent said, in a voice loud enough to be heard by everyone present, “Tell the judge that he is going to be reported to the Commission on Judicial Conduct and we’ll discontinue the case.” Respondent’s daughter stated that she would discontinue the case, and respondent added, “With leave to start a different venue.”

12. Judge Alexander stated that the case was dismissed.

13. At the Commission hearing, respondent denied that his conduct on May 14 was argumentative and testified that it was not inappropriate to state that he was going to contact the Commission.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.2(C) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

Respondent violated established ethical standards by asserting his judicial office and by his rude, inappropriate conduct in connection with his daughter’s small claims case.

The ethical rules explicitly prohibit a judge from lending the prestige of judicial office to advance private interests (Section 100.2[C] of the Rules Governing Judicial Conduct). As the Court of Appeals stated in *Matter of Lonschein*, 50 NY2d 569, 571-72 (1980):

[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. Members of the judiciary should be acutely aware that any action they take, 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. 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. [Citations omitted.]

It was improper for respondent to refer to his judicial office while arguing that he should be listed as co-claimant in his daughter’s case and again in his dispute with the court clerk over the filing fee. See *Matter of Nesbitt*, 2003 Ann Rep __ (Comm’n on Jud Conduct, June 21, 2002); *Matter of Ohlig*, 2002 Ann Rep 135 (Comm’n on Jud Conduct, Nov. 19, 2001). Respondent’s gratuitous references to his judicial status were obviously intended to persuade and intimidate. Compounding the impropriety, respondent’s rude, argumentative demeanor was unseemly and detracted from the dignity of his judicial office.

Respondent’s insistence on appearing in his daughter’s case, in which he was neither a party nor a lawyer, was inappropriate. Even after the presiding judge had advised respondent that he could not speak for his daughter, respondent, who is not an attorney, persisted in acting as his daughter’s advocate, making motions in the case, arguing with the presiding judge and repeatedly

attempting to speak on his daughter's behalf. His conduct was not only prejudicial to the defendant, who had been summoned to court, but rude and overbearing, culminating in a snide threat to report the presiding judge to the Commission. Respondent's conduct showed insensitivity to the special ethical obligations of judges.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Pope dissents as to the disposition only and votes that respondent be censured.

Dated: November 18, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **PAULA L. LEONARD**, a Justice of the Ulster Town Court, Ulster County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
DeGraff, Foy, Holt-Harris, Kunz & Devine, LLP (By David F. Kunz) for Respondent

The respondent, Paula L. Leonard, a Justice of the Ulster Town Court, Ulster County, was served with a Formal Written Complaint dated February 14, 2001, containing three charges. Respondent filed an answer dated March 26, 2001.

On November 8, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On November 8, 2002, the Commission approved the Agreed Statement of Facts and made the following findings of fact.

1. Respondent has been a Justice of the Ulster Town Court since January 1, 1978. She is not a lawyer. She has attended and successfully completed all required training sessions for judges.

As to Charge I of the Formal Written Complaint:

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

As to Charge II of the Formal Written Complaint:

3. On June 1, 1999, respondent went to her daughter's home while the police were there conducting a search pursuant to a search warrant, and she made her presence known to the police. There is no evidence that she went there because the police were there, and there is no evidence that she knew a search was being conducted. She knew that the police knew who she

was.

4. Respondent asked Captain George Turner, who was in charge of the search, what the police were doing, what the basis was for the search, and why she had not been given advance notice of the search. She objected to the participation of Sergeant Joseph Sinagra in the search and said that Sergeant Sinagra should not be participating in any facet of the search. Respondent and Sergeant Sinagra had a poor relationship.

5. When respondent's grandson arrived, respondent spoke privately with him, and related to Captain Turner that her grandson denied any knowledge of the theft that led to the search of the premises.

6. Although respondent's actions did not adversely affect the search and did not prevent the search, respondent recognizes that she should not have acted as an advocate for her grandson and should not have remained on the premises or said anything after she was advised initially of the reason for the police presence. She had a natural instinct to protect her grandson, but realizes now that she should avoid even the appearance of asserting her influence in such situations.

As to Charge III of the Formal Written Complaint:

7. On April 27, 2000, at the suggestion of the acting chief of the town's police force, respondent wrote a memorandum to the Ulster Town Police Commission Board, which oversees the Ulster Town Police Department, stating that she had dismissed a charge of Petit Larceny against Daniel Johnson because the arresting officer, Sergeant Joseph Sinagra, had released the defendant on an appearance ticket following an arrest on a bench warrant.

8. When a defendant is arrested on a bench warrant, it is required by Criminal Procedure Law Section 530.70(2) that the defendant appear before the court. Sergeant Sinagra had improperly released the defendant on an appearance ticket.

9. Respondent actually dismissed the charge because of the defendant's poor health in the interests of justice. Respondent's statement to the Police Commission Board was intended to underscore the point that it was poor police practice for Sergeant Sinagra to have released the defendant. The statement was inaccurate, in that it gave as the sole reason for the dismissal the decision of Sergeant Sinagra to release the defendant. Respondent also failed to make a record of the reason for the dismissal as required by law.

10. The release of the defendant on an appearance ticket did not justify a dismissal of the charge, and respondent's statement to the Police Board, while not intentionally false, was misleading. Respondent also stated to the Police Board that she dismissed the charge to protect against a lawsuit by the defendant, which would not be an appropriate action by a judge. That statement also was intended to highlight the poor practice of releasing a defendant on an appearance ticket after the defendant has been arrested on a bench warrant.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C) and 100.3(B)(1) of the Rules

Governing Judicial Conduct. Charges II and III of the Formal Written Complaint are sustained, and respondent's misconduct is established. Charge I is not sustained and is dismissed.

Respondent's conduct during the search of her daughter's home pursuant to a search warrant was an improper assertion of her judicial office. The ethical rules prohibit a judge from lending the prestige of judicial office to advance private interests (Section 100.2[C] of the Rules Governing Judicial Conduct). As the Court of Appeals has stated:

[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. 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. 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. [Citations omitted.] *Matter of Lonschein*, 50 NY2d 569, 571-72 (1980)

Having arrived at her daughter's home during the search and having made her presence known to the police officers, who were aware of respondent's judicial status, respondent should have been especially careful to avoid any further conduct which might be construed as using her judicial influence to advance the interests of her relatives. Instead, respondent acted as an advocate for her grandson, questioning the officer who was in charge of the search, conveying her grandson's denial of wrongdoing to the officer, and objecting to the participation of one officer with whom she had a poor relationship. It was especially improper for respondent to ask why she had not been given advance notice of the search; by that question, respondent not only implicitly invoked her judicial status, but implied that because of her judicial status, she should be afforded special access to confidential information concerning her relatives. As a judge since 1978, respondent should know that strict confidentiality is required in connection with the issuance and execution of search warrants. *See Matter of Gibbons*, 98 NY2d 448 (2002).

Regardless of her intent, respondent should have realized that her actions, even in the absence of a specific request for favorable treatment, would create an appearance of asserting the prestige of the judiciary to advance private interests, in violation of the ethical standards *See Matter of Edwards*, 67 NY2d 153, 155 (1986); *Matter of Ohlig*, 2002 Ann Rep 135 (Comm'n on Jud Conduct, Nov. 19, 2001). Respondent's "natural instinct" to protect a family member does not justify a departure from the high standards expected of a judge.

By giving a misleading reason to the Police Commission Board for having dismissed a criminal charge against a defendant, respondent failed to observe high standards of conduct and failed to act in a manner that promotes "public confidence in the integrity and impartiality of the judiciary" (Sections 100.1 and 100.2[A] of the Rules). It was not only inaccurate but mean-spirited for respondent to attribute the dismissal to the improper conduct of a police sergeant, with whom she had a poor relationship, when the actual reason was the defendant's poor health. Respondent also failed to "respect and comply with the law" by failing to make a record of the

reason for the dismissal, as required by Section 170.40(2) of the Criminal Procedure Law.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Mr. Pope and Judge Ruderman concur.

Judge Peters did not participate.

Ms. Moore was not present.

Dated: December 26, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RICHARD H. MILLER, II**, a Justice of the Union Town Court, Broome County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Hinman, Howard & Kattell, LLP (by Richard C. Lewis) for Respondent

The respondent, Richard H. Miller, II, a Justice of the Union Town Court, Broome County, was served with a Formal Written Complaint dated May 23, 2001, containing four charges. Respondent filed an answer dated July 9, 2001.

By Order dated July 18, 2001, the Commission designated Philip C. Pinsky, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 16 and 17 and February 14 and 28, 2002, in Syracuse, New York, on March 4, April 4 and 5, 2002, in Albany, New York, and on May 30, 2002, in Binghamton, New York. The referee filed his report dated October 17, 2002, with the Commission.

On October 30, 2002, the Administrator of the Commission, respondent's counsel and respondent entered into a Stipulation, agreeing that the Commission make its determination based upon the referee's findings of fact and conclusions of law, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On November 8, 2002, the Commission approved the Stipulation and made the following determination.

1. Respondent has been a justice of the Union Town Court, Broome County, since April 1996 and a justice of the Johnson City Village Court since January 2002.
2. Respondent is an attorney admitted to practice law in 1994. Since April 1996, he has practiced as a sole practitioner and, since 1997, has had one full-time secretary, Terri Hoosier.

As to Charge I of the Formal Written Complaint:

3. Respondent presided over two cases in which a party or a member of the party's immediate family was a client of respondent's law firm. In six additional proceedings, respondent engaged in conduct that conveyed an erroneous impression that he was presiding over a client's matters, thereby creating an appearance of impropriety. Specifications to Charge I are set forth in Appendix A.

As to Charge II of the Formal Written Complaint:

4. In three cases, respondent represented the defendants notwithstanding that the charges originated in the Union Town Court. Specifications to Charge II are set forth in Appendix B.

As to Charge III of the Formal Written Complaint:

5. In one case, respondent acted as an attorney in a proceeding in his own court. Specifications to Charge III are set forth in Appendix C.

As to Charge IV of the Formal Written Complaint:

6. In a small claims action in 2000, after respondent had issued a judgment against the defendant and the plaintiff notified the court that the defendant had not paid, respondent's court clerk issued four notices to the defendant, over respondent's signature, which stated that a warrant would be issued for the defendant's arrest if he did not appear in court to pay the judgment. Specifications to Charge IV are set forth in Appendix D.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(C)(1), 100.3(C)(2), 100.3(E)(1), 100.4(A), 100.4(D)(1)(c) and 100.6(B)(2) of the Rules Governing Judicial Conduct. Charges I through IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings, and respondent's misconduct is established.

A part-time judge may practice law, subject to certain restrictions designed to eliminate conflict and the appearance of any conflict between the exercise of judicial duties and the private practice of law. *Matter of Bruhn*, 1988 Ann Rep 133 (Comm'n on Jud Conduct, Dec 24, 1987); *Matter of Feeney*, 1988 Ann Rep 159 (Comm'n on Jud Conduct, Dec 24, 1987). Every lawyer-judge must scrupulously observe the applicable restrictions in order to avoid conduct that may create an appearance of impropriety and impugn the integrity of judicial office.

It is well-established that a judge may not take action in any case involving a client or former client of the judge's law practice. *Matter of Filipowicz*, 54 AD2d 348 (2d Dept 1976). Such conduct violates Section 100.3(C)(1) of the Rules Governing Judicial Conduct, which requires disqualification in a proceeding in which the judge's impartiality might reasonably be questioned. By presiding over one case in which he had an attorney-client relationship with the defendant and another case in which the defendant was the spouse of a client, respondent violated that standard. Respondent's conduct in *Barvainis v. Connelly* was especially egregious: by vacating a default judgment against his client's spouse based solely on his client's *ex parte*, unsworn communication, respondent created an appearance of partiality and favoritism. In six

additional cases, as found by the referee, respondent's conduct conveyed an erroneous impression that he was presiding over a client's matters, thereby creating an appearance of impropriety that undermines public confidence in the impartiality of the judiciary.

The ethical standards clearly prohibit a lawyer-judge from practicing law in the judge's own court (Jud Law §16; Rules Governing Judicial Conduct §100.6[B][2]). In *People v. Shepardson*, respondent acted as the attorney for the defendant by approving a settlement that included a favorable disposition of the harassment charge in the Union Town Court and by preparing an Affidavit of Non-Prosecution which the complainant signed and filed with the Union Town Court. Although respondent did not physically appear in the court in connection with the case, his actions violated the ethical prohibitions and constituted an impermissible intermingling of his roles as a lawyer and judge.

Section 16 of the Judiciary Law further prohibits a judge from practicing law "in an action, claim, matter, motion or proceeding originating in [the judge's] court." In three cases that originated in his court, respondent violated the statute by appearing on behalf of a party in another court.

It was also improper to issue notices to a small claims defendant which stated that a warrant would be issued for the defendant's arrest if he did not appear in court to pay the judgment. Such a warning conveys the false impression that non-payment of a judgment is a criminal matter. Although the notices were issued by respondent's clerk over his stamped signature, respondent was required to exercise supervisory vigilance to ensure the proper performance of the clerical functions. Respondent's supervision was inadequate, as indicated by the blatantly erroneous contents of the notices that were sent over his signature.

In its totality, respondent's conduct showed insensitivity and inattention to his ethical responsibilities and, in particular, to the special ethical obligations of judges who are permitted to practice law. In mitigation, we note that respondent was candid, cooperative and contrite at the hearing and that he has acknowledged his misconduct.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Pope did not participate.

Ms. Moore was not present.

Dated: December 30, 2002

APPENDIX A

1. Barvainis v. Mark Connelly

- A. On February 25, 1997, in *Barvainis v. Mark Connelly*, a small claims action in the Union Town Court commenced on January 29, 1997, respondent granted a default judgment to the plaintiff for \$510. The defendant, Mark Connelly, was the spouse of Amy Connelly, who was respondent's client in a pending Family Court matter that concluded on March 19, 1997.
- B. Subsequently, at a time when Amy Connelly was still respondent's client, respondent received an *ex parte* telephone call from Ms. Connelly. Ms. Connelly told respondent that her husband was in North Carolina, did not receive notice of the proceeding and wanted an opportunity to contest the matter. Respondent issued a letter written by his clerk dated March 17, 1997, "withdrawing the default judgment," which was tantamount to an order vacating the judgment. At the hearing, respondent acknowledged that he should have transferred the case to his co-judge without re-opening it.
- C. After the plaintiff appealed respondent's order withdrawing the default judgment and the County Court issued a decision and order vacating respondent's order and reinstating the default judgment, respondent signed a "Reinstatement of Notice of Default Judgment" dated March 11, 1998. Respondent signed another such Reinstatement in October 1998, apparently intended to be a certified copy of the March 1998 Reinstatement, after being directed to personally sign the March 1998 Reinstatement by a clerk of the County Court in response to a request by the plaintiff's attorney.
- D. A letter dated April 4, 1997, was issued over respondent's signature, without respondent's authorization, adjourning the matter until further notice.

2. People v. Allen Dittman

- A. This specification is not sustained and is, therefore, dismissed.

3. People v. Robert Holcomb

- A. In October 1999 respondent sentenced Robert Holcomb to six months of "work-weekend" jail attendance. In December 1999 respondent presided over the matter of sentence adjustments of Robert Holcomb and excused Mr. Holcomb's attendance on two December weekends due to the death of the defendant's father and the defendant's medical problems. On January 12, 2000, respondent directed that a Notice to Appear be sent to Mr. Holcomb, returnable January 24, 2000. Mr. Holcomb appeared before respondent on that date, and at that time respondent placed a telephone call from his court office to the Tully Town Court, Onondaga County, to verify representations that had been made by Mr. Holcomb during the presentence investigation.

- B. Although Mr. Holcomb was never respondent's client, respondent created an appearance of impropriety with respect to his apparent undertaking to represent Mr. Holcomb in and after December 1999, as set forth below.
- C. On November 3, 1999, Mr. Holcomb and Frederick Lurenz were charged in the Town of Triangle with transporting waste tires without a permit, a violation of the Environmental Conservation Law ("ECL"). On November 28 or 29, 1999, Mr. Holcomb and Mr. Lurenz came to respondent's law office seeking to have respondent represent them with respect to the charges. Respondent informed Mr. Holcomb that he could not represent him and agreed to represent Mr. Lurenz.
- D. Respondent's secretary, Terri Hoosier, prepared a letter to the Triangle Town Court dated November 29, 1999, with a copy to the district attorney's office, stating erroneously that respondent had been retained to represent Mr. Holcomb with regard to the ECL charge. The letter was generated from a computer form and was prepared in error. Respondent signed the letter in error and did not review the letter prior to signing it. By letter dated December 8, 1999, the Triangle Town Court acknowledged respondent's letter concerning his representation of Mr. Holcomb to the Triangle Town Court, which stated erroneously that he was representing Mr. Holcomb.
- E. When respondent received the district attorney's pretrial notice from the court on or about December 9, 1999, he realized that there was a mistake about whom he represented in Triangle. Respondent called the Triangle Town Court and informed the clerk that the letter had been sent in error and that he represented Mr. Lurenz, not Mr. Holcomb. Respondent wrote a letter dated December 13, 1999, to the Triangle Town Court confirming his representation of Mr. Lurenz, but did not send to the court or the district attorney's office written confirmation of his telephone notification to the court that he did not represent Mr. Holcomb, thereby compounding the appearance of impropriety created by the erroneous November 29, 1999, letter.
- F. Mr. Holcomb entered a guilty plea to the ECL violation in the Triangle Town Court on December 16, 1999, and paid a fine in November 2000. Mr. Holcomb never personally appeared in that court.
- G. Respondent never billed or received a fee from Mr. Holcomb regarding the ECL charge.

4. People v. Sheila Johnson-Pish

- A. Respondent presided over two Vehicle and Traffic Law charges against Sheila Johnson-Pish. Respondent's clerk issued, over respondent's signature stamp, a letter dated May 10, 1999, ordering a supporting deposition from the arresting officer and a notice dated May 10, 1999, scheduling a pretrial conference for June 3, 1999. Respondent did not contend that those documents were issued without his authority. On or shortly after June 3, 1999, respondent approved a plea agreement that Ms. Johnson-Pish had made with the district attorney's office; Ms. Johnson-Pish did not

- personally appear before respondent to enter the plea. Respondent testified that a negotiated reduction in the charge would be marked on the ticket and that a judge would then set the fine; it was respondent who did so. The court record shows that respondent was responsible for the fine, and the fine was included in respondent's report to the State Comptroller.
- B. Although they did not have a formal written agreement, respondent commenced an attorney-client relationship with Ms. Johnson-Pish in April 1999 which continued at all relevant times subsequent thereto. Respondent consulted with Ms. Johnson-Pish concerning Family Court matters on April 15 and April 27, 1999, and billed her \$125 for each such consultation. Ms. Johnson-Pish paid respondent \$125 for the April 27 meeting on that date. Without another intervening communication or meeting with Ms. Johnson-Pish, respondent, on June 14, 1999, mailed to her Family Court petitions for custody and support and a financial affidavit, which were requested at the April 27 conference.
4. People v. Ronald Jones
- A. This specification is not sustained and is, therefore, dismissed.
5. Summary Eviction Proceedings commenced by John Kuzel
- B. Respondent presided over five summary eviction proceedings commenced by John Kuzel in the Union Town Court: *Kuzel v. Milot* (filed April 9, 1999); *Kuzel v. Waterhouse* (filed April 27, 1999); *Kuzel v. Weaver* (filed November 15, 1999); *Kuzel v. Nemire* (filed January 10, 2000); and *Kuzel v. Suttan* (filed January 10, 2000). Although it was not established that Mr. Kuzel was respondent's client or that respondent performed or authorized the performance of legal services on behalf of Mr. Kuzel, respondent's signature as an attorney on two Notices of Petition in other eviction proceedings by Mr. Kuzel in the Binghamton City Court created an appearance of impropriety by conveying an erroneous impression that respondent was presiding over a recent former client's matters, as set forth below.
- C. Respondent's legal secretary, Terri Hoosier, prepared the paper work in Mr. Kuzel's eviction proceedings without any authority from respondent and without his knowledge. Ms. Hoosier prepared the eviction papers at her home or at another location when she met with Mr. Kuzel, a practice she had begun when she worked for two previous attorneys. Mr. Kuzel never discussed any of his evictions with respondent, never employed or consulted with respondent as an attorney and never paid or was billed by respondent in connection with the proceedings. Respondent's name does not appear on any of the petitioner's papers in the eviction proceedings. In *Weaver*, the petition shows Mr. Kuzel as "petitioner *pro se*."
- D. The petitions and certain other documents in the five eviction proceedings were notarized by Ms. Hoosier, who frequently notarized signatures for people in the geographic area who would stop by the law office to have her notarize a signature,

- whether or not they knew respondent. Thus, seeing Ms. Hoosier's notary stamp on eviction papers in proceedings, such as the *Kuzel* proceedings, coming before respondent did not concern respondent because he knew that his secretary frequently notarized signatures for litigants, including those appearing in the Union Town Court, even though he did not represent them. Respondent did not, at the time, consider that Ms. Hoosier's notarization of eviction petitions coming before him created an appearance of impropriety.
- E. In four other eviction proceedings commenced by John Kuzel in the Binghamton City Court in June 1999, August 1999, April 2000 and May 2000, in which Mr. Kuzel is listed as "petitioner *pro se*," respondent signed the Notice of Petition form on the line provided for the signature of the "clerk." (The latter two forms were signed by respondent after he last presided over any of Mr. Kuzel's eviction proceedings in the Union Town Court.) According to respondent, it was the practice in the Binghamton City Court that if an attorney signed a notice of eviction, the petitioner did not have to pay a filing fee at the time the eviction papers were filed. Ms. Hoosier was aware of that practice and had respondent sign the Binghamton eviction papers in order to obtain that benefit for Mr. Kuzel. By signing such papers as an attorney, respondent created an appearance of impropriety, *i.e.*, an appearance that he presided over three eviction proceedings of Mr. Kuzel after respondent had afforded a benefit to Mr. Kuzel in the Binghamton City Court by signing two of his Notices of Petition in that court. Such appearance is improper even though the eviction papers in the Binghamton City Court showed Mr. Kuzel as petitioner *pro se* and did not clearly indicate the purpose for respondent's signature on the line designated for signature by a "clerk." As to one of the Binghamton eviction papers signed by respondent, he testified that he "erred" by signing it.
- F. Respondent had no actual knowledge of the preparation of the legal documents by his legal secretary or of her arrangement with Mr. Kuzel to prepare such documents, and no such knowledge can be imputed to respondent. Ms. Hoosier's notarization of eviction papers did not, under the circumstances, impose upon respondent a duty to investigate further into the circumstances of the preparation of those petitions.
- G. There was no implicit or explicit undertaking by respondent to represent John Kuzel in any eviction proceeding. There is no evidence that Mr. Kuzel believed, reasonably or otherwise, that Ms. Hoosier was acting on behalf of respondent. No fee was paid, and no benefit was received by respondent. Ms. Hoosier did not have apparent authority to enter into an attorney-client relationship for respondent; nor did respondent provide her with apparent authority or an ostensible agency to act on his behalf with respect to Mr. Kuzel. Ms. Hoosier acted with no intention or motive of benefiting respondent, was not acting on his behalf, and was not acting, even in part, to further respondent's interest, and she had no such motive.

APPENDIX B

1. *People v. Ronald Jones*

- A. Between April 28, 1999, and February 15, 2000, respondent represented Ronald Jones in the Broome County Court in connection with a felony Driving While Intoxicated (“DWI”) charge. He appeared in the County Court on December 13, 15 and 16, 1999. On December 16, 1999, Mr. Jones pleaded guilty. The probation report dated January 26, 2000, accurately noted the pendency of a Violation of Probation charge in the Union Town Court, based upon the DWI arrest, that respondent had imposed the probation sentence, and that respondent was representing Mr. Jones on the felony DWI charge. At the sentencing proceeding in County Court on February 15, 2000, the County Court judge, based upon the sentence in the probation report, disqualified respondent from representing Mr. Jones and directed any retainer to be refunded. While representing Mr. Jones in County Court, respondent had ample time and opportunity to learn that the Violation of Probation charge was pending in the Union Town Court.

2. *People v. Marino Panaro*

- A. On August 25, 1999, Marino Panaro received tickets for four violations, one misdemeanor and two felonies (DWI and aggravated unlicensed operation of a vehicle). Respondent’s co-justice suspended the defendant’s driver’s license on September 21, 1999, and later transferred the matter to County Court in response to an indictment of the defendant in January 2000. The defendant was directed to appear in the Broome County Court on January 26, 2000.
- B. On the morning of the scheduled arraignment, the defendant’s father called respondent and asked him to appear with the defendant in County Court. Respondent represented the defendant at the arraignment in County Court that morning. A conference was set for January 28, 2000, at respondent’s request but was not held. After respondent left the courtroom following the arraignment, he read the indictment and noted that it involved a Town of Union matter. He spoke with the County Court judge and terminated his representation. Sometime prior to February 9, 2000, the County Court judge assigned a new attorney to represent the defendant.

3. *Greg Gilbert v. Jennifer Goss*

- A. This specification is not sustained and is, therefore, dismissed.

4. *Rachel Braden v. Douglas Shepardson*

- A. Rachel Braden filed two criminal informations against Douglas Shepardson, the father of her infant son. The information filed in the Town of Union alleged harassment committed on August 17, 1999, and was signed and filed on that date; the information filed in the Town of Maine (also in Broome County) alleged aggravated harassment committed on August 31, 1999. Ms. Braden also filed a family offense petition

against Mr. Shepardson in Family Court, Broome County, on September 1, 1999. The Family Court and the local criminal court had concurrent jurisdiction over these types of family offenses.

- B. Respondent represented Mr. Shepardson as the respondent and cross-petitioner in the Family Court offense proceeding (and related custody and visitation proceedings) commenced by Ms. Braden which were concluded at a court appearance on November 30, 1999, with the stipulated issuance of an order of protection issued by that court against Mr. Shepardson and other relief. All proceedings in the Union Town Court on the harassment violation were presided over by respondent's co-justice, who issued an adjournment in contemplation of dismissal on March 21, 2000.
- C. The family offense petition in the Family Court alleged harassment or other acts by Mr. Shepardson that occurred on seven different dates specified in the petition, one of which was August 17, 1999. The Harassment, Second Degree information filed in the Town of Union alleged harassment or other acts by Mr. Shepardson against Ms. Braden on the same date.

APPENDIX C

1. Barvainis v. Mark Connelly

- A. This specification is not sustained and is, therefore, dismissed.

2. People v. Douglas Shepardson

- A. Respondent acted as the attorney for Douglas Shepardson in two respects in relation to the Union harassment charge described in Appendix B, paragraph 4, even though he never appeared in the Union Town Court in connection with that charge. Respondent, on behalf of his client, approved a settlement of the Family Court proceeding that included a favorable disposition of the Union harassment charge; respondent also prepared an Affidavit of Non-Prosecution for signature by the complainant, Rachel Braden, which she signed and filed with the Union Town Court.
- B. Respondent prepared without charge and at the request of Ms. Braden's attorney Affidavits of Non-Prosecution for both the Town of Maine and the Town of Union. He did not stop to think that his preparation of the affidavit might constitute the practice of law in his own court. Respondent sent those Affidavits of Non-Prosecution for signature by Ms. Braden, to her attorney, Terrance Dugan, under cover of a letter dated January 12, 2000. Respondent's letter requested that the signed affidavits be returned to him. Mr. Dugan forwarded those affidavits to Ms. Braden under cover of his letter dated January 21, 2000. Mr. Dugan's letter informed his client that if she signed the affidavits, she "may then forward them directly to Mr. Miller per his request."
- C. On February 3, 2000, Ms. Braden signed the Affidavit of Non-Prosecution for the Union harassment charge, and she delivered that affidavit on the same date to the

Union Town Court.

- D. On February 28, 2000, Ms. Braden signed an additional copy of the Affidavit of Non-Prosecution for the Union harassment charge at the same time that she executed a second copy of the affidavit for the Town of Maine charge. This additional copy of the Union affidavit contains a hand-written notation dated March 6, 2000, reading: "RHM gave this to Eliza to put in file." This second affidavit was superfluous as to the Union charge since the first affidavit had been filed on February 3, 2000, and was never lost or misplaced.
- E. On March 21, 2000, respondent's co-justice issued an adjournment in contemplation of dismissal for the Union harassment charge.

3. Summary Eviction Proceedings commenced by John Kuzel (*Kuzel v. Milot, Kuzel v. Nemire, Kuzel v. Suttin, Kuzel v. Waterhouse, Kuzel v. Weaver*)

- A. These specifications are not sustained and are, therefore, dismissed.

4. Additional Eviction Proceedings (*Carpentieri v. Castelli, Johnson v. Polite and Backus, Nasiatka v. Hoyt, Suer v. Kistadet and Limonti, Korba v. Lysak and Welch*)

- A. These specifications are not sustained and are, therefore, dismissed.

APPENDIX D

1. Richard Santucci brought a small claims action against Michael Mitchell for \$235 in the Union Town Court. On March 27, 2000, both parties appeared before respondent. Mr. Mitchell stipulated that he owed the money, and judgment was entered.

2. On April 20, 2000, Mr. Santucci called respondent's court clerk, Ingeborg Nytech. Mr. Santucci told her that respondent had told him that if Mr. Santucci did not get paid, he should call the court and respondent would schedule an appearance for Mr. Mitchell to come in. The clerk told Mr. Santucci to call her at the beginning of May if he had not received his money. Mr. Santucci did not speak with respondent on that date.

3. On May 8, 2000, Mr. Santucci came to court and informed the clerk that Mr. Mitchell had failed to pay the \$235. The next day, respondent, upon being informed of Mr. Santucci's allegations, directed his clerk, Ms. Nytech, to notify Mr. Mitchell to appear on May 15, 2000. Mr. Santucci was orally notified.

4. Mr. Mitchell received a Notice to Appear from the court, over respondent's stamped signature, dated May 9, 2000, scheduling a May 15 court appearance. That document included a

printed notice, in capital letters, stating: “IF YOU FAIL TO APPEAR ON THE DATE AND TIME DESIGNATED, A WARRANT WILL BE ISSUED FOR YOUR ARREST. PLEASE DO NOT IGNORE THIS NOTICE !!!!!” (Emphasis in original). The form was captioned “People of the State of New York vs. Richard Santucci.”

5. On May 15, 2000, both parties appeared before respondent, and Mr. Mitchell agreed to start making partial payments of \$40 per week on May 19, directly to Mr. Santucci.

6. On June 20, 2000, Mr. Santucci called the court clerk and said he had not been receiving payments. He requested that the defendant “pay through the court.” Mr. Mitchell had made one \$40 payment and the June 22 court record made by Ms. Nytch showed a balance on the judgment of \$195.

7. The court clerk sent Mr. Mitchell a second Notice to Appear dated June 20, 2000, which included the same printed notice and warning of arrest and the same erroneous caption. This Notice was issued over respondent’s stamped signature and scheduled a June 26 court appearance.

8. On June 22, 2000, Mr. Mitchell called the clerk who, with the concurrence of respondent, approved the parties’ agreement that Mr. Mitchell should make weekly payments to the court of \$25. The payments were to be made on June 23, June 30, July 7, July 14, July 21, July 28 and August 4, with the final payment of \$20 on August 11, 2000. Mr. Mitchell testified that he had requested the payments to be made to the court. He made the first \$25 payment on June 26. Apparently the court appearance on June 26 was not held.

9. Mr. Mitchell did not pay any of the next three installment payments at or about the dates they were due. On July 17, 2000, the court clerk issued a third Notice to Appear, dated July 17, 2000, over respondent’s stamped signature, containing the same erroneous caption and printed warning as the two prior Notices. This Notice was returnable July 24. It is not clear from any court record whether the court appearance scheduled for July 24 was held.

10. A fourth Notice to Appear, dated August 2, 2000, was issued over respondent’s stamped signature, addressed to Mr. Santucci and referencing “Santucci vs. Mitchel.” The caption on the notice was “People of the State of New York vs. Mickel T. Mitchel.” This Notice, returnable September 11, contained the same printed warning as the prior three Notices. Mr. Mitchell paid \$50 on or about September 8, 2000, and the court appearance scheduled for September 11 was not held.

11. Respondent testified that his signature stamp was used on all four Notices to Appear. The second, third and fourth Notices to Appear, described above, clearly were stamped with respondent’s signature by the court clerk; the signature on the first Notice to Appear, dated May 9, seems to have been affixed by a different signature stamp. In any event, respondent is responsible for the issuance of all four Notices to Appear.

12. It appears that Mr. Mitchell was never served with any of the documents required to hold a judgment debtor in contempt for failure to respond to an information subpoena.

13. Respondent showed poor judgment in allowing his clerk to use his signature stamp on the court notices without his personally having reviewed the blatantly erroneous content of those notices, as completed by his clerk, prior to their issuance.

14. When Mr. Mitchell appeared before respondent on May 15, 2000, and July 24, 2000, respondent should have observed the erroneous and improper file copy of the Notice to Appear. Respondent admitted in his testimony that he saw the Notices to Appear the last time the parties came in.

15. With respect to respondent's contention that his court clerk had received direction from the Chief Court Clerk as to the form of a Notice to Appear to be used, any such advice should not have been substituted for respondent's direct oversight of his own clerk.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN B. NESBITT**, a Judge of the County, Family and Surrogate Courts, Wayne County.

THE COMMISSION

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Mary Katherine Villani for Respondent

The respondent, John B. Nesbitt, a Judge of the County, Family and Surrogate Courts, Wayne County, was served with a Formal Written Complaint dated January 4, 2002, containing one charge. Respondent filed an answer dated January 15, 2002.

On May 24, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On June 20, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Judge of the County, Family and Surrogate Courts, Wayne County since January 1, 2001.

2. On or about July 25, 2001, respondent improperly asserted the prestige of his judicial office on behalf of his son by sending a letter on judicial stationery in a judicial envelope to the Finger Lakes Community College Summer School Program Administrator challenging an administrative determination by the Program Administrator concerning respondent's son's participation in the program. The letter challenged the college administrator's findings and asserted that a hearing had to be conducted before the student was expelled. The letter specifically requested the reinstatement of respondent's son "pending hearing and determination of this matter by competent authority."

3. Respondent knew that his use of judicial stationery would receive attention and

that if the college knew respondent was a judge, the college would refer the matter to its attorney.

4. Respondent now understands that such action on his part inevitably attributes such a letter to his official position as a judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C) and 100.4(A)(2) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By writing a letter on judicial stationery to a school official challenging an administrative determination concerning respondent's son, respondent violated well-established ethical standards barring a judge from lending the prestige of judicial office to advance the private interests of the judge or others (Sections 100.2[C] of the Rules Governing Judicial Conduct). As the Court of Appeals stated in Matter of Lonschein v. State Commn on Jud Conduct, 50 NY2d 569, 571-72 (1980):

[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. Members of the judiciary should be acutely aware that any action they take, 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. 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. [Citations omitted.]

Respondent's judicial stationery lent particular clout to his statements that he had reviewed the matter, that he questioned the legal sufficiency of the school's procedures and that the school should consult an attorney. Using the words "Personal and Unofficial" does not diminish the undeniable impact of such a letter, which inevitably invokes the prestige of the judiciary. Respondent has acknowledged that his use of judicial stationery was intended to influence the recipient to give particular attention to his views simply because of respondent's judicial status. It was improper for respondent to inject his judicial status into a private dispute.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Judge Luciano, Ms. Moore, Judge Peters and Judge Ruderman concur.

Ms. Hernandez, Judge Marshall and Mr. Pope were not present.

Dated: June 21, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **THOMAS E. RAMICH**, a Judge of the Elmira City Court, Chemung County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Joseph J. Balok, Jr. for Respondent

The respondent, Thomas E. Ramich, a Judge of the Elmira City Court, Chemung County, was served with a Formal Written Complaint dated March 16, 2001, containing four charges. Respondent filed an answer dated May 15, 2001.

By Order dated February 15, 2002, the Commission designated Sherman F. Levey, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 18, 2002, in Bath, New York, and the referee filed his report dated September 26, 2002, with the Commission.

On October 21, 2002, the Administrator of the Commission, respondent's counsel and respondent entered into a Stipulation, agreeing that the Commission make its determination based upon the referee's findings of fact and conclusions of law, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On November 8, 2002, the Commission approved the Stipulation and made the following determination.

1. Respondent has been a full-time Elmira City Court Judge since January 1, 1996.
2. Between 1982 and January 1, 1996, respondent served as a part-time Judge of the Elmira City Court and maintained a private practice of law.
3. After becoming a full-time judge on January 1, 1996, respondent became aware of the prohibition in the Rules Governing Judicial Conduct against the practice of law by full-time judges.
4. Tina Dunn served as the private secretary in respondent's law office from 1986

through 1996 and was appointed by respondent as his court secretary in 1997. Ms. Dunn and respondent regard themselves as personal friends as well as business or professional associates.

As to Charge I of the Formal Written Complaint:

5. In May 1998 Ms. Dunn, on respondent's behalf, corresponded with National Finance and its attorneys, McMahan, Kublick, McGinty and Smith, PC, in connection with arranging the pay-off of a debt owed by James DeRico and Rita Garelle to Twin Tiers Eye Care Associates, the successor in interest to Steven Salsburg, MD PC, for whom respondent, as an attorney, had obtained a judgment in 1988.

6. In May 1998 respondent received at his home from McMahan, Kublick, McGinty and Smith, PC, a check for \$1,781.58 payable to Twin Tiers Eye Care Associates, reflecting the pay-off of the judgment.

7. Respondent gave the check to Ms. Dunn, who forwarded it on his behalf to Twin Tiers Eye Care Associates on May 2, 1998, with a bill for \$445.40.

8. On or about May 6, 1998, respondent signed, as an attorney for the judgment creditor, a Satisfaction of Judgment in *Steven Salsburg, MD PC v. James DeRico and Rita A. Garelle*, and Ms. Dunn filed it on respondent's behalf in the Chemung County Clerk's Office on May 7, 1998.

9. On May 28, 1998, Twin Tiers Eye Care Associates sent to respondent at his home a check for \$445.40.

10. Respondent did not report the \$445.40 income on his 1998 federal or state income tax return. Respondent subsequently filed an amended income tax return on or about June 23, 2000, reporting the \$445.40 income. The amended income tax return was filed by respondent prior to the issuance of the Formal Written Complaint issued by the Commission, but following the initiation of an investigation by the Commission.

11. Respondent did not report to the Chief Clerk of the Elmira City Court in 1998 or 1999 the \$445.40 in extra-judicial income he had received in 1998 from Twin Tiers Eye Care Associates. Respondent reported the extra-judicial income to the Chief Clerk on or about July 14, 2000, prior to the issuance of the Formal Written Complaint, but after the initiation of the Commission's investigation.

As to Charge II of the Formal Written Complaint:

12. In or about April 1999, respondent agreed to represent Nancy Waite in connection with the purchase of real property located on Upland Drive in the Town of Elmira. Although respondent knew that as a full-time judge he was prohibited from practicing law, respondent rationalized his action on the basis that assisting a relative without compensation did not violate that rule and that this representation was not actually the practice of law. Nancy Waite was the sister of respondent's wife, from whom he was then estranged, and respondent testified that he had some ill-formed concept that this might in some way ameliorate matters with his estranged

wife and perhaps lead to a reconciliation.

13. In connection with his representation of Nancy Waite, respondent personally received the abstract of title, survey, and proposed deed at court, reviewed and approved the documents, contacted the seller's attorney and paralegal and took various other steps consistent with representing a buyer of a personal residence.

14. When the time of the closing arrived, respondent, who had suffered an injury, arranged for his law clerk, Frederick M. Cerio, to represent Nancy Waite at closing.

15. In July 1999 respondent agreed to represent Gerald and Eileen Droleski in connection with their purchase of a personal residence at 829 Maple Avenue, Elmira, New York. Respondent has known Gerald Droleski since high school. Mr. Droleski had sustained a severe head injury in an accident and, although legally competent, was perceived by respondent to be somewhat irrational and over-emotional in various matters. Mr. Droleski appeared to rely substantially on respondent's judgment in various matters, and although it appears that respondent attempted to recommend other lawyers to Mr. Droleski, respondent eventually acquiesced in Mr. Droleski's insistence that respondent continue to assist him in connection with a purchase of personal real estate.

16. In connection with his representation of Gerald and Eileen Droleski, respondent received documents and performed other various services consistent with the legal representation of a purchaser of a personal residence, with many of these services performed at the offices of the Elmira City Court, and some performed by secretarial or clerical personnel of the court.

17. Respondent represented Gerald and Eileen Droleski at the closing, which was held at the office of the seller's law firm in Corning, New York.

18. In August 1999 respondent agreed to represent Russell and Mary Suzanne Kissinger in connection with their purchase of a personal residence at 406 Hillbrook Road, Elmira, New York. Mrs. Kissinger is respondent's cousin. In connection with his representation of the Kissingers, respondent received documents and performed various other services consistent with the legal representation of a purchaser of a personal residence, with many of these services performed at the offices of the Elmira City Court, and some performed by secretarial or clerical personnel of the court.

19. In October 1999 respondent represented his clients, Russell and Mary Suzanne Kissinger, at the closing that was held at the seller's attorney's office in Elmira.

20. Respondent received no fee or other remuneration whatsoever for his representation of Nancy Waite, Gerald and Eileen Droleski, and Russell and Mary Suzanne Kissinger.

As to Charge III of the Formal Written Complaint:

21. On or about February 1, 1999, respondent sent an *ex parte* letter on court stationery to Elmira City Police Chief Michael Ciminelli concerning *People v. Todd M. Shock*, a

pending case in which the defendant was charged with Reckless Endangerment, Second Degree and Criminal Mischief, Fourth Degree.

22. Respondent directed Chief Ciminelli to explain whether the defendant had been in police custody at a time after the warrant was issued but before it had been executed.

23. On or about February 3, 1999, Chief Ciminelli wrote to respondent indicating that he would not respond to respondent's letter because of his concern about *ex parte* communications.

24. On or about November 1, 1999, respondent sent an *ex parte* letter on court stationery to Chief Ciminelli, questioning why the defendant in *People v. Seth Vaughn*, a pending case in which the defendant was charged with Violation of Probation, had not been arrested pursuant to an arrest warrant when he was allegedly in police custody on an earlier occasion.

25. Elmira City Police Captain Michael Ross responded on behalf of Chief Ciminelli indicating why the defendant had not been arrested on the earlier occasion and referring to facts relevant to an additional charge filed against the defendant.

26. On January 10, 2000, respondent sent an *ex parte* letter on court stationery to Chief Ciminelli concerning *People v. Frank Russell*, a pending case in which the defendant had been charged with Criminal Possession Of A Controlled Substance, Seventh Degree.

27. Respondent directed Chief Ciminelli to explain why an appearance ticket had been issued to a defendant charged with this crime and with his criminal history.

28. On January 10, 2000, respondent sent an *ex parte* letter on court stationery to Chief Ciminelli concerning *People v. Adolph M. Asch*, a pending case in which the defendant had been charged with Criminal Possession Of A Controlled Substance, Seventh Degree and Criminal Possession Of A Hypodermic Needle.

29. Respondent directed Chief Ciminelli to explain why an appearance ticket had been issued to a defendant charged with this crime and with his criminal history.

As to Charge IV of the Formal Written Complaint:

30. On or about September 12, 2000, respondent received a telephone call from Mary Jean Pauldine, an elderly woman whom he knew through participation in a community organization. She advised respondent that her son and daughter-in-law had received tickets for No Seat Belt in the Elmira area, and asked whether they had to return from their home in South Carolina to attend to the matter. Ms. Pauldine also spoke to respondent about her personal and health problems and described the circumstances that led to the traffic charges. Respondent advised Ms. Pauldine that her relatives could mail pleas to the court.

31. Within 30 minutes after the call, respondent was again contacted by Ms. Pauldine, who advised him that the tickets were pending in the Elmira City Court. Respondent told Ms. Pauldine, "All right, have them send me the tickets and I'll get back to them."

32. On or about September 14, 2000, the Uniform Traffic Tickets in *People v. John D. Pauldine* and *People v. Diane D. Pauldine* were delivered by Federal Express to respondent's home. A note from the defendants to respondent, referring to respondent's prior discussion with Ms. Pauldine, was included with the tickets. It did not occur to respondent that he should disqualify himself as a consequence of the two calls he had received.

33. On or about September 22, 2000, respondent met in chambers with Chemung County Assistant District Attorney Geoffrey Peterson and advised Mr. Peterson about his discussions with Ms. Pauldine and the delivery of the tickets to his home.

34. Respondent relayed to Mr. Peterson the circumstances surrounding the traffic stop as told to respondent by Ms. Pauldine and also described Ms. Pauldine's personal and health problems. Respondent's purpose in relaying this information to the Assistant District Attorney was to obtain a favorable disposition of the tickets for the defendants. Respondent asked Mr. Peterson what he wanted to do with the case.

35. Mr. Peterson replied that the defendants should receive a "warning." Since there is no provision in the Vehicle and Traffic Law or the Criminal Procedure Law for disposing of a case by way of a "warning," Mr. Peterson used this term as a code word for "dismissal." Respondent then dismissed both charges.

36. Respondent dismissed the charges against both defendants notwithstanding that he was aware that neither defendant had made an appearance in the matter as required by law and that neither defendant had entered any plea.

37. Respondent presided over the disposition of these two traffic tickets notwithstanding that he was aware that he had engaged in *ex parte* discussions about the matters and knew that *ex parte* discussions concerning a pending matter were improper.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(6), 100.3(E)(1), 100.3(E)(1)(a)(ii), 100.4(A)(2), 100.4(A)(3), 100.4(G) and 100.4(H)(2) of the Rules Governing Judicial Conduct. Charges I through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Although respondent was aware that the ethical standards bar a full-time judge from engaging in the private practice of law, respondent performed legal services in several matters, in some instances using court facilities and personnel, while serving as a full-time judge of the Elmira City Court. Such conduct is strictly prohibited (*see* Rules Governing Judicial Conduct, Section 100.4[G]); *Matter of Moynihan*, 80 NY2d 322 [1992]; *Matter of Intemann*, 73 NY2d 580 [1989]), even if the judge accepts no fee for the legal services (*Matter of Katz*, 1985 Ann Rep 157 [Comm'n on Jud Conduct, March 30, 1989]) or performs legal services for a relative (*see* Adv Op. 92-118).

In the *Twin Tiers* case, a matter he had previously handled as an attorney when he was permitted to practice law, respondent's role in connection with filing a Satisfaction of Judgment

clearly constituted the prohibited practice of law. His misconduct was exacerbated by his failure to report the fee he received to the chief clerk of the court, as required by the ethical rules, or on his 1998 income tax returns. Such lapses are not excused by negligence or inattention and, even if inadvertent, create the appearance that respondent was intentionally concealing his extra-judicial activity. Moreover, respondent's use of his court secretary in the matter demonstrated a serious confusion between his judicial role and his former role as a practicing attorney.

Respondent also practiced law in three additional matters, in which he represented his sister-in-law, his friend and his cousin in real estate transactions. Although he received no fee in these cases, respondent's activities, including reviewing legal documents, corresponding with the opposing attorneys and appearing with his clients at the closings, flouted the prohibition against the practice of law. Respondent's misconduct was again exacerbated by his use of court personnel and court facilities in connection with these matters.

Respondent's letters to the Police Chief to obtain information about pending matters violated Section 100.3(B)(6) of the Rules, which prohibits a judge from engaging in *ex parte* communications. Such communications, however well-intentioned, were improper. It is troubling that respondent continued to send similar *ex parte* inquiries even after the Police Chief questioned the propriety of such communications.

It was also improper for respondent to preside over the two *Pauldine* cases after having engaged in *ex parte* communications with the defendants' relative in which he obtained personal information about the cases. It should have been obvious to respondent that his impartiality could reasonably be questioned in the cases, especially after he had discussed the substance of his communications with the assistant district attorney for the purpose of obtaining a favorable disposition for the defendants. By presiding in the matters and dismissing the charges, although the defendants never appeared or entered a plea, respondent engaged in conduct that conveyed an appearance of favoritism and undermined public confidence in the impartiality of the judiciary.

Respondent's conduct shows insensitivity and inattention to the high ethical standards applicable to judges. In mitigation, he has acknowledged his misconduct and, as the referee concluded, he now appears to recognize "the necessity for scrupulously following the relevant judicial rules in the future."

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. Moore was not present.

Dated: December 27, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **LAWRENCE T. REID**, a Justice of the Pavilion Town Court, Genesee County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission
Boylan, Morton & Whiting, LLP (By Paul S. Boylan) for Respondent

The respondent, Lawrence T. Reid, a justice of the Pavilion Town Court, Genesee County, was served with a Formal Written Complaint dated July 31, 2001, containing two charges. Respondent filed an answer dated October 16, 2001.

On April 23, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On May 9, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Pavilion Town Court since 1994. He is not a lawyer. He has attended and successfully completed all required training sessions for judges.

As to Charge I of the Formal Written Complaint:

2. In or about March 2000, the town clerk asked respondent to write an article for publication in a newsletter distributed by the Town of Pavilion concerning the issue of increased truck traffic passing through the town.

3. Respondent wrote an article for publication in which he expressed his concern about the increase in truck traffic passing through the town on Routes 63 and 19 and attempted to obtain support among local residents for the construction of a highway bypass around the town.

Respondent also wrote the article in an attempt to discourage truck drivers from using those routes through the town, which they were legally permitted to drive upon.

4. Respondent indicated in the article that he had been increasing fine amounts for defendants who had been convicted of trucking-related violations. Respondent warned that he would continue to increase fine amounts for defendants charged with trucking-related violations until such time as trucking operators chose alternate routes around the town. Respondent stated in his article:

...The Pavilion Court has attempted to gauge the danger to the community of this travel corridor and in the interest of safety raised the fines for this activity in the community within the guidelines of the State Laws. Judge Robert Westacott and I feel that the increased fines for trucks in this corridor will get the attention of the truckers and their companies to make it economically not worth the risk for what is saved by the “shortcut” to and from the New York State thruway as these trucks travel to and from New York and Canada and the free trade zone.

* * *

...the fines of truckers in Pavilion have increased dramatically and will continue to increase until such time as the truckers realize that the savings of \$40.00 may not be worth the gamble of a trip through Pavilion. The safety of the community is part of what justices are elected for as we are the “courts closest to the people”, and we will continue to act in a manner to protect our community until such time as the State of New York builds a bypass or places weight and size limits on Routes 19, 63 and 20.

As to Charge II of the Formal Written Complaint:

5. In eleven Vehicle and Traffic cases adjudicated between February 2000 and January 2001, as set forth in Schedule A, respondent accepted guilty pleas from the defendants to reduced charges and thereafter imposed fines that he knew were in excess of the statutorily authorized maximum fine for the specific convictions. The fines imposed by respondent were between \$20.00 and \$70.00 in excess of the statutorily authorized maximum fines for the specific convictions. Respondent mistakenly believed that he had the authority to set the fine amounts in each of these eleven cases based upon the original charges.

6. In five cases adjudicated between March 16, 2000, and October 10, 2000, as set forth in Schedule B, respondent accepted guilty pleas from defendants charged with violating Section 1110A of the Vehicle and Traffic Law and thereafter imposed fines that were in excess of the statutorily authorized maximum fines for those convictions. Respondent mistakenly believed that these convictions involved plea reductions. The fines imposed by respondent were between \$50.00 and \$70.00 in excess of the statutorily authorized maximum fine for these convictions.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1), 100.3(B)(4), 100.3(B)(8),

100.4(A)(1) and 100.4(A)(2) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

By writing an article for a newsletter in which he attempted to obtain support among local residents for construction of a highway bypass, respondent used the prestige of his judicial office to advance private interests, in violation of Section 100.2(C) of the Rules Governing Judicial Conduct. Respondent's explicit references to his judicial role, which he intertwined with his advocacy for the bypass, underscored that he was writing not as a private citizen, but as a judge.

Respondent's statements that he had increased the fines on truck drivers to discourage them from using local routes, and that he would continue to do so in the future, were particularly improper. Such statements are inconsistent with the role of a judge, which is to apply the law in each case in a fair and impartial manner (Sections 100.2[A] and 100.3[B][1] of the Rules). Respondent's words conveyed the appearance that he was biased against truck drivers and that he would not, and did not, consider each case individually on the merits in imposing an appropriate sentence, as he is required to do. Public confidence in the impartiality and independence of the judiciary is diminished by such statements. *See Matter of Tracy*, 2002 Ann Rep of NY Commn on Jud Conduct ___.

It is the responsibility of every judge, lawyer or non-lawyer, to "respect and comply with the law," to be faithful to the law and to maintain professional competence in it (Sections 100.2[A] and 100.3[B][1] of the Rules Governing Judicial Conduct). Respondent violated these standards in numerous Vehicle and Traffic cases by imposing fines based on the original charges, rather than the charges for which the defendants had been convicted. Such a practice was contrary to law and resulted in fines that exceeded the legal maximum. *See Matter of Christie*, 2002 Ann Rep of NY Commn on Jud Conduct ___. Compounding his legal error, respondent imposed excessive fines in some cases even when the defendants pleaded guilty to the original charges because he mistakenly believed the charges had been reduced. This mistake could have been avoided if respondent had been more diligent in determining the actual charges in the cases. By such conduct, respondent failed to diligently discharge his judicial duties.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Marshall was not present.

Dated: May 17, 2002

SCHEDULE A

<u>Defendant</u>	<u>Date Adjudicated</u>	<u>Original V&T Charge/ Reduction</u>	<u>Fine Imposed</u>	<u>Statutory Fine</u>
Glen H. Ceisner	02/29/00	1180B/1110A	\$ 150.00	\$ 100.00
Timothy M. Dunn	03/07/00	1180D/1110A	150.00	100.00
Katherine A. Shepard	03/14/00	1180B/1110A	150.00	100.00
Kathleen R. Parker	03/28/00	1180D/1110A	120.00	100.00
F.W. Kintzel, 4 th	04/09/00	1180D/1110A	150.00	100.00
Donald P. Rebmann	05/09/00	1180B/1110A	170.00	100.00
Katherine E. Petrinec	09/12/00	1180B/1110A	125.00	100.00
Matthew Wascak	10/10/00	1180B/1110A	150.00	100.00
Leonard J. Mioducki	10/17/00	1180B/1110A	150.00	100.00
Sarah E. Exford	11/14/00	1180D/1201A	115.00	100.00
Richard A. Mark	01/23/01	1180D/1201A	150.00	100.00

SCHEDULE B

Defendant	Date Adjudicated	Original V&T Charge/Reduction	FINE IMPOSED	Statutory Fine
Warren R. Klein	03/16/00	1110A	170.00	100.00
M. K. Memminger, Jr.	03/19/00	1110A	170.00	100.00

Marc T. Elam	05/16/00	1180B	250.00	200.00
Michael H. White, Jr.	05/16/00	1180D	150.00	100.00
Susan L. Elsasser	10/10/00	1110A	150.00	100.00

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **PETER E. STELLING**, a Justice of the Canaan Town Court, Columbia County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Gerstenzang, O'Hern, Hickey & Gerstenzang (By Peter Gerstenzang) for Respondent

The respondent, Peter E. Stelling, a Justice of the Canaan Town Court, Columbia County, was served with a Formal Written Complaint dated June 25, 2002, containing one charge. Respondent filed an answer dated July 16, 2002.

On August 22, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On September 19, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Canaan Town Court since November 1995. He is not an attorney. He is a former high school teacher and currently works as a Labor Relations Specialist.
2. On March 17, 2002, respondent operated a motor vehicle while intoxicated, for which he was arrested and charged with Driving While Intoxicated. Respondent's blood alcohol content was measured at .15% shortly after his arrest. Respondent was also charged with Moving From Lane Unsafely, in violation of Section 1128A of the Vehicle and Traffic Law.
3. On April 22, 2002, respondent pleaded guilty in the Schodack Town Court to the charge of Driving While Intoxicated, in violation of Section 1192(3) of the Vehicle and Traffic Law, as a result of the March 17, 2002, arrest. He was sentenced to pay a fine and surcharge, and his driver's license was revoked for six months.

4. Respondent had a prior alcohol-related conviction. In December 1994, prior to the time he became a judge, respondent was arrested for Driving While Intoxicated, and in April 1995 he pleaded guilty in the New Lebanon Town Court to Driving While Ability Impaired By Alcohol, in violation of Section 1192(1) of the Vehicle and Traffic Law, as a result.

5. Following his April 22, 2002, conviction, respondent entered into a course of alcohol treatment and affirms to the Commission that he has abstained from the use of alcoholic beverages.

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

A judge who operates a motor vehicle while his or her ability is impaired by alcohol violates the law and endangers public safety. Matter of Henderson, 1995 Annual Report 118 (Comm'n on Jud Conduct). Respondent's failure to abide by the laws that he is called upon to apply in court undermines his effectiveness as a judge.

In such cases, the Commission has always considered mitigating and/or aggravating circumstances in determining an appropriate disposition. Factors to be considered may include the level of intoxication, whether the judge's conduct caused an accident or injury, whether the conduct was an isolated instance or part of a pattern, the conduct of the judge after arrest, and the need and willingness of the judge to seek treatment. *See, e.g.,* Matter of Siebert, 1994 Annual Report 103 (Comm'n on Jud Conduct) (judge was convicted of Driving While Ability Impaired after causing a three-car accident [admonition]); Matter of Henderson, *supra* (judge was convicted of Driving While Intoxicated, identified himself as a judge and asked, "Isn't there anything we can do?" [admonition]); Matter of Quinn v. Comm'n on Jud Conduct, 54 NY2d 386 (1981) (judge was convicted of Driving With More Than .10% Blood Alcohol after a series of alcohol-related incidents, asserted his judicial office and was abusive and uncooperative during his arrest [sanction was reduced from removal to censure in view of the judge's retirement]).

In the instant case, the seriousness of the misconduct is exacerbated because respondent, who was convicted of Driving While Intoxicated, had an alcohol-related offense eight years earlier. We note, in mitigation, that there is no indication of other aggravating factors and that following his recent conviction, respondent entered into a course of alcohol treatment and affirms that he has abstained from the consumption of alcoholic beverages.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Judge Peters, Mr. Pope and Judge Ruderman concur.

Dated: October 1, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **TIMOTHY C. TAMSEN**, a Justice of the Newburgh Town Court, Orange County.

THE COMMISSION

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission
Honorable Timothy C. Tamsen, *pro se*

The respondent, Timothy C. Tamsen, a Justice of the Newburgh Town Court, Orange County, was served with a Formal Written Complaint dated November 15, 2001, containing one charge. Respondent filed an answer dated December 5, 2001.

By motion dated December 21, 2001, the administrator of the Commission moved for summary determination, pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR 7000.6[c]). Respondent opposed the motion by memorandum dated January 8, 2002, and affidavit dated January 11, 2002. The administrator filed a reply dated January 16, 2002, and respondent filed a reply dated January 24, 2002, and a letter dated January 30, 2002. By Decision and Order dated February 6, 2002, the Commission granted the administrator's motion and determined that the factual allegations were sustained and that respondent's misconduct was established.

The parties filed briefs with respect to the issue of sanctions. On May 10, 2002, the Commission heard oral argument, at which respondent appeared. By letter dated May 21, 2002, respondent submitted additional materials, and the deputy administrator filed a letter in response dated June 3, 2002. Thereafter the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Newburgh Town Court, Orange County since February 1998. In November 1998 he was elected to a four-year term as town justice.

2. In 1995 respondent was an attorney associated in the practice of law in Orange County with Peter H. Neuman, Esq. Although the name of the firm was Neuman & Tamsen, respondent was not a partner.

3. On June 30, 1995, respondent represented Mr. and Mrs. Paul Coogan in connection with the sale of property located in Highland Mills to Mr. and Mrs. Charles Muller for \$30,000. The legal fee due the firm of Neuman & Tamsen was \$500. Respondent received a check from the purchasers for that amount, which he endorsed and deposited into an account maintained at M&T Bank entitled "Timothy C. Tamsen, Attorney." When the check was issued, the fee was owed to the firm of Neuman & Tamsen, but respondent deposited it into his M&T account without the knowledge and/or consent of Neuman. In so doing, respondent engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][8] [now(7)]), by misappropriating funds.

4. Respondent represented Albert Foldan in connection with a vehicle and traffic infraction. The matter was referred to Neuman & Tamsen by Ackerman, Wachs & Finton, P.C., an Albany law firm. The fee owed to Neuman & Tamsen was \$250 and was paid by Ackerman, Wachs & Finton, P.C., by check dated February 2, 1996, which was payable to respondent. Respondent endorsed the check and deposited it into a personal account maintained at M&T Bank entitled "Timothy Tamsen." When the check was issued, the fee was owed to the firm of Neuman & Tamsen, but respondent deposited it into his M&T account without the knowledge and/or consent of Neuman. In so doing, respondent engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][8] [now(7)]), by misappropriating funds.

5. On December 14, 1995, respondent received \$450 on behalf of Neuman & Tamsen from Luis Vasquez as a retainer in connection with an uncontested matrimonial action. Respondent admitted under oath that the funds were deposited into a personal account without the knowledge and/or consent of Neuman. By depositing such funds into his personal account, respondent engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][8] [now(7)]), by misappropriating funds.

6. In November 1995 respondent was retained by James Denton to defend him against a charge of driving while intoxicated. Respondent received a \$350 check from Denton dated November 1, 1995, which was payable to him. When the check was issued, the fee was owed to the firm of Neuman & Tamsen, but respondent deposited it into a personal account without the knowledge and/or consent of Neuman. In so doing, respondent engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][8] [now(7)]), by misappropriating funds.

7. In May 1995 respondent was retained by Robert Browne to represent his son, Thomas, in a criminal matter. The Neuman & Tamsen receipt book reflects that Robert Gunsch paid the firm \$500 by check on May 10, 1995, in connection with an unrelated matter and that he was given receipt number 001782 by the office manager. The firm copy of receipt number 001783 indicated that Gunsch paid an additional \$500 to the firm on the same date. The firm copy of receipt number 001783 also indicated that the name Gunsch was written over another name. The receipt was written in respondent's handwriting and signed by respondent.

Moreover, the box indicating that the \$500 was received in cash was changed to indicate that the amount was paid by check. The original receipt was given to Browne, not Gunsch, and reflected that the \$500 was paid to respondent by Browne in cash, not by check. When respondent received the money, the fee was owed to the firm of Neuman & Tamsen, but respondent knowingly altered the receipt book to disguise his theft. In so doing, respondent engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][8] [now(7)]), by misappropriating funds, and respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of DR 1-102(a)(4) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][4]).

8. On July 25, 1995, respondent received \$450 on behalf of Neuman & Tamsen from Carlos Mera as a retainer in connection with an uncontested matrimonial action. Respondent failed to deposit the funds into a firm account. Instead, he took the money for his personal use without the knowledge and/or consent of Neuman. In so doing, respondent engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][8] [now(7)]), by misappropriating funds.

9. By reason of the foregoing, respondent engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][8] [now(7)]), by misappropriating funds, and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of DR 1-102(a)(4) of the Code of Professional Responsibility (22 NYCRR §1200.3[a][4]).

10. As a result of respondent's actions as set forth above, and following formal disciplinary proceedings, respondent was disbarred as an attorney by Opinion and Order of the Appellate Division, Second Department, dated June 11, 2001. The Appellate Division Opinion and Order noted that "respondent has a long disciplinary history" in that he had previously been cautioned twice and admonished four times as an attorney.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(1) of the Rules Governing Judicial Conduct and lacks fitness to perform the official duties of a judge pursuant to Article 6, Section 22 of the Constitution of the State of New York. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's misappropriation of funds from the law firm with which he was associated and his attempt to conceal his theft by altering firm records constitute serious misconduct for which he has been disbarred as an attorney. Matter of Tamsen, 284 AD2d 8 (2d Dept 2001). Relying upon the findings of the Appellate Division (*see Matter of Embser v. Commn on Jud Conduct*, 90 NY2d 711 [1997]), we conclude that respondent has demonstrated that he lacks the integrity to sit on the bench and is unfit for judicial office.

Respondent's removal is warranted even though his misconduct predates his ascension to the bench (*see* Matter of Pfingst, 33 NY2d [a], 409 NYS2d 986, 988 [Ct on the Jud 1973]). The Commission is empowered to consider complaints with respect to "fitness to perform" judicial duties and to remove a judge "for cause, including but not limited to...conduct, on or off the bench, prejudicial to the administration of justice" (NY Const Art 6 §22[a]). The term "for cause" has been interpreted to include conduct that occurs "prior to the taking of judicial office." Matter of Sarisohn, 26 AD2d 388, 390 (2d Dept 1966). As the Court stated in Sarisohn:

A judicial officer is nonetheless unfit to hold office and the interests of the public are nonetheless injuriously affected even though the misdeeds which portray his unfitness occurred prior to ascending such office. *Id.*

We are unpersuaded by respondent's argument that his derelictions as an attorney do not impair his fitness to serve as a judge. The Court of Appeals has upheld the removal of a lawyer-judge for his "unethical and unlawful conduct" as an attorney, "notwithstanding that all of the wrongdoings related to conduct outside his judicial office." Matter of Boulanger v Commn on Jud Conduct, 61 NY2d 89, 92 (1984); *see also* Matter of Embser, supra; Matter of Steinberg v Commn on Jud Conduct, 51 NY2d 74, 83-84 (1980). Nor do the character letters submitted by respondent attesting to his integrity and judicial demeanor warrant the imposition of a lesser sanction. *See* Matter of Shilling v Commn on Jud Conduct, 50 NY2d 397, 399, 402 (1980).

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore and Judge Ruderman concur.

Mr. Pope dissents as to the disposition only and votes that the appropriate sanction is censure.

Judge Peters did not participate.

Judge Marshall was not present.

Dated: July 2, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RAMONA THWAITS**, a Justice of the Jay Town Court, Essex County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

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

The respondent, Ramona Thwaits, a Justice of the Jay Town Court, Essex County, was served with a Formal Written Complaint dated June 17, 2002, containing three charges. Respondent filed an answer dated July 8, 2002.

On November 4, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On November 8, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Jay Town Court since January 2000. She is not an attorney. Respondent has attended and successfully completed all required training sessions for justices.

2. The Town of Jay has a population of approximately 2,300 people. Respondent is related to many of the town's residents. Until January 2002, respondent had no co-justice in the town to whom she could transfer cases in the event of a conflict.

As to Charge I of the Formal Written Complaint:

3. Abe Lincoln is the brother of respondent's daughter's husband, Bryan Lincoln. John Thwaits is the nephew of respondent's late husband.

4. On or about March 21, 2001, Abe Lincoln appeared before respondent on charges

of Criminal Contempt, 1st degree, a felony, and Stalking, 3rd degree, a misdemeanor. Earlier that day, bail had been set at \$10,000 by another judge, who had conducted an immediate arraignment of the defendant and had transferred the case to respondent's court as the court of original jurisdiction. Over the objection of the assistant district attorney, respondent reduced the bail to \$5,000. The case was later transferred to County Court.

5. In February 2001, due to respondent's unavailability, a judge of another court had conducted an arraignment of Abe Lincoln on a Harassment charge and issued an Order of Protection in favor of John Thwaites, the complaining witness. In or about April 2001, on the *ex parte* request of Bryan Lincoln, respondent's son-in-law, respondent orally modified the Order of Protection, so as to permit Abe Lincoln to attend a wake at the funeral home where John Thwaites was employed. Respondent later disqualified herself from the Harassment case.

6. On or about July 30, 2001, after Abe Lincoln was again charged with felony Criminal Contempt and Stalking his estranged wife, and respondent disqualified herself from presiding over the felony hearing because of her relationship with the defendant and his family, respondent attended the felony hearing at the Elizabethtown Town Court in a small courtroom, where the matter had been transferred, and sat in the courtroom near members of the defendant's family.

7. Respondent asserts that she frequently observed the proceedings in the Elizabethtown Town Court in order to learn, and she asserts further that she did not attend court specifically for the *Lincoln* matter. Respondent now recognizes that her appearance there on that evening conveyed the appearance that she supported the defendant and his family, who also attended for the purpose of showing support for the defendant.

As to Charge II of the Formal Written Complaint:

8. On or about May 30, 2001, respondent adjourned in contemplation of dismissal a charge of Unsafe Passing against Michael Thwaites, respondent's late husband's nephew by adoption, without notice to or the consent of the prosecution, in violation of Section 170.55(1) of the Criminal Procedure Law, and notwithstanding that the charge had been issued to the defendant following a property damage accident.

9. On or about September 26, 2001, with the consent of the arresting officer, respondent dismissed violations of the local junk ordinance against James Thwaites, the second cousin of respondent's late husband, notwithstanding that the defendant had not fully remedied the violations. Respondent did not disclose to the prosecution her familial relationship with the defendant.

As to Charge III of the Formal Written Complaint:

10. On or about August 7, 2000, respondent conducted an arraignment of Richard Reynolds, a social acquaintance of respondent, on a charge of Criminal Contempt, an alleged violation of an Order of Protection, and granted an adjournment in contemplation of dismissal to the defendant, without notice to or the consent of the prosecution, in violation of Section

170.55(1) of the Criminal Procedure Law.

11. On or about November 26, 2000, after the complaining witness filed a complaint with the police that Mr. Reynolds had again violated an Order of Protection, respondent, without reading the complaint, refused to issue an arrest warrant for the defendant and told a trooper to instruct the complaining witness, Deborah Reynolds, to come to court so that respondent could explain to her why she had not issued a warrant.

12. On or about December 6, 2000, when Deborah Reynolds came to court, she and respondent spoke *ex parte* concerning Ms. Reynolds' criminal complaint.

13. On or about December 13, 2000, following her meeting with Ms. Reynolds, respondent issued a warrant of arrest for Mr. Reynolds for Criminal Contempt for violating the Order of Protection, and thereafter presided over the matter to disposition, without disclosing to the prosecution respondent's social relationship with the defendant.

14. While the criminal charges against Richard Reynolds were pending before respondent or impending, Mr. Reynolds approached respondent *ex parte* and told respondent of his problems with his wife, Deborah Reynolds, the criminal complainant against him.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2 (B), 100.2(C), 100.3(B)(1), 100.3(B)(6), 100.3(E)(1) and 100.3(E)(1)(d) of the Rules Governing Judicial Conduct. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A judge's disqualification is required when a party or a material witness to a proceeding is within the sixth degree of relationship to the judge or the judge's spouse or is married to such a relative (Sections 100.3[E][1][d][i] and 100.3[E][1][d][iv] of the Rules Governing Judicial Conduct). As the Court of Appeals has stated:

The handling by a judge of a case to which a family member is a party creates an appearance of impropriety as well as a very obvious potential for abuse, and threatens to undermine the public's confidence in the impartiality of the judiciary. Any involvement by a judge in such cases or any similar suggestion of favoritism to family members has been and will continue to be viewed...as serious misconduct.

Matter of Wait, 67 NY2d 15, 18 (1986)

Disqualification is also required when the judge's impartiality can reasonably be questioned (Section 100.3[E][1] of the Rules). On numerous occasions, respondent violated these standards. Although some of the individuals in the above-cited matters were not close relatives of respondent (one distant relative was not within the sixth degree of relationship), respondent should not have handled any aspect of proceedings involving these persons; nor should she have handled the case of this social acquaintance. See *Matter of Robert*, 89 NY2d 745 (1997); *Matter of Going*, 97 NY2d 121 (2001).

We recognize that, in small communities, local justices may frequently be presented with matters in which they have some personal relationship with the parties. Although disqualification may occasion some inconvenience and delay, every judge must be mindful of the importance of adhering to the ethical standards so that public confidence in the impartiality of the judiciary may be preserved.

Respondent's handling of the matters involving her relatives and acquaintance raises further questions as to her impartiality. Respondent's actions not only generally favored her relatives, but were sometimes contrary to law: in two cases, respondent granted an adjournment in contemplation of dismissal without the consent of or notice to the prosecution, as required by statute. In other cases, respondent's actions followed prohibited *ex parte* contacts.

It was also improper for respondent to sit near her relatives in court during a felony hearing for her relative. Her presence, in a small courtroom with other family members who were present to show support for the defendant, could reasonably convey the appearance of lending her judicial prestige to support the defendant and his family.

In mitigation, we note that respondent has conceded that her conduct was improper and that she asserts that she will be more sensitive to her ethical responsibilities, will avoid improper *ex parte* communications, and will disqualify herself or make disclosure in cases involving her relatives and social acquaintances, as required by the Rules.

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

Mr. Berger, Judge Ciardullo, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Coffey dissents and votes to reject the agreed statement of facts on the basis that the disposition is too harsh.

Ms. Moore was not present.

Dated: December 30, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROSEANNA H. WASHINGTON**, a Judge of the White Plains City Court, Westchester County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair³
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission
Honorable Roseanna H. Washington, *pro se*

The respondent, Roseanna H. Washington, a Judge of the White Plains City Court, Westchester County, was served with a Formal Written Complaint dated April 16, 2001, containing two charges. Respondent filed an answer dated May 7, 2001.

By Order dated June 6, 2001, the Commission designated Honorable Janet A. Johnson as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on September 28, 2001, in White Plains, New York, and the referee filed her report dated March 4, 2002, with the Commission.

The parties submitted briefs with respect to the referee's report. On June 20, 2002, the Commission heard oral argument, at which respondent appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent, an attorney, has served as a part-time judge of the City Court of White Plains, Westchester County, since her appointment in January 1997.
2. The responsibility of the part-time judge in the White Plains City Court is to preside over small claims matters on alternate Wednesdays and to fill in for the full-time judge in the event the judge is unavailable.
3. Respondent presides over approximately 75 to 80 small claims cases each year.

³ Judge Marshall died on September 10, 2002. The vote in this case was taken on June 20, 2002.

With respect to Charge I of the Formal Written Complaint:

4. Respondent failed to render timely decisions in 67 small claims matters, as set forth in the annexed Schedule 1. Of the 67 matters, 20 were pending for periods of six to twelve months; 19 were pending for periods of one year to 18 months; 12 were pending for periods of 18 months to two years; and nine were pending for periods of between two and two and a half years. Seven small claims cases that were tried between March 2000 and February 2001 were still pending as of September 28, 2001: Bernstein v. Ray Cohen Lexus (trial held October 11, 2000); Maggio v. Baldwin (trial held October 18, 2000); Mangeri v. Route World Brokers (trial held March 22, 2000); McDonald v. Div Dati Construction (trial held January 17, 2001); Quirk v. Sprague (trial held June 28, 2000); Weintraub v. Siegel (trial held February 7, 2001); and White Plains Drapery & Upholstery v. Anker Management (trial held April 5, 2000).

5. For the periods of January-March 1998, April-June 1998 and July-September 1998, respondent filed quarterly reports regarding undecided matters pending for more than 60 days, as required by Section 4.1 of the Rules of the Chief Judge, that stated, contrary to the facts, that there were no cases pending for more than 60 days. With respect to these reports, respondent testified that, on each occasion, she believed that she “would get to them, finish them up and, at that time, be, quote, ‘caught up.’”

6. On her quarterly report for January-March 1999, dated April 7, 1999, respondent listed nine cases as pending more than 60 days and wrote: “These matters will be decided on or before 7/21/99.” Of the nine matters, one was decided in August 1999, one in September 1999, one in October 1999, one in February 2000, one in May 2000, and four were decided in July 2000.

7. For the periods of April-June 1999, July-September 1999 and October-December 1999, respondent failed to file quarterly reports of cases pending more than 60 days until March 27, 2000, notwithstanding that respondent’s Administrative Judge, Honorable Francis A. Nicolai, in letters dated July 22, 1999, October 25, 1999, January 24, 2000, and February 7, 2000, directed respondent to file the overdue reports as soon as possible.

8. On her quarterly report for April-June 2000, which was filed on July 10, 2000, respondent listed 19 delayed cases for “April-May 2000 quarter” and wrote that she “will clear all pending decision[s] by July 14, 2000.” Of the 19 matters listed, one was decided in June 2000, seven in September 2000, seven in October 2000, one in November 2000, one in May 2001, and two were still pending as of September 28, 2001.

9. Respondent failed to report 38 cases pending for more than 60 days in the quarterly reports required by Section 4.1 of the Rules of the Chief Judge, as set forth in the annexed Schedule 2.

10. Judge Nicolai directed respondent on numerous occasions to issue timely decisions in the undecided small claims matters. Judge Nicolai wrote to respondent directing her to issue timely decisions on April 27, 1999, March 30, 2000, April 7, 2000, April 18, 2000, May 4, 2000, May 26, 2000 and September 14, 2000.

11. Early in 1999, Judge Nicolai and his principal law clerk, Tomme Berg, Esq., met with respondent to discuss the numerous undecided matters pending before respondent. At that meeting, Judge Nicolai directed respondent to render decisions in the pending matters.

12. On April 18, 2000, after respondent reported 47 delayed matters on her quarterly report for January-March 2000, Judge Nicolai and Ms. Berg met again with respondent to discuss the numerous undecided matters pending before respondent. At that meeting, Judge Nicolai directed respondent to render decisions in the pending matters. Judge Nicolai and Ms. Berg also advised respondent on techniques to render more timely decisions. Respondent advised Judge Nicolai that she would issue decisions in five of the pending cases each week. Respondent failed to comply with that schedule. By May 19, 2000, respondent had issued decisions in six of the 47 delayed matters, and respondent did not render any additional decisions in the delayed matters until June 26, 2000, when she decided three matters.

13. Respondent knew that many of the litigants of the pending small claims matters had complained about the lack of timely decisions. Respondent had personally received complaints. Complaints were relayed to respondent from the clerk of the court; Judge Nicolai also advised respondent of complaints he had received.

14. The small claims matters awaiting decision by respondent did not involve unusual or complex issues, but rather presented typical small claims matters. The decisions rendered by respondent are generally less than two full pages, although two are four pages in length, and contain summaries of the evidence and a very brief discussion of any legal issues, often without citation to any legal authority.

15. Since early 2000, a court attorney has been assigned to respondent's court. Although respondent could have assigned the court attorney to research decisions in the pending matters and believed that the court attorney would do so expeditiously if so assigned, respondent did not assign the matters to the court attorney.

16. Respondent testified that after her appointment as a judge, she attempted to change her law practice, which had been largely in criminal law in local courts, to a general civil practice, due to ethical restrictions prohibiting her from appearing before any part-time judge in Westchester County. Respondent testified that "as a result... much more time had to be taken than I anticipated. This meant that I was not available to spend more time in court."

17. Respondent testified further that her practice in handling cases was to take extensive notes during the trial and reserve decisions, pending research of the legal issues, because she felt a responsibility to the litigants who were predominantly *pro se*. Respondent testified that as a consequence of this practice and the limited time she could devote to the court, the cases started "building up."

With respect to Charge II of the Formal Written Complaint:

18. On October 6, 2000, respondent received a letter from the Commission, dated October 5, 2000, requesting her response to questions concerning her conduct.

19. On October 30, 2000, respondent received a follow-up letter from the Commission dated October 23, 2000, advising respondent that she had not responded to the Commission's letter dated October 5, 2000, and requesting her response.

20. On November 28, 2000, respondent received a third letter from the Commission, dated November 9, 2000, advising respondent that she had not responded to the Commission's letter dated October 5, 2000, and requesting that she respond within five days of receipt of the letter.

21. Respondent testified before the Commission on December 15, 2000. At that time, respondent submitted a response to the Commission's letter of October 5, 2000. Prior to that time, respondent did not respond to the letter of October 5, 2000 or communicate with the Commission concerning her failure to respond to the letter, although respondent testified that she "was aware that once the Commission wrote me, that this was serious."

22. On March 5, 2001, respondent received a letter from the Commission, dated March 2, 2001, requesting her response to questions concerning her conduct and asking that she respond by March 13, 2001.

23. Respondent responded to the Commission's letter of March 2, 2001, on April 6, 2001, by letter received by facsimile transmission at the Commission's office. Prior to April 6, 2001, respondent did not respond to the Commission's letter or communicate with the Commission concerning her failure to respond to the letter.

24. Respondent testified that she did not consider requesting an extension of time to respond to the Commission's letter; rather, respondent tried to focus on getting all of the material together to respond to the Commission as soon as possible.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(7) and 100.3(C)(1) of the Rules Governing 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.

The record establishes that respondent failed to render timely decisions in numerous small claims matters, despite the active intervention and assistance of her administrative judge, and that she subverted the efforts of court administrators to monitor her delays. Respondent's failure to respond in a timely manner to the Commission's repeated inquiries concerning her conduct was consistent with a pattern of inattention to her responsibilities as a judge. By her actions, respondent has demonstrated that she is unable or unwilling to properly carry out the duties of a judge.

Despite a small caseload consisting of approximately 75 to 80 small claims matters per year, respondent began to develop a backlog of cases awaiting decision soon after her ascension to the bench. Respondent, a part-time judge who is permitted to practice law, explained at the hearing that her efforts to change her law practice required more time than she had anticipated,

which “meant that I was not available to spend more time in court.” Although the small claims matters she handled were relatively simple and, by respondent’s own account, each decision “would take about an hour to an hour and a half,” respondent failed to devote sufficient time to her judicial duties to enable her to issue timely decisions on a consistent basis, resulting in a significant backlog and numerous complaints from litigants about the delays.

As stated in Section 100.3(A)(1) of the Rules Governing Judicial Conduct: “The judicial duties of a judge take precedence over all the judge’s other activities.” The ethical standards specifically require every judge to “dispose of all judicial matters promptly, efficiently and fairly” (Section 100.3[B][7] of the Rules).

Not even the active intervention of her administrative judge or his repeated, strongly-worded reminders induced respondent to dispose promptly of the delayed matters and to avoid delays on the new matters she handled. On numerous occasions respondent’s administrative judge directed her to dispose of the delayed matters and offered to provide assistance. In one letter, he advised respondent that her “lengthy delays are completely unacceptable” and “must receive your highest priority”; a month later, he wrote: “[T]his unacceptable situation must be resolved and must receive your highest priority”; the following month, he again advised respondent that the problem of delayed matters “must be remedied without delay.” Respondent’s administrative judge met with respondent to discuss the problem, advised respondent on techniques to render timely decisions and worked out a schedule for disposing promptly of the delayed matters.

Despite these notable efforts, the problem of delays continued, even after respondent was on notice of the Commission’s involvement in the matter. Significantly, of the eight delayed matters listed as still pending as of the date of the Formal Written Complaint, respondent had rendered decisions in only three of the matters (Avgush, Daher and Post) by the date of the hearing five months later, at which point the five undecided matters had been pending for periods ranging from 11 to 18 months. (Two additional pending matters were cited in an amended Schedule 1.)

Respondent seriously compounded her misconduct by failing to file quarterly reports of undecided matters in a timely manner, as required by Section 4.1 of the Rules of the Chief Judge, and by filing reports that were false, misleading and incomplete. Three reports filed in 1998 falsely stated that respondent had no pending matters undecided for more than 60 days when, in fact, there were numerous such delayed matters, including one case tried in May 1997. Three quarterly reports for 1999 were not filed until March 27, 2000, despite repeated reminders from her administrative judge, and those reports omitted numerous matters that should have been reported. On two reports, respondent added a note stating that all the delayed matters would be decided within three months (Comm. Ex. 5) or within a few days (Comm. Ex. 10), but respondent failed to comply even with her self-imposed deadlines and decided only one matter within the time she had specified.

In Matter of Greenfield v. Commn on Jud Conduct, 76 NY2d 293, 298 (1990), the Court of Appeals held that a judge’s delays in eight civil matters did not constitute misconduct and that

such matters generally “can and should be resolved in the administrative setting.” The Court further stated that disciplinary action:

...should only be appropriate and necessary when the judge has defied administrative directives or has attempted to subvert the system by, for instance, falsifying, concealing or persistently refusing to file records indicating delays.

* * *

[I]f the judge fails to comply with administrative orders, his conduct must necessarily be deemed an appropriate subject for disciplinary action.

Id.

The Court in Greenfield cited with approval the rule requiring the filing of quarterly reports of delayed cases, “which permits and requires court administrators to assess the reasons for the delay and take appropriate action” (*Id.* at 299).

In the present matter, respondent’s conduct falls squarely within the parameters of misconduct set forth in Greenfield in that she defied repeated administrative directives to promptly dispose of the delayed matters and, even after strenuous intervention and assistance by court administrators, filed reports of delayed matters that were untimely and incomplete. Indeed, one letter to respondent by the Deputy Chief Administrative Judge (in April 1999) and another letter by respondent’s administrative judge (in May 2000) specifically cited Greenfield and warned respondent of the possibility of sanctions if the delays continued; another letter admonished respondent: “This situation cannot be allowed to continue. It is unfair to the litigants and reflects adversely upon you and the judicial system.”

Respondent’s pattern of delay and inattention to her responsibilities as a judge included her failure to respond in a timely manner to letters from the Commission, which was investigating her conduct. She failed to respond to the Commission’s initial letter for more than two months, notwithstanding two follow-up letters that were sent, and she submitted a response to a subsequent inquiry three weeks after it was due.

As respondent has acknowledged: “The impression of the public on the court system is formed by the kind of contact made with the court. Small claims and commercial claims litigants come to the court expecting a resolution to their legal problems.” Moreover, such litigants are generally unrepresented and are not knowledgeable as to what action to take when decisions are delayed for extended periods of time after trial. As the Court of Appeals has stated: “[L]itigants should not be expected to wait years for a decision because a judge wants to produce a scholarly writing; nor should they be required to commence collateral proceedings to compel the judge to render a decision.” Matter of Greenfield, *supra*, 76 NY2d at 298.

In determining that the sanction of removal is appropriate, we are mindful that “the purpose of judicial disciplinary proceedings is ‘not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents.’” Matter of Reeves v. Comm on Jud Conduct, 63 NY2d 105, 111 (1984), quoting Matter of Waltemade, 37 NY2d (a), (III) (Ct on

the Jud 1975). Respondent's inability or unwillingness to perform her responsibilities as a judge with appropriate diligence demonstrates that she is unfit for judicial office.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Moore, Judge Luciano, Judge Peters and Judge Ruderman concur.

Ms. Hernandez, Judge Marshall and Mr. Pope were not present.

Dated: October 1, 2002

SCHEDULE 1

	Case	Date of Trial	<u>Date of Decision</u>	How Long Pending
<u>1</u>	<u>Accurso v. Merl</u>	10/20/99	10/12/00	11 months, 22 days
2	Alcena v. Whittle	07/28/99	01/26/00	5 months, 29 days
3	Avgush v. Friedman	08/21/00	07/26/01	11 months, 5 days
4	Barbalaco v. Siino	03/12/97	09/05/97	5 months, 24 days
5	Beck v. Abrahams	08/26/98	04/14/99	7 months, 19 days
6	Bernstein v. Ray Cohen Lexus	10/11/00		Pending as of 09/28/01
7	Campbell v. Con Edison	05/27/98	10/12/99	1 year, 4 months, 15 days
8	Campos-Irizarry v. Williams	03/03/99	10/12/00	1 year, 7 months, 9 days
9	Christenson (Empire State Builders) v. Shaffer	06/09/99	05/03/00	10 months, 24 days

10	Ciervo v. Carbone and Acciai Speciali Terni USA, Inc.	07/09/98	07/07/00	1 year, 11 months, 28 days
11	Clemente v. Basler	12/03/97	07/24/98	7 months, 21 days
12	Corner Closet, Inc. v. Fabric Concepts (Goldberg v. Burke Fabric)	04/08/98	05/19/00	2 years, 1 month 11 days
13	Daher v. Gouveia	03/15/00	05/02/01	1 year, 1 month, 17 days
14	Deutsch v. Lancelloti	10/20/99	10/12/00	11 months, 22 days
15	Dilip Kha v. Zellermyer	01/03/01	09/13/01	8 months, 10 days
16	Duffy and Kelly v. White Plains Dodge	08/19/98	07/05/00	1 year, 10 months, 16 days
17	Esposito and Gerena v. Peck	05/19/99	06/26/00	1 year, 7 days
18	Feinsod Hardware Co. v. Alfredo Landscaping & Consultants	04/21/99	07/07/00	1 year, 2 months, 16 days
19	Flamio v. Flamio	09/01/99	10/03/00	1 year, 1 month, 2 days
20	George v. Metro Toyota	01/06/99	07/07/00	1 year, 6 months, 1 day
21	Green v. Congregation Kol Ami JCC of White Plains	12/15/99	10/12/00	9 months, 27 days
22	Gross v. A. Palmeri Landscaping Co.	11/18/98	11/10/99	11 months, 23 days

23	Halpak Plastics, Inc. v. Bedemco Import-Export, Inc.	06/30/99	05/16/00	10 months, 16 days
24	Harris v. Burke Fuel & Heating Co., Inc	09/16/98	06/29/00	1 year, 9 months, 13 days
25	Harris v. Graubart	05/26/99	09/26/00	1 year, 4 months
26	Hunter v. Westchester Chrysler Plymouth	04/28/99	07/07/00	1 year, 2 months, 9 days
27	Johnson v. Meile	01/06/99	02/16/00	1 year, 1 month, 10 days
28	Kronick v. Soltzer	03/16/98 (Inquest)	04/26/00	2 years, 1 month, 10 days
29	Larmon v. Horne	06/17/98	07/05/00	2 years, 18 days
30	Lent v. The Bank of New York	01/07/98	07/05/00	2 years, 5 months, 28 days
31	Lester v. The Marcon Group, LTD	03/22/00	11/14/00	7 months, 23 days
32	Libsch v. Stephen Roger Rabin	06/30/99	09/26/00	1 year, 2 months, 27 days
33	Lyons v. Westchester Pavilion	09/16/98	02/23/00	1 year, 5 months, 7 days
34	Maggio v. Baldwin	10/18/00		Pending as of 09/28/01
35	Mangeri v. Route World Brokers, Inc.	03/22/00		Pending as of 09/28/01
36	Mark v. Capital Quest, LLC	10/20/99 (Motion)	09/26/00	11 months, 6 days

37	Masso v. Seigetvari	04/15/98	07/07/00	2 years, 2 months, 22 days
38	McDonald v. Div Dati Construction	01/17/01		Pending as of 09/28/01
39	McDonald v. Lousberg	06/11/97	09/28/99	2 years, 3 months, 17 days
40	Meyer v. Masback	02/11/98	08/13/99	1 year, 6 months, 2 days
41	Monteleone v. Arone	09/22/99	09/26/00	1 year, 4 days
42	Morales v. Sholz Isuzu, Inc.	01/21/98	07/05/00	2 years, 5 months, 14 days
43	Mosiello v. Allstate Insurance Co.	01/06/99	09/29/00	1 year, 8 months, 23 days
44	Nakagawa v. C&C Moving and Storage	05/26/99	06/26/00	1 year, 1 month
45	Post v. Pleska	11/03/99 (Inquest)	03/28/01	1 year, 4 months, 25 days
46	Quirk v. Sprague	06/28/00		Pending as of 09/28/01
47	Reis v. Vanderheof (Touch of Gold)	01/20/99	09/24/00	1 year, 8 months, 4 days
48	Riemer v. Pearl	04/07/99	02/16/00	10 months, 9 days
49	Rossi-Gilman v. Galleria Furniture, Inc.	12/15/99	10/12/00	9 months, 27 days
50	Sanders v. Kavy	01/06/99	07/05/00	1 year, 5 months 29 days
51	Savino v. Peter Elliot Corp.	02/10/99	10/03/00	1 year, 7 months, 23 days

52	Soddano v. Brooks	01/07/98	01/05/99	11 months, 29 days
53	Soddano v. Soto	04/15/98	03/18/99	11 months, 3 days
54	Stein v. Nordstrom, Inc.	10/07/98	07/07/00	1 year, 9 months
55	Stevens v. Runge	03/03/99	07/05/00	1 year, 4 months, 2 days
56	Sturman v. Westchester Chrysler Plymouth Jeep Eagle, Inc.	09/01/99	09/26/00	1 year, 25 days
57	Sullivan v. Westchester Chrysler Plymouth Jeep	10/07/98	07/07/00	1 year, 9 months
58	Suthar v. White Plains Hotel	05/26/99	07/05/00	1 year, 1 month, 9 days
59	Taylor & Nagele v. Westchester Pet Shoppes, Inc.	02/10/99	10/12/00	1 year, 8 months, 2 days
60	Thadathil v. George	04/15/98	03/18/99	11 months, 3 days
61	Trinidad v. GA Insurance Co. of NY	07/29/98	07/05/00	1 year, 11 months, 6 days
62	Wagner v. Sellian	07/22/98	03/10/00	1 year, 7 months, 16 days
63	Waite v. Geyer	03/24/99	07/07/00	1 year, 3 months, 13 days
64	Weintraub v. Siegel	02/07/01		Pending as of 09/28/01
65	Westchester Moving & Delivery v. Brenhouse	05/14/97	06/30/98	1 year, 1 month, 16 days

66	White Plains Drapery & Upholstery v. Anker Management	04/05/00		Pending as of 09/28/01
67	Zayas v. Galleria Mall Space	12/15/99	10/03/00	9 months, 18 days

SCHEDULE 2

	Case	Not reported in the following quarters:
1	Alcena v. Whittle	July-Sept 1999 Oct-Dec 1999
2	Beck v. Abrahams	Oct-Dec 1998 Jan-March 1999
3	Campbell v. Con Edison	July-Sept 1998 Oct-Dec 1998
4	Ciervo v. Carbone and Acciai Speciali Terni USA, Inc.	July-Sept 1998 Oct-Dec 1998
5	Clemente v. Basler	Jan-March 1998 Apr-June 1998
6	Corner Closet, Inc. v. Fabric Concepts (Goldberg v. Burke Fabric)	July-Sept 1998 Oct-Dec 1998
7	Duffy and Kelly v. White Plains Dodge	Oct-Dec 1998 Jan-March 1999
8	Feinsod Hardware Co. v. Alfredo Landscaping & Consultants	July-Sept 1999 Oct-Dec 1999
9	Flamio v. Flamio	Oct-Dec 1999
10	George v. Metro Toyota	Jan-March 1999

11	Gross v. A. Palmeri Landscaping Co.	Jan-March 1999
12	Halpak Plastics, Inc. v. Bedemco Import-Export, Inc.	July-Sept 1999 Oct-Dec 1999
13	Harris v. Burke Fuel & Heating Co., Inc	Oct-Dec 1998 Jan-March 1999
14	Johnson v. Meile	Jan-March 1999
15	Kronick v. Soltzer	Apr-June 1998 July-Sept 1998 Oct-Dec 1998
16	Larmon v. Horne	July-Sept 1998 Oct-Dec 1998
17	Lent v. The Bank of New York	Jan-March 1998 Apr-June 1998 July-Sept 1998 Oct-Dec 1998
18	Libsch v. Roger Rabin	July-Sept 1999 Oct-Dec 1999
19	Lyons v. Westchester Pavilion	Oct-Dec 1998
20	Mark v. Capital Quest, LLC	Oct-Dec 1999
21	Masso v. Seigetvari	Apr-June 1998 July-Sept 1998 Oct-Dec 1998 Jan-March 1999
22	McDonald v. Lousberg	Jan-March 1998 Apr-June 1998 July-Sept 1998 Oct-Dec 1998
23	Meyer v. Masback	Apr-June 1998 July-Sept 1998 Oct-Dec 1998

24	Monteleone v. Arone	Oct-Dec 1999
25	Morales v. Sholz Isuzu, Inc.	Jan-March 1998 Apr-June 1998 July-Sept 1998 Oct-Dec 1998
26	Mosiello v. Allstate Insurance Co.	Jan-March 1999
27	Post v. Pleska	Jan-March 2000 Apr-June 2000 July-Sept 2000 Oct-Dec 2000
28	Reis v. Vanderheof (Touch of Gold)	Jan-March 1999
29	Sanders v. Kavy	Jan-March 1999
30	Soddano v. Brooks	Jan-March 1998 Apr-June 1998 July-Sept 1998
31	Soddano v. Soto	Apr-June 1998 July-Sept 1998 Oct-Dec 1998
32	Stein v. Nordstrom, Inc.	Oct-Dec 1998 Jan-March 1999
33	Sturman v. Westchester Chrysler Plymouth Jeep Eagle, Inc.	Oct-Dec 1999
34	Sullivan v. Westchester Chrysler Plymouth Jeep	Oct-Dec 1998 Jan-March 1999
35	Thadathil v. George	Apr-June 1998 July-Sept 1998 Oct-Dec 1998
36	Trinidad v. GA Insurance Co. of NY	July-Sept 1998 Oct-Dec 1998 Jan-March 1999

37	Wagner v. Sellian	July-Sept 1998 Oct-Dec 1998 Jan-March 1999
38	Westchester Moving & Delivery v. Brenhouse	Jan-March 1998

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **WILLIAM WATSON**, a Judge of the Lockport City Court, Niagara County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair⁴
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

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

The respondent, William Watson, a Judge of the Lockport City Court, Niagara County, was served with a Formal Written Complaint dated November 30, 2000, containing one charge. Respondent filed an answer dated December 22, 2000.

On January 5, 2001, respondent filed a motion to dismiss the Formal Written Complaint. By affirmation dated January 18, 2001, the administrator opposed the motion. On February 8, 2001, the Commission denied the motion to dismiss.

By order dated January 8, 2001, the Commission designated C. Bruce Lawrence, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 17, 2001, in Rochester, New York. The referee filed his report with the Commission on January 10, 2002.

The parties filed briefs and replies with respect to the referee's report. On May 9, 2002, the Commission heard oral argument, at which respondent and his counsel appeared. Thereafter, additional briefs were filed at the Commission's request. The Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a judge of the Lockport City Court, Niagara County since January 2000.

2. In 1999 respondent, who was then a Niagara County Assistant District Attorney, became a candidate for Lockport City Court Judge.

⁴ Judge Marshall died on September 10, 2002. He was not present on May 9, 2002, when oral argument was heard.

3. Respondent was a candidate in the primary election on September 14, 1999, for the Republican, Democratic, Conservative, Independent and Liberal nominations for Lockport City Court Judge.

4. Respondent's opponents in the primary election were the incumbent Lockport City Court Judges Betsy Hurley and David Wendt.

5. In connection with his announcement of his candidacy in April 1999, respondent issued a statement, published in the Lockport Union-Sun & Journal, which stated, in part:

We must no longer put up with drug dealers and other violent criminals from Rochester, Buffalo and Niagara Falls, who feel that it is acceptable for them to come into City of Lockport and commit crimes.

* * *

Watson said a city judge can "make it very unattractive for a person to be committing a crime in the City of Lockport," both in setting bail and sentencing. "You have to use those to your best advantage," the prosecutor said.

6. In a campaign letter published in the Lockport Union-Sun & Journal on August 3, 1999, respondent stated, in part:

Drug crimes are the biggest problem the City of Lockport is currently facing. Fortunately, this being an election year the voters get an opportunity to do something about it.

* * *

...vote out of office those people who have contributed to the situation in which we currently find ourselves.

* * *

In fact, under the terms of office of both of my opponents, drug arrests have increased dramatically, in the City of Lockport. According to the US&J (5/7/99), the Lockport Police Department made 30 arrests for criminal possession of a controlled substance in 1996. That figure sky rocketed to 149 arrests in 1998. That is an astonishing increase of almost 400 percent and should not be tolerated by the voters. Likewise, this trend is not only limited to drug related arrests. Between 1997 and 1998, trespass arrests jumped up 369 percent, criminal possession of stolen property arrests rose 151 percent, robbery arrests were up 61 percent, and burglary arrests increased 56 percent.

* * *

Currently Lockport is attracting criminals from Rochester, Niagara Falls and Buffalo to come into our city to peddle their drugs and commit their crimes. We, as voters, must bring this to an end. I urge all voters to take a stand on primary day, Sept. 14, 1999. Vote

for the candidates who have proven themselves successful in the war against crime. We need to take back our city and elect those people who are part of the solution, not part of the problem!

7. On September 5, 1999, respondent wrote a letter addressed to employees of the Lockport Police Department that stated, in part:

We are in desperate need of a judge who will work with the police, not against them. We need a judge who will assist our law enforcement officers as they aggressively work toward cleaning up our city streets.

8. In the same letter to the Lockport Police Department employees, respondent asked his readers to vote for him and urged them to get the message to their relatives, friends, neighbors and acquaintances. Respondent concluded the letter by stating in bold capital letters: "PUT A REAL PROSECUTOR ON THE BENCH!" Respondent testified that his intent was to distinguish his prosecutorial experience from that of the incumbent City Court judge, Betsy Hurley, who had previously worked in the District Attorney's office for 18 years and had been the First Assistant District Attorney.

9. In a letter published in the Lockport Union-Sun & Journal on September 7, 1999, respondent stated, in part:

Last year arrests skyrocketed in Lockport; burglary up 56 percent, robbery up 61 percent, possession of stolen property up 151 percent and trespass up 369 percent. Astonishingly, drug possession has increased 396 percent over the last two years!

10. In a letter published in the Lockport Union-Sun & Journal on September 9, 1999, respondent stated, in part:

My opponents have been in office together for the last several years. Arrests have skyrocketed in Lockport recently, even though crime is down countywide, statewide and nationally.

11. In a campaign advertisement also published in the Lockport Union-Sun & Journal on September 9, 1999, respondent stated, in part:

Are you ready to take back the City of Lockport?

ARRESTS TELL THE STORY

Burglary up 56%

Stolen Property Possession up 151%

Trespass up 369%

Robbery up 133%

Drug Possession up 396%

12. In his written response to questions published in the Lockport Union–Sun & Journal on September 13, 1999, respondent stated, in part:

It is absolutely unacceptable that arrests are skyrocketing in
Lockport when crime is going down nationally.

* * *

We must begin to deter criminals before they come into the city.

* * *

. . .criminals from surrounding communities are flocking into
Lockport. Once we gain a reputation for being tough, you'd
be surprised how many will go elsewhere, making the caseload
more manageable.

13. As a result of the primary election on September 14, 1999, respondent received the Republican, Democratic, Conservative and Independent nominations for Lockport City Court.

14. In connection with his campaign during the general election in the fall of 1999 in which he was opposed by incumbent Lockport City Court Judge Betsy Hurley, who was the Liberal candidate, respondent stated, in part, in a campaign advertisement: “In the last two years drug possession has increased 396% in the City of Lockport.”

15. Respondent defeated Judge Hurley in the November 1999 election and was elected to the Lockport City Court.

16. The themes of respondent’s campaign were that respondent would be a “tough judge who would be tough on crime” and that his campaign opponents were to blame for an increase in crime within the City of Lockport.

17. By advertising his intention to be a "tough judge" who would be tough on crime and by stating repeatedly his intention to make Lockport a city that was "very unattractive" for criminal defendants who resided outside the city, including his statements concerning his intended use of bail against defendants, and by urging police department employees to “PUT A REAL PROSECUTOR ON THE BENCH!”, respondent created the appearance that he would not be impartial as a judge, would not judge cases on an individual basis or upon the merits, and would be biased against criminal defendants.

18. Respondent's focusing his repeated campaign advertisements and statements upon the increase in arrests in five specific crime categories was an intentional attempt to create the impression with the public that his opponents were responsible for an increase in crime in Lockport.

19. Since respondent knew at the time he published his campaign material that arrest statistics change for complex reasons that are most likely to be wholly unrelated to a judge's

actions, and since he had no way to determine why the arrest statistics he cited in his campaign material had increased, respondent's conduct in attributing to his campaign opponents the responsibility for the increase in arrests in the five crime categories was intentionally misleading to the public.

20. Further, respondent's campaign material was intentionally misleading to the public in that: (i) respondent included in his campaign material only those arrest statistics published in the Lockport Union–Sun & Journal article on May 7, 1999, that displayed an increase, while knowing that the article also reported significant declines in other serious crime categories, and (ii) the campaign material failed to make reference to the explanations in the article provided by police officials for the increasing arrests.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(4)(a), 100.5(A)(4)(d)(i), 100.5(A)(4)(d)(ii) and 100.5(A)(4)(d)(iii) of the Rules Governing 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 Rep 111, 112 (Comm'n on Jud Conduct, Jan 27, 1994). A judicial candidate may not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office”; nor may a candidate “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” (Sections 100.5[A][4][d][i] and [ii] of the Rules Governing Judicial Conduct). To do so compromises the impartiality that is essential to a judge's unique role. *See Matter of Birnbaum*, 1998 Ann Rep 73, 74 (Comm'n on Jud Conduct, Sept 29, 1997). Every judicial candidate should be mindful of the importance of adhering to these standards so that public confidence in the judiciary may be preserved.

Although the U.S. Supreme Court recently held that the First Amendment protects the right of judicial candidates to “announce [their] views on disputed legal or political issues” (*Republican Party of Minnesota v. White*, 536 US ___ [June 27, 2002]), the “announce” rule, held unconstitutional in *White*, is not a part of New York's ethical code. The existing prohibitions in New York against “pledges or promises” and “statements that commit or appear to commit the candidate” focus precisely on conduct which goes to the heart of judicial neutrality, impartiality and independence; indeed, without these restrictions, campaign speech by judicial candidates might be as unfettered and unapologetically biased as that of partisan, non-judicial office-seekers. These provisions are not within the ambit of the *White* decision. And while the Court of Appeals in *Matter of Shanley*, 98 NY2d 310 (2002), recently held that the phrase “law and order candidate” does not, by itself, suggest a pro-prosecution pledge or compromise judicial impartiality, respondent's entire campaign for City Court in 1999 presented him as a candidate who would bring to the bench a pro-prosecution bias.

Flouting the ethical standards, respondent's campaign literature vowed that he would be a “tough judge” who would use bail and sentencing to make Lockport “unattractive” for outsiders who come there to commit crimes. In campaign advertisements, published letters and public statements, respondent repeatedly urged voters to join him in a “war on crime” and declared his

intention to “work with the police” and assist them in “cleaning up our city streets.” The unmistakable bias of respondent’s campaign theme is exemplified in his letter to police employees, urging them to “PUT A REAL PROSECUTOR ON THE BENCH!”. While such pro-prosecutorial rhetoric may be common in non-judicial political campaigns, it is highly inappropriate for judicial candidates and created the appearance that respondent would not be impartial as a judge. *See Matter of Hafner*, 2001 Ann Rep 113 (Comm’n on Jud Conduct, Dec 29, 2000).

Particularly offensive were respondent’s efforts to link his opponents, the incumbent judges, with an increase in crime. Referring to the increase of arrests for drug crimes, respondent urged voters to “vote out of office those people who have contributed to the situation” and to “elect those people who are part of the solution, not part of the problem!”. Respondent selectively cited statistics indicating increasing arrest rates to support his contention that “criminals...are flocking into Lockport” and that if “we gain a reputation for being tough, you’d be surprised how many will go elsewhere.” Although respondent has acknowledged in this proceeding that arrest statistics change for complex reasons that are most likely wholly unrelated to a judge’s actions, his campaign rhetoric made no such allowances (“ARRESTS TELL THE STORY”). As the referee concluded, respondent’s use of arrest statistics was “intentionally misleading” and was an intentional effort to blame the incumbents for an increase in crime in Lockport, contrary to Section 100.5(A)(4)(d)(iii) of the Rules.

As to his letter urging police department employees to “[p]ut a real prosecutor on the bench,” respondent explained that it would have been improper to make that appeal to the public but testified that he avoided impropriety by directing his words to police employees. Yet in the same letter to the police employees, he called upon them to get his message out to their friends and relatives. Moreover, the reference to “a real prosecutor” was intended to distinguish respondent’s prosecutorial service with that of the incumbent City Court judge, who, in fact, had far more prosecutorial experience than respondent. Respondent offered the rationale that in his briefer tenure in the District Attorney’s office, he had done more to reduce crime than the incumbent had done; indeed, in campaign ads, respondent personally took credit for significant reductions of drug cases in the county. Implicit in respondent’s statements was the message that his prosecutorial efforts would give him a pro-prosecutorial bias that would be an asset in the “war on crime” he intended to wage. Such statements may pander to popular views, but they do a disservice to the public and the judiciary.

Respondent’s campaign statements, which contributed to his election over two incumbent judges, are far more egregious than those in other cases the Commission has previously considered. *See, e.g., Matter of Hafner, supra; Matter of Herrick*, 1999 Ann Rep 103 (Comm’n on Jud Conduct, Feb 6, 1998); *Matter of Polito*, 1999 Ann Rep 129 (Comm’n on Jud Conduct, Dec 23, 1998); *Matter of Maislin*, 1999 Ann Rep 113 (Comm’n on Jud Conduct, Aug 7, 1998). As a candidate for judicial office, respondent had as much of an obligation as a sitting judge to know the applicable rules pertaining to elections and to ensure that his campaign statements were consistent with the standards articulated in the rules and in numerous Commission determinations.

In arriving at an appropriate sanction, we have consistently weighed a judge’s statements

of apology in mitigation of punishment, when the judge is truly contrite. Accordingly, if a judge genuinely accepts responsibility for his or her acts at the earliest available opportunity we will often pay deference to that confession and ameliorate the sanction. In this case, respondent displayed no honest remorse. Indeed, his appeal to his youth and inexperience rings hollow. Even after formal charges were served and respondent was given a full opportunity to both explain his actions and apologize for them, he failed to do so. Indeed, at the hearing he offered excuses that either were disingenuous or bordered on the ludicrous. It was only later, after he consulted and retained a competent attorney and it was obvious that the charges were serious, that his position softened. Only then, aware for the first time that both his conduct and his outright refusal to acknowledge his malfeasance were a problem, did he come to the conclusion that a contrite heart would serve him better than a defiant tone. It would be inappropriate to reward respondent for arriving so belatedly at the conclusion that not only his conduct but his subsequent refusal to acknowledge wrongdoing were unacceptable.

A judge's election is tarnished when the judge's campaign activity flouts not only the ethical rules, but fundamental standards of honesty and fairness. Respondent's intentionally misleading use of arrest statistics and his intentional effort to blame the incumbents for an increase in crime were inconsistent with those standards and demonstrate that he is unfit to serve as a judge. Moreover, to allow respondent to retain his judgeship would be to reward him for intentional misconduct and might encourage other judicial candidates, knowing that they may reap the fruits of their misconduct, to ignore the rules applicable to judicial elections. We conclude, therefore, that the sanction of removal is appropriate.

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

Mr. Berger, Judge Ciardullo, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Mr. Pope and Judge Ruderman concur.

Mr. Coffey and Judge Peters dissent only as to the sanction and vote that the appropriate sanction is censure.

Judge Marshall was not present.

Dated: December 26, 2002

OPINION CONCURRING IN PART AND DISSENTING IN PART BY JUDGE PETERS

I share the concern of the majority regarding the ramifications of permitting respondent to retain his position on the bench. Clearly, each time we impose discipline upon a judge for an election violation, if such discipline falls short of removal, one can conclude that the judge has reaped the benefits of such misconduct. At present, candidates for judicial office may well believe that flouting of the rules is worth the suffering of an admonition or censure when the success of their campaign hangs in the balance. I cannot, however, concur with my colleagues' determination that respondent must be removed from office.

To be sure, the conduct respondent engaged in warrants removal, but two factors compel me to conclude that he should not suffer a greater penalty than censure. First, had respondent considered Commission precedent, he would have discovered that although we have repeatedly decried conduct similar to that he engaged in (*Matter of Hafner*, 2001 Ann Rep 113 [Commn on Jud Conduct, Dec 29, 2000]; *Matter of Polito*, 1999 Ann Rep 129 [Commn on Jud Conduct, Dec 23, 1998]), the violators were merely admonished. In *Polito*, the candidate for Supreme Court exhorted the voters to "pull the lever for Bill Polito, and crack down on crime" and proclaimed that he would not "experiment with alternative sentences [because] criminals belong in jail, not on the street." In *Hafner*, a candidate for County Court stated that he was "tired of seeing career criminals get a 'slap' on the wrist." Obviously, this statement was critical of the incumbent's conduct. Second, I am also mindful of the fact that while respondent was obligated to follow the rules of conduct, he was not a judge when he ran for office and therefore had no need to familiarize himself with such rules or abide by them prior to the commencement of his campaign.

For these reasons, I would censure respondent but note that since sanctions short of removal have not deterred election misconduct, we will not hesitate to impose this ultimate sanction in the future.

Finally, I am compelled to comment upon the need for more timely response to complaints concerning conduct of candidates for judicial office. I am of the opinion that while the Commission's practices and procedures are wholly appropriate to address most complaints concerning judicial conduct, they do not permit prompt resolution of allegations of misconduct during campaigns. For this reason, I suggest consideration of a procedure by which such complaints can be promptly resolved.

Dated: December 26, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JEFFREY R. WERNER**, a Justice of the Newburgh Town Court, Orange County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission
Larkin, Axelrod, Trachte & Tetenbaum, LLP (By John Ingrassia) for Respondent

The respondent, Jeffrey R. Werner, a Justice of the Newburgh Town Court, Orange County, was served with a Formal Written Complaint dated July 3, 2002, containing one charge.

On August 2, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 19, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Newburgh Town Justice since January 1998. His current term of office commenced on January 1, 2000, and expires on December 31, 2003.
2. Respondent is an attorney admitted to practice law in the State of New York.
3. At approximately 8:00 P.M. on May 25, 2001, respondent and his wife were traveling in the City of Newburgh in respondent's car. Respondent was driving.
4. Shortly after 8:00 P.M. on May 25, 2001, Newburgh Police Lt. Oscar Lopez, who was driving a patrol car in the City of Newburgh, stopped respondent's car, approached the driver's side door and asked for respondent's driver's license and car registration.
5. In response to Lt. Lopez's request for respondent's driver's license and car registration, respondent handed over his driver's license and his Office of Court Administration photo identification card, which states that respondent is a "Town Justice."

6. As a result of the stop on or about May 25, 2001, respondent was charged with Speeding and Driving While Intoxicated.

7. In February 2002, after trial in the Newburgh City Court, respondent was acquitted of the Speeding and Driving While Intoxicated charges and all lesser included offenses.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's conduct during a traffic stop created the appearance that he was asserting his judicial office in order to obtain special treatment by the police. The ethical standards prohibit a judge from using the prestige of judicial office to advance the judge's private interests (Section 100.2[C] of the Rules Governing Judicial Conduct). Judges are also required to avoid even the appearance of impropriety, both on and off the bench (Sections 100.1 and 100.2 of the Rules). By producing a card identifying him as a judge and handing it to the police officer who had stopped respondent's car, respondent gratuitously interjected his judicial status into the incident, which was inappropriate. Matter of D'Amanda, 1990 Annual Report 91 (Comm'n on Jud Conduct). It was unnecessary for respondent to identify himself as a judge since the officer had simply requested respondent's driver's license and car registration.

Respondent's conduct was improper even in the absence of an explicit request for special consideration. See Matter of Edwards v. Comm'n on Jud Conduct, 67 NY2d 153, 155 (1986). Judges must be particularly careful to avoid any conduct that may create an appearance of seeking special consideration simply because of their judicial status. Public confidence in the fair and proper administration of justice requires that judges, who are sworn to uphold the law, neither request nor receive special treatment when the laws are applied to them personally.

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

Mr. Berger, Judge Ciardullo, Ms. Hernandez, Ms. Moore, Judge Peters and Mr. Pope concur.

Mr. Coffey, Mr. Goldman, Judge Luciano and Judge Ruderman dissent and vote to reject the agreed statement of facts on the basis that the disposition is too severe.

Dated: October 1, 2002

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **EDWARD J. WILLIAMS**, a Justice of the Kinderhook Town and Valatie Village Courts, Columbia County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission
Gerstenzang, O'Hern, Hickey & Gerstenzang (By Thomas J. O'Hern) for
Respondent

The respondent, Edward J. Williams, a justice of the Kinderhook Town and Valatie Village Courts, Columbia County, was served with a Formal Written Complaint dated November 13, 2001, containing one charge. Respondent filed an answer dated December 14, 2001.

On March 6, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On May 9, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Valatie Village Court since 1982 and a justice of the Kinderhook Town Court since 1984. He is not a lawyer. He has attended and successfully completed all required training sessions for judges.
2. On or about December 14, 2000, David St. Onge was arrested on the complaint of the state police and his wife, Barbara Novak, and charged in the Stuyvesant Town Court with Assault, 2nd Degree and Menacing, 2nd Degree, after Ms. Novak alleged that Mr. St. Onge had threatened and assaulted her with a rifle. Mr. St. Onge was arraigned by Stuyvesant Town Justice John A. Dorsey, who set bail and issued an Order of Protection, requiring Mr. St. Onge to stay away from Ms. Novak.

3. A few days after the arraignment, Ms. Novak and Mr. St. Onge reconciled and Mr. St. Onge moved back into the marital residence. Ms. Novak went to court and requested that Judge Dorsey vacate the Order of Protection, but Judge Dorsey refused and referred Ms. Novak to the district attorney.

4. On or about December 20, 2000, prior to the next court appearance, Mr. St. Onge and Ms. Novak, who were acquainted with respondent, went to respondent's home, without notice to or the consent of the prosecution, and requested that respondent vacate the Order of Protection. Respondent said that he could not do so and offered to speak with Judge Dorsey. Respondent then telephoned Judge Dorsey, using Judge Dorsey's unlisted telephone number, and requested that he rescind the Order of Protection he had issued against Mr. St. Onge. Respondent told Judge Dorsey that Mr. St. Onge and his wife were friends of respondent.

5. When Judge Dorsey replied that it was improper for respondent to make such a request and that Judge Dorsey would not vacate the Order of Protection without hearing from the prosecution, respondent argued with him and stated that Judge Dorsey could act without giving the prosecution an opportunity to be heard. In attempting to convince Judge Dorsey that he had the authority to vacate the Order of Protection, respondent said to Judge Dorsey that respondent had vacated orders of protection without notice to the district attorney. Respondent told Judge Dorsey that "The D.A. isn't God." Judge Dorsey refused to rescind the Order of Protection, and Mr. St. Onge later pleaded guilty to a reduced Assault charge.

6. Respondent now recognizes that his telephone call to Judge Dorsey was improper, that Judge Dorsey was correct in advising him that Judge Dorsey had to give the district attorney an opportunity to be heard and that it would be improper for a judge to vacate an Order of Protection upon an *ex parte* request.

7. Respondent agrees that he will not make *ex parte* calls to judges on behalf of parties in any court proceeding, that he will not lend the prestige of office to advance private interests, that he will give the district attorney notice and a right to be heard when the law calls for such a procedure, and that he will pay greater attention to the Rules Governing Judicial Conduct.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C) and 100.3(B)(6) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By contacting another judge on behalf of a friend and asking the judge to vacate an Order of Protection he had issued, respondent intervened in a pending proceeding and used the prestige of judicial office in an attempt to advance his friend's private interests. Such conduct constitutes an improper assertion of influence as well as an unauthorized *ex parte* communication (Sections 100.2[C] and 100.3[B][6] of the Rules Governing Judicial Conduct). As the Court of Appeals stated in Matter of Lonschein (50 NY2d 569, 571-72):

No judge should ever allow personal relationships to color his conduct or lend the prestige of his office to advance the private interests of others. Members of the judiciary should be acutely

aware that any action they take, whether or on 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.

The Court on the Judiciary described the solicitation of special consideration as favoritism, which “is wrong, and always has been wrong.” Matter of Byrne, 420 NYS2d 70, 71 (Ct on the Jud 1979); *see also* Matter of Young, 2001 Ann Report of NY Comm on Jud Conduct 129; Matter of DeLuca, 1985 Ann Report of NY Comm on Jud Conduct 119. As a judge since 1982, respondent should have recognized that such communications seriously undermine the fair administration of justice and are strictly prohibited.

Even after the presiding judge refused respondent’s request, stated that he would not vacate the order without hearing from the prosecution and reminded respondent that the request was improper, respondent, who had described the defendant and his wife as respondent’s friends, persisted in his impermissible, heavy-handed advocacy. Arguing with the presiding judge, respondent told the presiding judge that respondent himself had vacated orders of protection without notice to the prosecution and commented, “The D.A. isn’t God.” Respondent’s conduct showed remarkable insensitivity to the special ethical obligations of judges.

In imposing sanction, we note respondent’s previous discipline for engaging in improper political activity, excluding an attorney from his courtroom, berating an assistant district attorney and failing to administer an oath to witnesses (Matter of Williams, 2002 Ann Rep of NY Comm on Jud Conduct ___). Respondent’s misconduct in the instant case occurred approximately three months after respondent was served with a Formal Written Complaint in the previous matter. We also note that in 1993 respondent was issued a confidential letter of dismissal and caution upon a determination of misconduct for being discourteous to an attorney.

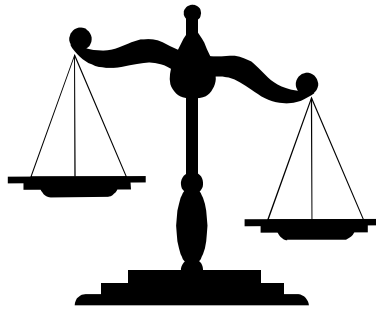
By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Ms. Moore, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Marshall was not present.

Dated: May 17, 2002

Statistical Analysis of Complaints



2003 Annual Report
New York State
Commission on Judicial Conduct

COMPLAINTS PENDING AS OF DECEMBER 31, 2001

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIM'RY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>								
<i>NON-JUDGES</i>								
<i>DEMEANOR</i>		11	19	11	1	0	7	49
<i>DELAYS</i>		1	4	2	1	0	1	9
<i>CONFLICT OF INTEREST</i>		6	7	3	0	0	3	19
<i>BIAS</i>		0	7	4	0	0	0	11
<i>CORRUPTION</i>		3	2	1	0	0	4	10
<i>INTOXICATION</i>		0	0	0	0	0	1	1
<i>DISABILITY/QUALIFICATIONS</i>		0	2	0	0	0	0	2
<i>POLITICAL ACTIVITY</i>		4	3	7	0	2	3	19
<i>FINANCES/RECORDS/TRAINING</i>		5	5	12	1	1	3	27
<i>TICKET-FIXING</i>		0	0	1	0	0	1	2
<i>ASSERTION OF INFLUENCE</i>		2	2	0	0	0	4	8
<i>VIOLATION OF RIGHTS</i>		13	1	5	4	1	7	31
<i>MISCELLANEOUS</i>		0	0	0	0	0	0	0
TOTALS		45	52	46	7	4	34	188

*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 2002

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIM'RY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	566							566
<i>NON-JUDGES</i>	214							214
<i>DEMEANOR</i>	141	48	13	7	0	0	0	209
<i>DELAYS</i>	43	12	0	3	0	0	0	58
<i>CONFLICT OF INTEREST</i>	17	16	2	0	1	0	0	36
<i>BIAS</i>	85	6	1	0	0	1	0	93
<i>CORRUPTION</i>	11	7	4	0	1	0	0	23
<i>INTOXICATION</i>	0	2	0	0	0	0	1	3
<i>DISABILITY/QUALIFICATIONS</i>	3	0	0	0	0	0	0	3
<i>POLITICAL ACTIVITY</i>	20	22	4	1	0	1	0	48
<i>FINANCES/RECORDS/TRAINING</i>	10	9	2	2	1	0	0	24
<i>TICKET-FIXING</i>	0	2	1	0	0	0	0	3
<i>ASSERTION OF INFLUENCE</i>	8	4	0	1	1	0	0	14
<i>VIOLATION OF RIGHTS</i>	101	18	5	1	0	0	0	125
<i>MISCELLANEOUS</i>	13	1	1	0	1	0	0	16
TOTALS	1232	147	33	15	5	2	1	1435

*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 2002: 1435 NEW & 188 PENDING FROM 2001

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIM'RY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	566							566
<i>NON-JUDGES</i>	214							214
<i>DEMEANOR</i>	141	59	32	18	1	0	7	258
<i>DELAYS</i>	43	13	4	5	1	0	1	67
<i>CONFLICT OF INTEREST</i>	17	22	9	3	1	0	3	55
<i>BIAS</i>	85	6	8	4	0	1	0	104
<i>CORRUPTION</i>	11	10	6	1	1	0	4	33
<i>INTOXICATION</i>	0	2	0	0	0	0	2	4
<i>DISABILITY/QUALIFICATIONS</i>	3	0	2	0	0	0	0	5
<i>POLITICAL ACTIVITY</i>	20	26	7	8	0	3	3	67
<i>FINANCES/RECORDS/TRAINING</i>	10	14	7	14	2	1	3	51
<i>TICKET-FIXING</i>	0	2	1	1	0	0	1	5
<i>ASSERTION OF INFLUENCE</i>	8	6	2	1	1	0	4	22
<i>VIOLATION OF RIGHTS</i>	101	31	6	6	4	1	7	156
<i>MISCELLANEOUS</i>	13	1	1	0	1	0	0	16
TOTALS	1232	192	85	61	12	6	35	1623

*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 OR AFTER PRELIM'RY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	11,129							11,129
<i>NON-JUDGES</i>	3366							3366
<i>DEMEANOR</i>	2447	59	853	255	84	78	191	3967
<i>DELAYS</i>	1049	13	97	53	16	12	17	1257
<i>CONFLICT OF INTEREST</i>	496	22	355	127	44	20	104	1168
<i>BIAS</i>	1527	6	208	47	24	15	24	1851
<i>CORRUPTION</i>	338	10	89	9	31	13	24	514
<i>INTOXICATION</i>	42	2	32	7	8	3	21	115
<i>DISABILITY/QUALIFICATIONS</i>	48	0	31	2	16	10	6	113
<i>POLITICAL ACTIVITY</i>	241	26	202	143	10	18	30	670
<i>FINANCES/RECORDS/TRAINING</i>	207	14	221	152	105	79	89	867
<i>TICKET-FIXING</i>	22	2	72	157	38	61	160	512
<i>ASSERTION OF INFLUENCE</i>	139	6	108	56	10	7	45	371
<i>VIOLATION OF RIGHTS</i>	2156	31	278	138	59	29	51	2742
<i>MISCELLANEOUS</i>	681	1	226	78	26	38	57	1107
TOTALS	23,888	192	2772	1224	471	383	819	29,749

*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.

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

EDMUND G. FITZGERALD, JR.,

a Judge of the City Court of Yonkers,
Westchester County.

DETERMINATION

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Vickie Ma, Of Counsel) for the Commission

Edwards & Angell, LLP (Hal R. Lieberman) for Respondent

The respondent, Edmund G. Fitzgerald, Jr., a judge of the City Court of
Yonkers, Westchester County, was served with a Formal Written Complaint dated

November 13, 2001, containing one charge. Respondent filed a verified answer dated December 27, 2001.

By motion dated January 2, 2002, the administrator of the Commission moved for summary determination, pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR §7000.6[c]). Respondent opposed the motion by memorandum dated January 23, 2002, and the administrator filed a reply dated January 28, 2002. Respondent filed a supplemental memorandum dated January 29, 2002, and the administrator filed a letter dated January 30, 2002. By Decision and Order dated February 6, 2002, the Commission granted the administrator's motion in part and determined that the factual allegations were sustained and that respondent's misconduct was established.

The parties filed briefs with respect to the issue of sanctions and the issue of respondent's fitness and qualifications to serve as a judge under the State Constitution. On May 6, 2002, respondent requested a stay or postponement of the proceeding, which the administrator opposed by letter dated May 7, 2002. On May 9, 2002, the Commission denied the request.

On May 10, 2002, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the City Court of Yonkers, Westchester County since January 2000.

2. On or about September 28, 1990, respondent issued check number 1711 in the amount of \$5,000, payable to cash, which was disbursed from his attorney escrow account entitled "Angelo & Fitzgerald, Attorney Trust Account," number 0306148501, maintained at Hudson Valley National Bank ("attorney escrow account"), in violation of DR 9-102(e) of the Code of Professional Responsibility (22 NYCRR §1200.46).

3. In August 1990 respondent issued check number 1703 in the amount of \$4,060, payable to Iona College for a non-client matter, which was disbursed from his attorney escrow account, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3). The check represented a loan from respondent's client, Joseph DiNapoli, which was used to pay for respondent's son's college tuition.

4. By failing to memorialize the terms of the loan in writing, respondent did not adequately protect his client's interests, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3).

5. As of August 1, 1997, the balance remaining in respondent's attorney escrow account was \$11,088.26. Respondent was unable to account for whom the funds were being held, in violation of DR 1-102(a)(8) (now [7]) of the Code of

Professional Responsibility (22 NYCRR §1200.3).

6. Respondent was unable to account for a substantial portion of the activity in his attorney escrow account from December 1989 through February 1992, in violation of DR 1-102(a)(8) (now [7]) of the Code of Professional Responsibility (22 NYCRR §1200.3).

7. As a result of respondent's actions as set forth above, and following formal disciplinary proceedings, respondent was disbarred as an attorney by Order of the Appellate Division, Second Department, dated December 4, 2000. The Appellate Division found that respondent had engaged in "serious professional misconduct" and ordered respondent to:

desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

8. Respondent's motion for leave to appeal to the Court of Appeals was denied on July 2, 2001.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(1) of the Rules Governing Judicial Conduct and lacks the qualifications to perform the official duties of a judge pursuant to Article 6, Sections 20 and 22 of the Constitution of the State of New

York. Charge I of the Formal Written Complaint is sustained insofar as it consistent with the above findings, and respondent's misconduct is established.

The Commission is empowered to consider complaints with respect to the "qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system" (NY Const Art 6 §22[a]).

The New York Constitution provides that no person "may assume the office of" city court judge unless such person has been admitted to practice law in New York State for at least five years (NY Const Art 6 §20[a]). The Court of Appeals has interpreted that language as "impliedly requiring" a continuing obligation to be qualified to practice law. Ginsberg v. Purcell, 51 NY2d 272, 276 (1980).

Considering a claim for back pay by a Family Court judge who was disbarred upon conviction of a felony, the Court in Ginsberg construed the same language at issue here, stating:

The requirement that to be a Judge one must also be an attorney for a given period imports not only the experiential background afforded by the time required but also "the character and general fitness requisite for an attorney" (Jud Law §90, subd 1, par a). The constitutional requirement that to assume office a Judge must be a lawyer can, therefore, quite properly be viewed as impliedly requiring, in order to protect the integrity of the Judge's office, that he not only be a lawyer when he assumes office but that he continue to be qualified as a lawyer, not only intellectually but also in character and fitness (*cf.* Pfingst v. State of New York, 57 AD2d 163, 165).

Id. at 276

In interpreting the relevant constitutional provision, the Court considered both rules of construction and policy considerations. The Court noted that the Constitution should be interpreted “to give its provisions practical effect, so that it receives ‘a fair and liberal construction, not only according to its letter, but also according to its spirit and the general purposes of its enactment’” (*Id.*).

The Court cited with approval Thaler v. State of New York, 79 Misc2d 621, 624 (Ct of Claims 1974), in which the court held that the requirement that one must be an attorney to “assume the office of” justice of the Supreme Court implied continuity and that a person who was disbarred was unable to receive the salary, or discharge the duties and responsibilities, of a Supreme Court justice.

Although the facts in Ginsberg are different from the facts in this case, the Court of Appeals was interpreting the same language that applies here. We conclude, therefore, that in view of his disbarment, respondent should be removed from office since he lacks the requisite “qualifications” to serve as a judge.

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

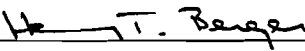
Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Marshall and Ms. Moore were not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: July 1, 2002



Henry T. Berger, Esq., Chair
New York State
Commission on 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

LARRY D. MARTIN,

a Justice of the Supreme Court, Kings County.

DETERMINATION

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

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

Jerome Karp for Respondent

The respondent, Larry D. Martin, a justice of the Supreme Court, Kings County, was served with a Formal Written Complaint dated January 2, 2001, containing two charges.

On March 19, 2001, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts. The Commission approved the agreed statement on March 29, 2001. Each side submitted memoranda as to sanction.

On June 18, 2001, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and rendered a determination dated December 26, 2001, that respondent be admonished.

On January 31, 2002, respondent moved for correction of the record, reargument and/or reconsideration of the determination, and renewal. By memorandum dated February 20, 2002, the Administrator opposed the motion. On May 9, 2002, the Commission granted the motion for reconsideration and, upon reconsideration, issued the following determination.

1. Respondent became a judge in January 1993 upon election to the Civil Court of the City of New York. He was elected to the Supreme Court in November 1994 and assumed that office in January 1995.

As to Charge I of the Formal Written Complaint:

2. On August 7, 2000, respondent sent a letter on his judicial stationery

to the Honorable Ralph Gazzillo, a Justice of the Supreme Court, Suffolk County, seeking favorable consideration on behalf of Marlon Paul, a defendant in Judge Gazzillo's court convicted on a felony drug charge. Respondent's letter stated that a "non-jail probation disposition would allow for [the defendant to] continue to be a productive member of his community." The defendant, a college graduate, was the son of a long-time family friend of respondent.

3. Respondent wrote the letter in response to a request for assistance from the defendant's mother and the defendant himself. Respondent's letter had not been solicited by any court or any probation official. Respondent sent a copy of the letter to defense counsel but did not send a copy to the District Attorney prosecuting the case.

4. During the Commission's investigation of this matter, an attorney for Mr. Paul informed Commission staff that, prior to sentencing, he had advised Judge Gazzillo that Mr. Paul's attorneys were obtaining character letters on behalf of the defendant, including a letter from a judge, and that Judge Gazzillo had stated that he did not want to receive a character letter from another judge. There is no indication in the record that respondent was informed of Judge Gazzillo's statement prior to sending the letter on behalf of the defendant.

5. Upon receipt of respondent's letter, Judge Gazzillo recused himself from the case by order dated August 11, 2000, but subsequently accepted a guilty plea from the defendant and imposed sentence.

As to Charge II of the Formal Written Complaint:

6. On or about May 4, 1999, respondent sent a letter on his judicial stationery to the Honorable Lawrence C. McSwain, Chief Judge of the Guilford County District Court in Greensboro, North Carolina, seeking favorable consideration on behalf of Stefan Malliet, a defendant in Judge McSwain's court convicted of shoplifting.

Respondent's letter expressly supported the position advocated by defense counsel. The defendant, a college student, was the son of a long-time family friend of respondent's.

7. Respondent wrote the letter after requests for assistance from both the defendant's mother and the defendant's attorney. Respondent did not send a copy of his letter to the District Attorney prosecuting the case.

8. Respondent advised the Commission of his letter to Judge McSwain in response to a question by Commission staff during the investigation concerning his letter to Judge Gazzillo.

As to Charges I and II of the Formal Written Complaint:

9. After election to the Civil Court and again after election to the Supreme Court, respondent attended orientation and training programs for newly elected judges run by the Office of Court Administration. At those programs, respondent and his colleagues were acquainted with the Rules Governing Judicial Conduct and were specifically advised to avoid unauthorized *ex parte* communications and to avoid using

the prestige of judicial office to advance a private interest.

10. Respondent was aware of the Advisory Committee on Judicial Ethics and the role of that committee in issuing advisory opinions to judges upon request. Respondent did not request an advisory opinion before writing the letters to Judge Gazzillo and Judge McSwain addressed above. Numerous published opinions of the Advisory Committee have advised judges against sending such communications.

11. Respondent received annually the Opinions of the Advisory Committee on Judicial Ethics and the Annual Reports of the Commission, which made it clear that judges must avoid initiating *ex parte* communications and asserting the influence of their judicial office for the private benefit of others.

12. Respondent asserts that, when he wrote the two letters at issue in this case, he did not consider that his conduct constituted an improper *ex parte* communication, the assertion of influence or lending the prestige of judicial office to advance a private interest.

13. Respondent is active in a community program that provides mentors for young men and women. Respondent himself is and has been a mentor through this program, but he had not been a mentor to either defendant in the two matters referred to above. He is also active with the Center for Community Alternatives, which is also involved in counseling young people.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C) and 100.3(B)(6) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

On two occasions, respondent sent *ex parte* letters seeking special consideration on behalf of defendants who were awaiting sentencing in other courts. Such conduct violated well-established ethical standards barring a judge from lending the prestige of judicial office to advance the private interests of others and from engaging in unauthorized *ex parte* communications (Sections 100.2[C] and 100.3[B][6] of the Rules Governing Judicial Conduct). As the Court of Appeals stated in Matter of Lonschein v. State Commn on Jud Conduct, 50 NY2d 569, 571-72 (1980):

[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. Members of the judiciary should be acutely aware that any action they take, 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. 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. [Citations omitted.]

With his judicial stationery underscoring the impact of his professional clout, respondent acted as the defendants' advocate, recommending a "non-jail probation disposition" for one defendant and expressly supporting the position of defense counsel in the other matter. Respondent's letters could have had only one purpose: to influence the presiding judges to give special consideration to the defendants, who were the children of respondent's long-time friends. A request by one judge to another for special consideration for any person is "wrong and always has been wrong," whether for favorable treatment as to sentence or for other matters. Matter of Byrne, 47 NY2d (b)(Ct on the Jud 1978); Matter of Calabretta, 1985 Ann Report of NY Commn on Jud Conduct 112. In numerous cases over more than two decades, the Commission and the Court of Appeals have disciplined judges for engaging in such conduct. *See, e.g.,* Matter of Dixon v. State Commn on Jud Conduct, 47 NY2d 523 (1979); Matter of Freeman, 1992 Ann Report of NY Commn on Jud Conduct 44; Matter of Engle, 1998 Ann Report of NY Commn on Jud Conduct 125; Matter of Putnam, 1999 Ann Report of NY Commn on Jud Conduct 131. As a judge since 1993, respondent should have recognized that such communications are strictly prohibited. *See also* Adv Op 89-4 and 89-73 (Advisory Comm on Jud Ethics).

Upon assuming the bench, a judge surrenders certain rights and must refrain from conduct which may be permissible for others. Even otherwise laudable civic or charitable activities must be avoided if they create the appearance that a judge is lending

the prestige of judicial office to advance to private interests. Difficult as it may be to refuse a friend's request to write a letter on behalf of a family member in trouble, every judge must be mindful of the importance of adhering to the ethical standards so that public confidence in the integrity and impartiality of the judiciary may be preserved. While respondent's judgment may have been clouded by a "sincere, albeit misguided desire" to help his friends, that does not excuse his ethical transgressions. Matter of Lonschein, *supra*, 50 NY2d at 573; Matter of Edwards v. State Commn on Jud Conduct, 67 NY2d 153 (1986).

While a judge may respond to an official request for his or her views, a judge may not initiate communication with a sentencing judge in order to convey information. If a judge has information which he or she believes is pertinent, the defense attorney may request the Probation Department to formally contact the judge for the judge's input as part of the pre-sentencing investigation. In no case may a judge voluntarily communicate with a sentencing judge, as respondent did here. Compounding the misconduct, respondent did not send a copy of either letter to the prosecution (*see* Section 100.3[B][6] of the Rules Governing Judicial Conduct).

The consequences of respondent's improper intervention were far from harmless. A judge who receives such an *ex parte* request is placed in a difficult position; indeed, one sentencing judge felt constrained to disqualify himself from the case after receiving respondent's letter, though he later accepted the defendant's guilty plea and

imposed sentence. The fair and proper administration of justice, and public confidence in the integrity of the process, are impaired when a defendant is the beneficiary of an influential plea for favorable treatment from a sitting judge, a benefit not available to other defendants. Nor can it be said that respondent received no personal benefit from his actions. A judge who is willing to use judicial prestige to advance the interests of others in need may well earn the gratitude of friends and community, but such conduct is detrimental to the judiciary as a whole.

In mitigation, we have considered respondent's record of community service, which includes acting as a mentor to others, and that he has been forthright and cooperative throughout this proceeding.

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

Mr. Berger, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

Judge Ciardullo and Mr. Coffey dissent as to sanction only and vote that respondent be issued a letter of caution.

Ms. Moore and Mr. Pope did not participate.

Judge Marshall was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: June 6, 2002

A handwritten signature in black ink, appearing to read "Henry T. Berger", is written over a solid horizontal line.

Henry T. Berger, Esq., Chair
New York State
Commission on 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

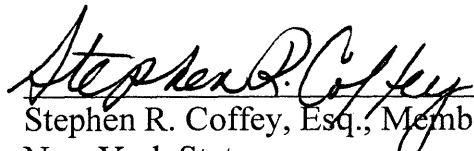
LARRY D. MARTIN,

a Justice of the Supreme Court, Kings County.

DISSENTING OPINION
BY MR. COFFEY,
IN WHICH JUDGE
CIARDULLO JOINS

I am mindful of the numerous precedents cited by Commission counsel that judges should be publicly disciplined when they improperly assert the influence of judicial office in seeking special consideration on behalf of others. I find that these precedents, however, do not address the specific facts raised in this case. Indeed, I am persuaded that respondent acted on both occasions out of a sincere, selfless desire to help the children of his long-time friends at a critical time in their lives and expected and received no benefit in return for his letters. While I concur with the conclusion that respondent's conduct violated the ethical rules, I would not publicly admonish this judge. Accordingly, I respectfully dissent.

Dated: June 6, 2002


Stephen R. Coffey, Esq., Member
New York State
Commission on 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

REYNOLD N. MASON,

a Justice of the Supreme Court, 2nd Judicial
District, Kings County.

DETERMINATION

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

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

Gentile & Dickler (Paul T. Gentile) for Respondent

The respondent, Reynold N. Mason, a justice of the Supreme Court, 2nd
Judicial District, Kings County, was served with a Formal Written Complaint dated April

5, 2001, containing six charges.

On May 15, 2001, the Administrator moved for a summary determination and a finding that respondent's misconduct has been established based upon respondent's failure to answer the formal written complaint. Responding papers were due on June 6, 2001. By letter dated June 14, 2001, respondent requested a 21-day extension to respond to the motion. On June 15, 2001, respondent filed papers in opposition to the motion. By order dated June 20, 2001, the Commission denied the request for an extension and granted the motion for summary determination in all respects and determined that respondent's misconduct was established, and determined further that the order granting the motion for summary determination would be vacated provided that respondent file an Answer to the Formal Written Complaint within 20 days and be available for a hearing on or before August 6, 2001, or as soon thereafter as scheduled by a referee.

Respondent filed an answer dated July 9, 2001, and an amended answer dated August 7, 2001.

By order dated June 20, 2001, the Commission designated Mark S. Arisohn, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held in New York City on September 10, October 23 and 25 and November 7, 9 and 14, 2001. The referee filed his report with the Commission on February 22, 2002.

The parties filed briefs with respect to the referee's report. On May 9,

2002, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent served as an elected judge of the Civil Court of the City of New York, Kings County, from January 1995 through December 1997. He was elected a Supreme Court justice on November 4, 1997, and took office on January 1, 1998. Prior to becoming a judge, respondent practiced law and concentrated on landlord-tenant matters.

As to Charge I of the Formal Written Complaint:

2. Respondent resided in apartment 2H at 150 East 19th Street in Brooklyn, New York from 1986 or 1987 to August 31, 1992. The apartment was rent-stabilized at a monthly rental of \$336.45.

3. Respondent's lease expired in March 1992, at which time, as a rent-stabilized tenant, respondent was entitled to a renewal lease, subject to statutory rent increases. Respondent remained in the apartment without a lease until August 1992, when he vacated the apartment and moved into a house he had purchased. When he vacated the apartment, respondent did not intend to return to the apartment, surrendered all rights to the apartment and was not liable for any future rent.

4. Upon vacating the apartment, respondent, without obtaining the

consent of the landlord, Samuel Leifer, permitted Rocky Abrams to occupy the apartment. Respondent, who was then married to Mr. Abrams' sister, had represented Mr. Abrams in a matrimonial action in 1990 or 1991.

5. Respondent sought to have Mr. Abrams pay rent directly to Mr. Leifer for the months of September, October and November 1992 so that Mr. Abrams would become Mr. Leifer's tenant at the rent respondent had been paying. Mr. Leifer did not accept Mr. Abrams' rent checks. For several months thereafter, respondent sent his own checks to Mr. Leifer for the rent on the apartment, which Mr. Leifer did not accept.

6. Mr. Leifer advised respondent that he would accept Mr. Abrams as a tenant only if Mr. Abrams signed a new lease at a higher rent than respondent had been paying. Under the applicable rent regulations, a landlord was entitled to a rent increase when the lease on a rent-stabilized apartment expired and to a vacancy allowance when an apartment was vacated.

7. Respondent unsuccessfully negotiated on Mr. Abrams' behalf to get a new lease for Mr. Abrams. Respondent did not advise the landlord that he wanted to sublease the apartment.

8. From December 1, 1992, through July 31, 1996, respondent collected rent on a monthly basis from Mr. Abrams in the amount that respondent had been paying, which was below the market value.

9. On August 4, 1994, respondent asked Mr. Abrams for the amount of

\$1,009.35, representing the three months of rent in 1992 that Mr. Abrams had sent to Mr. Leifer and that Mr. Leifer had rejected. Mr. Abrams wrote a check to respondent dated January 2, 1995, for that amount.

10. In January 1995, while respondent was a judge, respondent deposited Mr. Abrams' check for the 1992 rent (\$1,009.35) into his personal checking account.

11. Respondent had advised Mr. Abrams to pay the monthly rent by check payable to respondent. Mr. Abrams' understanding was that respondent would forward the funds to the landlord and that the funds were not for respondent's personal use. Mr. Abrams never gave respondent permission to use the funds for his own personal purposes.

12. All but two of Mr. Abrams' rent checks from December 1, 1992, to September 1, 1994, were made payable to respondent "as attorney" and all but one were deposited at respondent's direction into respondent's escrow account at Republic National Bank of New York. Two rent checks during that period were made payable to Reynold N. Mason (not "as attorney"). After September 1994, Mr. Abrams' rent checks, including his check for the rent covering September, October and November 1992, were made payable to Reynold N. Mason (not "as attorney").

13. As of December 1, 1994, although respondent had received more than \$7,000 in rent payments which he deposited into his escrow account, the balance in respondent's escrow account was \$1,940.72.

14. Mr. Leifer never gave permission for respondent to accept or retain rent for the apartment. Approximately five years after respondent had vacated the apartment, Mr. Leifer was unaware that respondent had collected rent from Mr. Abrams; in 1997 Mr. Leifer was “shocked” when Mr. Abrams came to court with a stack of cancelled rent checks made out to respondent.

15. Respondent received a total of \$15,813.15 in rent payments from Mr. Abrams.

16. After January 1, 1995, when respondent became a judge, respondent transferred the funds remaining in his Republic National Bank of New York escrow account to his personal checking account.

17. Before and after becoming a judge, respondent withdrew funds from his attorney escrow account, which he used for personal purposes (*see* Charges V and VI).

18. Respondent has retained the rent payments he collected from Mr. Abrams, failed to preserve the funds he collected and used the funds for his personal purposes. Except for checks in 1992 and 1993, which Mr. Leifer refused to accept, respondent has refused to forward the rent payments to Mr. Leifer, even after Mr. Leifer demanded the money.

19. During the Commission’s investigation, respondent stated that he held Mr. Abrams’ rent checks in trust for Mr. Leifer to make certain that Mr. Leifer did

not lose the income on the apartment and to protect himself against a claim by Mr. Leifer that respondent was responsible for the rent after he vacated the apartment, although he acknowledged that he was not liable on the apartment after he vacated it.

20. When asked during the investigation to set forth the legal basis for collecting rent for the apartment, respondent's written response was:

I do not claim any legal basis to do so. As I said earlier, I simply collected the rent to protect myself because Mr. Leifer refused to accept it, and I wanted to ensure that I was not left holding the bag if for some reason Mr. Abrams should suddenly become unavailable. The landlord and I had spoken about this, and I believe he understood what I was doing at the time.

21. Respondent's testimony at the hearing that he had subleased or attempted to sublease the apartment to Mr. Abrams is not credible and appears to be a recent fabrication attempting to justify his unauthorized retention of the rent funds he had collected. His testimony is contradicted by the evidence, including: (1) the absence of any such claim by respondent prior to the hearing; (2) respondent's earlier testimony specifically denying that Mr. Abrams was a subtenant and stating that he told Mr. Abrams that he would try to get him a lease; (3) Mr. Leifer's testimony that, in his negotiations with respondent concerning a lease for Mr. Abrams, respondent never requested a sublease; (4) Mr. Abrams' rent checks made out to respondent "as attorney"; and (5) Mr. Abrams' understanding that he was sending the rent to his attorney as a conduit and not for the personal use of the attorney. Moreover, respondent, a former landlord-tenant

attorney, knew that, by law, a sublease for a rent-stabilized apartment is limited to two years of a four-year period and is based on the tenant's intent to return to the apartment and maintaining the apartment as his or her primary residence (*see* Rent Stabilization Law §26-511, subd c [12] and Rent Stabilization Code §2525.6; RPL §226-b).

22. During the investigation, when respondent was asked about the nature of his relationship with Mr. Abrams, his present involvement with the apartment and the purpose of his retaining the funds he collected from Mr. Abrams, respondent never mentioned a sublease. Respondent's testimony at the hearing that he never advised the Commission of a sublease during the investigation because the Commission never asked about it lacks candor.

23. Respondent had no legal authority to permit Mr. Abrams to reside in the apartment after he moved out, to collect the rent payments from Mr. Abrams or to use the money he had collected from Mr. Abrams for his personal purposes.

As to Charge II of the Formal Written Complaint:

24. Respondent testified during the investigation that he had a warranty claim against Mr. Leifer, who had purchased the building in 1991 or 1992, for services that had not been provided by the former building owner in the 1980's. Respondent did not disclose that his warranty claims against the previous owner had been settled prior to 1992.

25. Under the settlement, which was established by the documentary evidence and the testimony of the former managing agent, respondent, who had withheld rent against the prior owner and was in arrears for over \$6,500, agreed to pay \$3,000 and the prior owner agreed to make repairs and to waive the remaining arrears for “breach of warranty” claims. After paying \$1,000 of the amount he owed under the settlement, respondent agreed to make certain repairs himself in return for receiving a credit of \$2,000. There is no evidence to support respondent’s testimony at the hearing that his warranty claims continue because the former owner reneged in making repairs.

26. To underscore his position on his warranty claim, respondent testified during the investigation that he had “never withheld rent one day” during the earlier period. Confronted with evidence establishing that he had stopped paying rent for approximately 18 months and had been \$6,500 in arrears when he negotiated a settlement for his warranty claims, respondent conceded at the hearing that he “may have” withheld rent.

27. Respondent testified at the hearing that he did not mention the settlement during his investigative testimony because he “was never asked that question” and, if he had been asked, he would not have mentioned the settlement because he did not recall it.

28. It is not credible that, having raised his warranty claims against the previous owner to justify his retention of the rent funds he had collected, respondent did

not recall that the claims had been settled. Respondent's failure to disclose the settlement was a violation of his duty to be candid in his testimony and in responding to Commission inquiries.

29. From December 1, 1992, to the date of the Formal Written Complaint, respondent did not advise Mr. Leifer that he was retaining the funds he had collected from Mr. Abrams because of alleged prior unreimbursed expenses constituting a warranty claim or a breach of warranty; failed to provide any legitimate reason for not giving Mr. Leifer, when Mr. Leifer demanded the money, an amount equaling the total amount of rent money he had collected from Mr. Abrams; and failed to advise Mr. Leifer how much he had collected.

30. Respondent testified during the investigation that the rents he collected were not his funds and that he was holding the funds for Mr. Leifer. In collecting the rents under those circumstances, respondent had a duty to apprise Mr. Leifer that he was collecting funds from Mr. Abrams and how much he had collected.

As to Charge III of the Formal Written Complaint:

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

As to Charge IV of the Formal Written Complaint:

32. During the investigation, respondent received six letters from the Administrator of the Commission in which the Commission was seeking replies to

questions concerning the matters under investigation. The letters were dated, respectively, February 15, 2001; February 20, 2001; March 1, 2001; March 8, 2001; March 10, 2001; and March 19, 2001.

33. The February 15, 2001, letter set forth six questions for respondent to answer, asked respondent to reply within 10 days and advised respondent that failure to respond to the questions might constitute lack of cooperation.

34. The February 15, 2001, letter summarized the Commission investigation concerning Mr. Leifer's complaint and advised respondent that the Commission had learned from the former managing agent, after respondent's investigative testimony, that respondent had been reimbursed for certain renovations and related 1980's repairs. The letter stated that the Commission wanted to ascertain if respondent had forgotten about the settlement in testifying that he had never missed a rent payment and that he had a legal claim over some of the rent money he had collected for Mr. Leifer because of expenses that respondent had incurred before Mr. Leifer owned the building. The letter further stated that the Commission had authorized an Administrator's Complaint, dated February 14, 2001, a copy of which was attached to the letter, for an investigation concerning allegations that respondent had commingled escrow funds with his own personal funds, had made personal payments from his escrow account, had written escrow checks to "cash" and had transferred escrow funds to his personal bank account when he became a judge.

35. Respondent failed to respond to the February 15, 2001, letter.

36. At the hearing, respondent testified that he had read the February 15, 2001, letter but did not see the questions in the letter. This testimony is not credible.

37. In a letter dated February 20, 2001, the Commission asked respondent if he had located certain subpoenaed records and to clarify certain testimony that he had given concerning escrow records. Respondent failed to respond to the letter.

38. On March 1, 2001, the Commission sent respondent a letter requesting that he respond within five days to the February 15 and February 20, 2001 letters, copies of which were enclosed. Respondent failed to respond.

39. On March 8, 2001, the Commission again wrote to respondent, requesting that he respond to the February 15 and February 20, 2001 letters, copies of which were enclosed. The March 8, 2001, letter from the Administrator of the Commission stated in part:

You have not responded to the letters and you have not advised me that you do not intend to respond. Please respond to the Commission's letters upon receipt of this letter. Your failure to respond to the letters may be deemed by the Commission to constitute a failure to cooperate with the Commission.

40. Respondent sent a letter to the Commission dated March 9, 2001, which requested a two-week extension to respond.

41. Respondent testified at the hearing that he considered his March 9,

2001, letter to the Commission, in which he requested a two-week extension, to be a substantive response to the Commission's inquiry. This testimony is not credible.

42. The Administrator of the Commission sent a letter to respondent dated March 10, 2001, in response to his March 9 letter, stating in part:

The responses to earlier letters are all very much overdue. It is surprising to learn from your letter that despite your receipt of these letters, you were unaware that some papers . . . were past due. I believe the letters speak for themselves and clearly set forth the request for responses to questions; and all of these letters were sent to you after your last appearance here. So, it is very unclear why you believed that your last appearance here in some way excused you from responding to my letters. In fact, at your last appearance, you were two hours late and the referee had already left when you arrived; consequently, you did not testify.

The Commission has your letter of March 9, in which you state that you have been busy. Whether that is an adequate reason for your failure to respond to the letters sent to you to date will be decided by the Commission.

In response to your asking for two weeks to review and search [your] available records, we can only suggest that you respond to these letters as soon as possible. As I have advised you in recent letters, your failure to respond may be considered by the Commission as lack of cooperation. I can provide no other assurances at this time. The Commission is still awaiting a response.

43. Respondent testified that he did not respond to the March 10 letter because in his view it did not call for a response. This testimony is not credible.

44. On March 14, 2001, respondent wrote to the Commission requesting an extension of time until May 2001 to respond to the Commission's inquiries.

45. In a letter to respondent dated March 19, 2001, which was delivered by hand, the Commission's Administrator set forth the history of the Commission's requests for information, repeated the questions from the February 15, 2001 letter and concluded by stating:

As to the above questions, I indicated that you should respond in 10 days. It is now more than a month later and you have made no attempt to respond to a single question.

46. On April 27, 2001, the Commission's Administrator sent a letter to respondent stating that it was significant that respondent had not responded to the Commission's six letters and further stating: "You have a continuing obligation to respond to the questions posed in those letters."

47. Respondent never provided the Commission with any substantive response to the Commission's letters.

48. Respondent testified at the hearing that he did not read in detail all the letters he received from the Commission and that he merely scanned or "speed read" the correspondence. He also testified that he did not open some letters from the Commission, notwithstanding that he could ascertain from the envelopes that they came from the Commission.

49. If respondent did not open some of the Commission's letters or did not read them in their entirety, as he testified, his conduct in that regard would be improper.

50. Based on respondent's testimony and the efforts made by the Commission to direct his attention both to the letters and to his failure to respond, it is clear that respondent read the letters and knew that the Commission was requesting his response to the questions that had been asked.

51. The questions asked of respondent in the six letters that he failed to answer were reasonable and were based on the pending investigation, and it was within the Commission's lawful authority to require answers to those questions.

52. The letters which respondent ignored were relevant to the allegations under investigation, gave respondent notice of the possible consequences of his continued refusal to cooperate with the Commission and provided respondent several opportunities to recant or explain his earlier testimony concerning his alleged warranty claim.

53. Respondent had a duty to cooperate with the Commission and to be truthful, and he failed to satisfy these duties. Respondent's failure to respond to the Commission's letters in any substantive way constituted a gross failure to cooperate with the Commission's duly-authorized investigation.

54. Respondent's claim that he was being harassed by the letters is not an excuse or justification for his refusal to answer the letters. The repeated inquiries were based on his repeated refusals to respond to the questions.

55. Respondent did not file any response to the Formal Written Complaint dated April 5, 2001, or to a motion for summary determination dated May 15,

2001, which required a response by June 6, 2001, until June 8, 2001, when his attorney sent a letter to the Commission requesting a postponement of the motion. When respondent's counsel asked respondent at the hearing to explain his delay in filing an Answer to the formal written complaint and being "almost in default or...in default concerning the complaint," respondent testified that he thought that the papers addressed to him, which were marked "Confidential," were "just another bunch of those things... and here's my basis. I didn't look at the stuff." Respondent's conscious disregard of Commission notices to him in this proceeding was part of a pattern that demonstrated his lack of cooperation.

As to Charge V of the Formal Written Complaint:

56. From on or about November 30, 1994, to on or about December 31, 1994, respondent, who was then an attorney, issued checks from his attorney escrow account at Republic National Bank of New York to himself, to "cash" or to pay his personal expenses, as set forth in Schedule A, which contravened basic and well-established standards in handling escrow funds.

As to Charge VI of the Formal Written Complaint:

57. From on or about January 1, 1995, to on or about April 25, 1995, respondent, who was then a judge of the Civil Court of the City of New York, issued checks from his attorney escrow account at Republic National Bank of New York to

“cash” or to pay his personal expenses, as set forth in Schedule B, which contravened basic and well-established standards in handling escrow funds.

58. On January 26, 1995, respondent wrote a check on his attorney escrow account to the New Era Democratic Club in the amount of \$1,000, which was a political contribution.

Additional Findings:

59. Respondent’s testimony at the hearing lacked candor in numerous, material respects, including his testimony that:

(a) he subleased the apartment to Mr. Abrams and had attempted to get Mr. Leifer’s approval for a sublease;

(b) he did not advise the Commission during the investigation that he had subleased the apartment to Mr. Abrams because the Commission staff never asked about a sublease;

(c) he did not notice that Mr. Abrams’ rent checks were made out to him “as attorney”;

(d) he did not advise the Commission during the investigation of the settlement of his “warranty” claim because he was not asked about it and, moreover, did not recall that the claim, which he had raised as to justify his retention of the rent funds, had been settled;

(e) he read the Commission's February 15, 2001, letter but did not see the questions therein and did not realize that he was being asked to respond;

(f) he believed that his letter to the Commission dated March 9, 2001, asking for an extension to submit a response was a substantive response to the allegations;

(g) he did not respond to the Commission's letter dated March 10, 2001, because in his view it did not ask for a response;

(h) he did not respond to the Commission's letters because he believed that he had already given the Commission the information being sought; and

(i) he did not read the Administrator's Complaint attached to the February 15, 2001, letter when he received it and he never saw the Administrator's Complaint until it was shown to him during cross-examination.

60. Respondent's testimony throughout the proceeding was evasive, incredible and unreliable. His testimony at the hearing was, in numerous respects, inconsistent with his testimony during the investigation and, at times, inconsistent with other testimony he gave at the hearing.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.5(A)(i)(h) (formerly Section 100.7) of the Rules Governing Judicial Conduct and engaged in conduct that adversely affects his fitness to perform the official duties of a judge pursuant to Article 6,

Section 22 of the Constitution of the State of New York. Charges I, II, V and VI and paragraph 21 of Charge IV of the Formal Written Complaint are sustained insofar as they are consistent with the above facts, and respondent's misconduct is established. Charge III and paragraphs 19 and 20 of Charge IV are not sustained and are dismissed.

On and off the bench, judges "are held to higher standards of conduct than members of the public at large and ... relatively slight improprieties subject the judiciary as a whole to public criticism and rebuke." Matter of Kuehnel v. Commn on Jud Conduct, 49 NY2d 465, 469 (1980); Matter of Mazzei v. Commn on Jud Conduct, 81 NY2d 568, 572 (1993). As established by the evidence and as found by the referee, respondent's behavior, as an attorney and as a judge, fell well below established ethical standards.

After vacating his rent-stabilized apartment in 1992, respondent permitted Rocky Abrams, his former client and then-brother-in-law, to move into the apartment and, for the next four years, collected rent from Mr. Abrams, without the landlord's knowledge, based upon Mr. Abrams' understanding that respondent would negotiate a lease for Mr. Abrams and would hold the money in trust for the landlord. Respondent deposited Mr. Abrams' checks, most of which were written to respondent "as attorney," into his attorney escrow account and used the funds for his personal purposes. When the landlord demanded the funds from respondent after learning belatedly that respondent had

been collecting the rent payments for four years, respondent refused to provide the total funds he had collected.

In his sworn testimony, respondent has offered various, conflicting explanations for his retention of the funds, including that he had subleased the apartment to Mr. Abrams and that he had warranty claims against the previous owner of the building. Respondent's testimony in that regard is not only contradictory but inconsistent with the evidence presented. We are mindful of the tortuous history of litigation involving the apartment and need not resolve issues that are properly determined in a court with jurisdiction over landlord-tenant disputes. It is abundantly clear, however, that having collected the rent funds in trust and having deposited them into his escrow account, respondent had a duty, as a fiduciary, to preserve the funds he collected and to exercise the highest degree of care and trust with respect to the funds. Respondent clearly violated that duty by failing to advise the landlord of the amounts he collected and by using the funds for his personal purposes.

Respondent has acknowledged that he commingled the funds he had collected for Mr. Abrams, which were deposited into his attorney escrow account, with his personal funds. Both before and after he became a judge, respondent used his escrow account to write checks payable to cash and for other personal purposes. Escrow accounts are governed by strict ethical rules, intended to insure that funds which are held in trust are properly preserved. Respondent's misuse of his escrow account demonstrates

a notable carelessness in complying with established ethical standards.

Respondent compounded his misconduct by his willful refusal to respond to six letters during the Commission's investigation. Pursuant to Section 7000.3, subdivision (c), of the Commission's Operating Procedures and Rules (22 NYCRR §7000.3[c]), the Commission is authorized to "request a written response from the judge who is the subject of the complaint." By refusing to answer the Commission's written inquiries, respondent impeded the Commission's efforts to obtain a full record of the relevant facts and obstructed the Commission's discharge of its lawful mandate. His failure to cooperate with the Commission seriously exacerbated the underlying misconduct. Matter of Cooley v. Commn on Jud Conduct, 53 NY2d 64 (1981).

Conceding that his failure to respond to the Commission's letters was improper, respondent has offered various explanations in mitigation, including his belief that he was being harassed, that the letters were repetitive and that his requests for extensions were sufficient response. None of these factors excuses his failure over a period of several months to provide any substantive response to the questions posed in the Commission's letters. Moreover, respondent's testimony at the hearing that he failed to open some of the letters he received, although he recognized that they were from the Commission, demonstrates an unacceptable lack of respect for the process, created by Constitution and statute, under which the Commission is empowered to investigate the conduct of judges.

Respondent further exacerbated his misconduct by his repeated lack of candor throughout this proceeding. Matter of Gelfand v. Commn on Jud Conduct, 70 NY2d 211 (1987). As the referee concluded, respondent's investigative testimony concerning his purported warranty claims "was a violation of his duty to be candid," and his testimony at the hearing as to various pertinent matters was "incredible," "unworthy of belief" and "not supported in law and logic." 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. Commn on Jud Conduct, 67 NY2d 550 (1986); Matter of Gelfand, supra. The giving of false testimony is inexcusable and destructive of a judge's usefulness on the bench. Matter of Gelfand, supra; Matter of Intemann v. Commn on Jud Conduct, 73 NY2d 580 (1989).

Respondent's conduct prior to his ascension to the bench may be considered with respect to determining his fitness for judicial office. See Matter of Pfingst, 33 NY2d (a), (kk), 409 NYS2d 986, 988 (Ct on the Jud 1973). The Commission is empowered to consider complaints with respect to "fitness to perform" judicial duties and to remove a judge "for cause, including but not limited to...conduct, on or off the bench, prejudicial to the administration of justice" (NY Const Art 6 §22[a]). The term "for cause" has been interpreted to include conduct that occurs "prior to the taking of judicial office." Matter of Sarisohn, 26 AD2d 388, 390 (2d Dept 1966). Significantly, in the instant matter respondent's pre-election misconduct continued after he ascended to the bench, since he

continued to collect rents from Mr. Abrams and refused to return the funds after he became a judge, negotiated with the landlord's attorney in his chambers, and continued to use his escrow account for personal purposes. As a judge, respondent obstructed the Commission's investigation by failing to respond to the Commission's inquiries and gave testimony concerning his conduct before and after ascending the bench that was evasive and incredible.

Viewed in its entirety, respondent's conduct demonstrates "a pattern of injudicious behavior and inappropriate actions which cannot be viewed as acceptable conduct by one holding judicial office." Matter of VonderHeide v. Commn on Jud Conduct, 72 NY2d 658, 660 (1988). Such conduct jeopardizes public confidence in the judiciary, which is indispensable to the administration of justice in our society. Matter of Levine v. Commn on Jud Conduct, 74 NY2d 294 (1989). This breach of the public trust demonstrates respondent's unfitness to serve as a judge.

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

With respect to the findings of misconduct, Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez and Ms. Moore concur. Judge Peters dissents only as to Charge I and votes that the charge be dismissed. Judge Luciano, Mr. Pope and Judge Ruderman dissent only as to paragraphs 19 and 20 of Charge IV and vote that the

allegations therein be sustained.

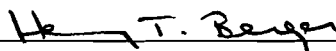
With respect to the sanction, Mr. Berger, Judge Ciardullo, Mr. Coffey, Ms. Hernandez, Judge Luciano, Mr. Pope and Judge Ruderman concur. Mr. Goldman, Ms. Moore and Judge Peters dissent and vote that respondent be censured.

Judge Marshall was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: June 21, 2002



Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct

SCHEDULE A

CHECKS FROM REYNOLD N. MASON IOLA ACCOUNT
REPUBLIC NATIONAL BANK OF NEW YORK

<u>Check Number</u>	<u>Date</u>	<u>Amount</u>	<u>Payee</u>
1251	11/30/94	\$1,940.00	Cash
1252	12/2/94	\$500.00	Ida L. Moulanier
1257	12/6/94	\$646.95	Carifta Travel Service
1258	12/4/94	\$40.00	Dr. Verlaine Brunot
1259	12/9/94	\$4,000.00	Reynold N. Mason
1260	12/9/94	\$19,000.00	Reynold N. Mason
1261	12/11/94	\$500.00	Afrika House
1262	12/12/94	\$149.00	Reynold N. Mason
1263	12/12/94	\$1,700.00	Reynold N. Mason
1265	12/12/94	\$4,800.00	Munich Overseas, Ltd.
1266	12/13/94	\$1,000.00	Reynold N. Mason
1268	12/14/94	\$66.50	G.U. Insurance Company
1269	12/14/94	\$2,000.00	Cash
1270	12/14/94	\$1,303.20	Commonwealth Brokerage Inc.
1271	12/14/94	\$302.62	Internal Revenue Service
1272	12/17/94	\$400.00	St. Marks United Methodist Church

1273	12/18/94	\$500.00	St. Marks United Methodist Church
1277	12/19/94	\$300.00	Cash
1278	12/30/94	\$328.00	Tessa Abrams
1279	12/31/94	\$300.00	Tessa Abrams
1280	12/31/94	\$4,000.00	Munich Overseas, Ltd.

SCHEDULE B

CHECKS FROM REYNOLD N. MASON IOLA ACCOUNT
REPUBLIC NATIONAL BANK OF NEW YORK

<u>Check Number</u>	<u>Date</u>	<u>Amount</u>	<u>Payee</u>
1281	1/13/95	\$850.00	Tessa Abrams
1282	1/9/95	\$300.00	Ayana Mason
1283	1/13/95	\$225.00	Support Collection Unit
1284	1/16/95	\$500.00	Tessa Abrams
1285	1/17/95	\$498.00	Chase Automotive Finance
1286	1/20/95	\$500.00	Tessa Abrams
1287	1/20/95	\$225.00	Support Collection Unit
1288	1/22/95	\$25.00	St. Marks Church
1290	1/23/95	\$37.89	Kingsway Exterminating
1292	1/26/95	\$1,000.00	New Era Democratic Club
1296	2/23/95	\$216.00	Tessa Abrams
1297	2/28/95	\$134.00	NYC Department of Finance
1299	4/25/95	\$97.41	Cash