

ANNUAL REPORT

2006

NEW YORK STATE



COMMISSION ON JUDICIAL CONDUCT

**NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT**

* * *

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July 1, 2006

To Governor George E. Pataki,
Chief Judge Judith S. Kaye 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, 2005.

Respectfully submitted,

Raoul Lionel Felder, Chair
On Behalf of the Commission

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INTRODUCTION TO THE 2006 ANNUAL REPORT

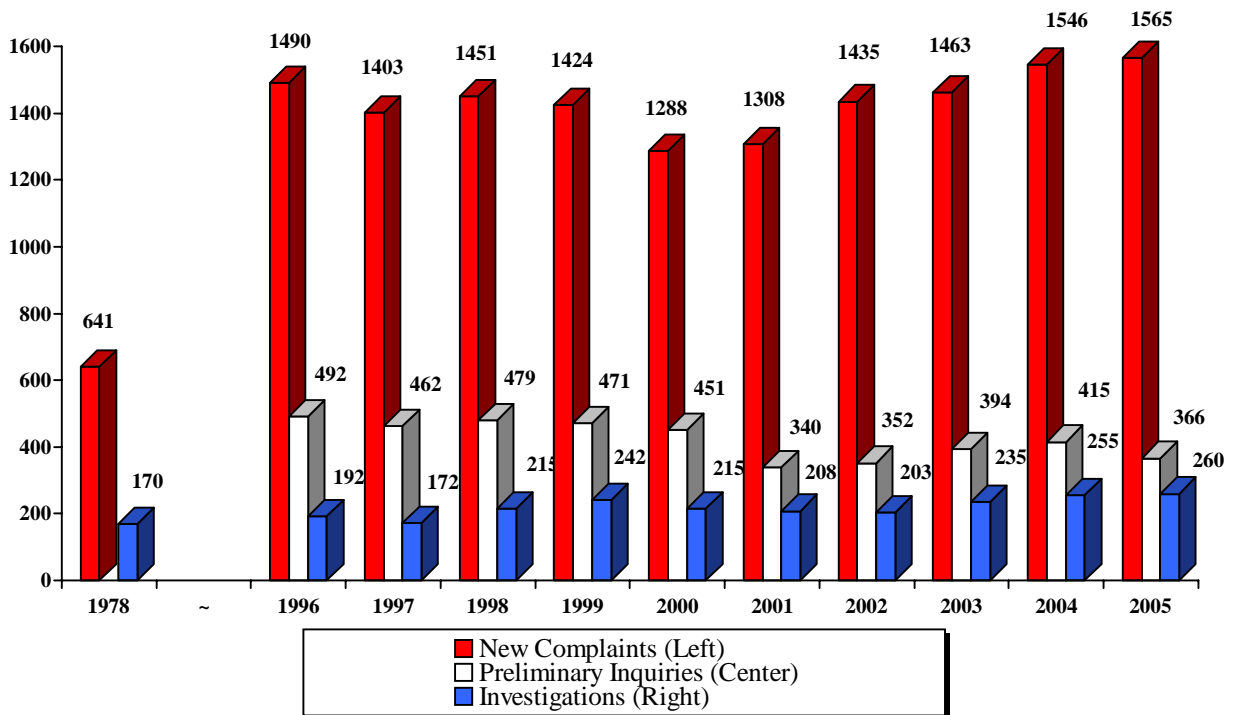
The New York State Commission on Judicial Conduct is the independent agency designated by the State Constitution to review complaints of misconduct against judges of the State Unified Court System, which includes over 3,400 judges and justices.

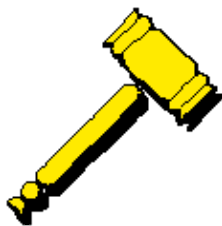
The Commission’s objective is to enforce high standards of conduct for judges, who must be free to act independently, on the merits and in good faith, but also must be held accountable by an independent disciplinary system, should they commit misconduct. The text of the Rules Governing Judicial Conduct, 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 14 years has substantially increased compared to the first 17 years of the Commission’s existence. Since 1996, the Commission has averaged over 1430 new complaints per year, 400 preliminary inquiries and 200 investigations. Last year, a record number of complaints (1565) were received and processed, and a record number were investigated (260). In each of the last 10 years, the number of incoming complaints has been more than double the 641 we received in 1978. Yet our budget has not kept pace – indeed, our staff has decreased from 63 in 1978 to 28 last year, when 260 investigations were authorized. (Budget data on pages 34-35.)

This report covers Commission activity in the year 2005.

Complaints, Inquiries & Investigations in the Last Ten Years





Action Taken in 2005

Following are summaries of the Commission's actions in 2005, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

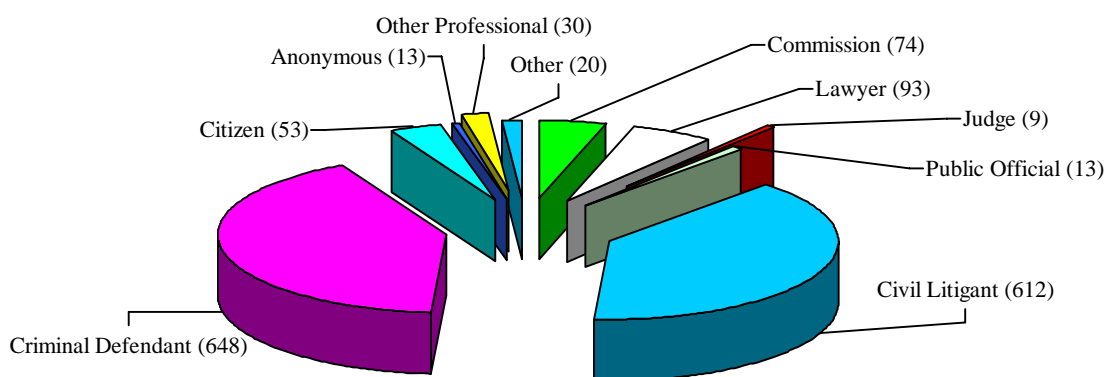
Complaints Received

The Commission received 1565 new complaints in 2005, the most ever. Preliminary inquiries were conducted in 366 of these, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts. In 260 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.

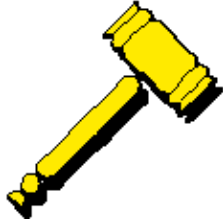
New complaints dismissed upon initial review are those that the Commission deems

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, Judicial Hearing Officers, referees 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 2005 appears in the following chart.



Complaint Sources in 2005



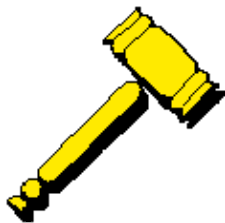
Preliminary Inquiries and Investigations

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 an investigation is warranted. In 2005, staff conducted 366 such preliminary inquiries, requiring such

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

During 2005, the Commission commenced 260 new investigations. In addition, there were 191 investigations pending from the previous year. The Commission disposed of the combined total of 451 investigations as follows:

- 160 complaints were dismissed outright.
- 39 complaints involving 36 different judges were dismissed with letters of dismissal and caution.
- 6 complaints involving 6 different judges were closed upon the judges' resignation.
- 13 complaints involving 5 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.
- 37 complaints involving 24 different judges resulted in formal charges being authorized.
- 196 investigations were pending as of December 31, 2005.



Formal Written Complaints

As of January 1, 2005, there were pending Formal Written Complaints in 39 matters, involving 28 different judges. During 2005, Formal Written Complaints

were authorized in 37 additional matters, involving 24 different judges. Of the combined total of 76 matters involving 52 judges, the Commission made the following dispositions:

- 34 matters involving 24 different judges resulted in formal discipline (admonition, censure or removal from office).
- 4 matters involving 4 judges resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- 12 matters involving 7 judges were closed upon the judge's resignation.

- 2 matters involving 2 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.
- 25 matters involving 15 different judges were pending as of December 31, 2005.

Summary of All 2005 Dispositions

The Commission's investigations, hearings and dispositions in the past year involved judges of various courts, as indicated in the following ten tables.

TABLE 1: TOWN & VILLAGE JUSTICES – 2,300,* ALL PART-TIME

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	77	263	340
Complaints Investigated	36	112	148
Judges Cautioned After Investigation	2	19	21
Formal Written Complaints Authorized	1	14	15
Judges Cautioned After Formal Complaint	2	0	2
Judges Publicly Disciplined	2	10	12
Formal Complaints Dismissed or Closed	1	7	8

Note: Approximately 400 town and village justices are lawyers.

TABLE 2: CITY COURT JUDGES – 385, ALL LAWYERS

	<i>Part-Time</i>	<i>Full-Time</i>	<i>Total</i>
Complaints Received	65	165	230
Complaints Investigated	7	20	27
Judges Cautioned After Investigation	1	2	3
Formal Written Complaints Authorized	1	6	7
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	1	2	3
Formal Complaints Dismissed or Closed	0	0	0

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 – 128 FULL-TIME, ALL LAWYERS*

Complaints Received	182
Complaints Investigated	14
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

* Includes 13 who also serve as Surrogates, 6 who also serve as Family Court Judges, and 38 who also serve as both Surrogates and Family Court judges.

TABLE 4: FAMILY COURT JUDGES – 126, FULL-TIME, ALL LAWYERS

Complaints Received	157
Complaints Investigated	22
Judges Cautioned After Investigation	2
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	3
Formal Complaints Dismissed or Closed	0

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

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

TABLE 6: COURT OF CLAIMS JUDGES – 72, FULL-TIME, ALL LAWYERS

Complaints Received	50
Complaints Investigated	5
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

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

Complaints Received	43
Complaints Investigated	5
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

* Some Surrogates also serve as County Court and Family Court judges. See Table 3 above.

TABLE 8: SUPREME COURT JUSTICES – 332, FULL-TIME, ALL LAWYERS*

Complaints Received	247
Complaints Investigated	32
Judges Cautioned After Investigation	6
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	5
Formal Complaints Dismissed or Closed	0

* Includes 13 who serve as Justice of the Appellate Term.

**TABLE 9: COURT OF APPEALS JUDGES – 7 FULL-TIME, ALL LAWYERS;
APPELLATE DIVISION JUSTICES – 57 FULL-TIME, ALL LAWYERS**

Complaints Received	20
Complaints Investigated	2
Judges Cautioned After Investigation	2
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 AND
OTHERS NOT WITHIN THE
COMMISSION’S JURISDICTION***

Complaints Received	286
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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, hearings 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 2005. The actual texts are appended to this Report.

Overview of 2005 Determinations

The Commission rendered 24 formal disciplinary determinations in 2005: 4 removals, 15 censures and 5 admonitions. In addition, 6 matters were disposed of by stipulation made public by agreement of the parties. Seventeen of the 30 respondents

were non-lawyer-trained judges, and 13 were lawyers. Nineteen of the respondents were part-time town or village justices, and 11 were judges of higher courts.



Determinations of Removal

The Commission completed four formal proceedings in 2005 that resulted in determinations of removal. The cases are summarized below, and the texts are appended.

defendant. Judge Blackburne requested review by the Court of Appeals, which accepted the Commission's determination and removed the judge on June 13, 2006. (The Court's decision will be discussed in next year's Annual Report.)

Matter of Laura D. Blackburne

The Commission determined on November 18, 2005, that Laura D. Blackburne, a Justice of the Supreme Court, Queens County, should be removed for directing a court officer to escort a defendant out of the courthouse through a private secured corridor behind the courtroom in order to elude a detective who was waiting outside the front of the courtroom to arrest the

Matter of Michael H. Feinberg

The Commission determined on February 10, 2005, that Michael H. Feinberg, Surrogate of Kings County, should be removed for awarding "excessive and overly generous" fees over a five and a half year period to Louis R. Rosenthal, his longtime friend whom he had appointed as Counsel to the Public Administrator, without requiring Mr. Rosenthal to file statutorily-mandated

affidavits of legal services and without considering various factors set forth in law as predicate to the award of fees.

Judge Feinberg requested review by the Court of Appeals, which accepted the Commission determination and removed the judge from office. 5 NY3d 206 (2005).

Matter of Glenn T. Fiore

The Commission determined on August 17, 2005, that Glenn T. Fiore, a part-time Justice of the North Hudson Town Court, Essex County, should be removed for having abandoned his judicial office by departing the United States for full-time private-sector

employment in Iraq as a truck driver. Judge Fiore, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Charles A. Pennington

The Commission determined on September 7, 2005, that Charles A. Pennington, a part-time Justice of the Alexandria Bay Village Court, Jefferson County, should be removed for taking a young female defendant to his home after her arraignment and for using racially-charged language during a trial. Judge Pennington, who is not a lawyer, did not request review by the Court of Appeals.



Determinations of Censure

The Commission completed 15 formal proceedings in 2005 that resulted in determinations of censure. The cases are summarized below, and the texts are appended.

apologized for his conduct, which “appears to have been an isolated lapse in an otherwise unblemished record.” Judge Allman did not request review by the Court of Appeals.

Matter of Richard N. Allman

The Commission determined on March 23, 2005, that Richard N. Allman, a Judge of the New York City Criminal Court, Kings County, should be censured for unjustifiably chastising and screaming at a Legal Aid attorney for interfering with the judge’s attempts to question a defendant directly, and coming down from the bench and firmly grabbing the attorney while continuing to yell at him. The Commission concluded that the judge’s conduct was “highly improper and utterly inexcusable” and that such a physical confrontation is “fundamentally inimical to the role of a judge.” The Commission noted in mitigation that the judge promptly

Matter of JoAnne Assini

The Commission determined on November 18, 2005, that JoAnne Assini, a Judge of the Family Court, Schenectady County, should be censured for failing in several cases to advise litigants of the right to counsel and making comments that were rude and demeaning. Judge Assini did not request review by the Court of Appeals.

Matter of Vincent Barringer

The Commission determined on October 11, 2005, that Vincent Barringer, a part-time Justice of the Town Court of Olive, Ulster County, should be censured for *inter alia* engaging in improper public advocacy on behalf of closing a local road, including

making statements that appeared to advocate civil disobedience, and for disposing of cases without the participation of the prosecution and issuing a statement with his co-judge (Ronald C. Wright) that he would no longer enforce the posted speed limit on a particular road because of his personal view that the signs were illegally posted. Judge Barringer, who is not a lawyer, affirmed that he would leave the bench in two months when his term expired and would neither seek nor accept judicial office in the future. He did not request review by the Court of Appeals.

Matter of Marie A. Cook

The Commission determined on August 31, 2005, that Marie A. Cook, a part-time Justice of the Chateaugay Town Court, Franklin County, should be censured for disposing of various criminal cases without proper notice to the prosecutor and for granting a request made by another judge for favorable treatment to a defendant charged with Speeding. Judge Cook, who is not a lawyer, did not request review by the Court of Appeals.

Matter of James P. Gilpatric

The Commission determined on December 14, 2005, that James P. Gilpatric, a part-time Judge of the Kingston City Court, Ulster County, should be censured for having appeared in court on a particular day while under the influence of alcohol. Judge Gilpatric thereafter entered and successfully completed a rehabilitation program. He did not request review by the Court of Appeals.

Matter of Thomas R. Glover

The Commission determined on October 11, 2005, that Thomas R. Glover, a part-time Justice of the Saranac Lake Village Court and the Harrietstown Town Court, Franklin

County, should be censured for inappropriately sending a letter on court stationery ordering a local resident to stop holding band rehearsals, after communicating with other local residents who complained about loud music, notwithstanding that there was no case pending on the matter. Judge Glover, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Duane A. Hart

The Commission determined on October 20, 2005, that Duane A. Hart, a Justice of the Supreme Court, Queens County, should be censured for improperly holding a litigant in contempt because the litigant's attorney insisted on making a record of a chance out-of-court encounter between the judge the litigant the day before. Judge Hart requested review by the Court of Appeals, which accepted the Commission's decision and censured the judge on May 4, 2006. (The Court's decision will be discussed in next year's Annual Report.)

Matter of Nilda Morales Horowitz

The Commission determined on March 25, 2005, that Nilda Morales Horowitz, a Judge of the Family Court, Westchester County, should be censured for interceding on behalf of friends in two cases that were pending or impending before other judges in Family Court. In one case, Judge Horowitz left a voice mail message for the court attorney of a judge, asking for assistance in getting the judge's disqualification. In another case, the judge advised several individuals, including the presiding judge and various court personnel, that the litigants were her friends and were "nice people." The Commission concluded that the judge's conduct was "an improper assertion of judicial influence," constituting favoritism. Judge Horowitz did not request review by the Court of Appeals.

Matter of Richard D. Huttner

The Commission determined on July 5, 2005, that Richard D. Huttner, a Justice of the Supreme Court, Kings County, should be censured for presiding over a case notwithstanding that he had a close social relationship with and had made fiduciary appointments to the defendants' attorney, and not disclosing the relationship while the case was pending before him. Judge Huttner did not request review by the Court of Appeals.

Matter of Daniel L. LaClair

The Commission determined on August 31, 2005, that Daniel L. LaClair, a part-time Justice of the Clinton Town Court, Clinton County, should be censured for requesting special consideration of two other judges on behalf of his wife and friend, both of whom had been issued summonses for Speeding. Judge LaClair, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Diane A. Lebedeff

The Commission determined on March 18, 2005, that Diane A. Lebedeff, a Judge of the New York City Civil Court and an Acting Justice of the Supreme Court, New York County, should be censured for presiding over a case in which the plaintiff was an attorney with whom she had a "significant social and professional relationship" and to whom she awarded fiduciary appointments, including a "lucrative guardianship" resulting in a fee of \$84,000. The Commission concluded that, in view of her relationship with the plaintiff, Judge Lebedeff should have recognized her ethical obligation not to preside in the case. Judge Lebedeff did not request review by the Court of Appeals.

Matter of Donna M. Mills

The Commission determined on August 17, 2005, that Donna M. Mills, a Justice of the Supreme Court, Bronx County, should be censured for improperly operating a motor vehicle after consuming numerous alcoholic beverages and inappropriately accusing the officers on the scene of arresting her because she is African-American. Judge Mills did not request review by the Court of Appeals.

Matter of John J. Pisaturo

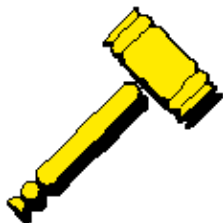
The Commission determined on November 18, 2005, that John J. Pisaturo, a part-time Justice of the Gates Town Court, Monroe County, should be censured for having levied fines over a five year period (in over 700 vehicle and traffic law cases) based on the original charge against the defendant as opposed to the charge on which the defendant was actually convicted. In mitigation, the Commission noted that, on learning that this practice was not authorized in law, Judge Pisaturo made significant efforts to identify and refund to those defendants the excess monies collected. Judge Pisaturo, who is a lawyer, did not request review by the Court of Appeals.

Matter of John M. Voetsch

The Commission determined on August 17, 2005, that John M. Voetsch, a part-time Justice of the Harrison Town Court, Westchester County, should be censured for accepting real estate business from an individual who had recently litigated a case in his court and the family of a defendant on whom the judge had recently imposed a lenient sentence in a highly publicized case. Judge Voetsch, who is a lawyer and a licensed real estate broker, did not request review by the Court of Appeals.

Matter of Ronald C. Wright

The Commission determined on October 11, 2005, that Ronald C. Wright, a part-time Justice of the Town Court of Olive, Ulster County, should be censured for issuing a statement with his co-judge (Vincent Barringer) that he would no longer enforce



Determinations of Admonition

The Commission completed five formal proceedings in 2005 that resulted in determinations of public admonition. The cases are summarized below, and the texts are appended.

Matter of Brian F. DeJoseph

The Commission determined on July 5, 2005, that Brian F. DeJoseph, a Justice of the Supreme Court, Onondaga County, should be admonished for telephoning another judge on behalf of a longtime friend whose son had been arrested, and implicitly endorsing the friend's request that the other judge release the defendant. Judge DeJoseph did not request review by the Court of Appeals.

Matter of William J. Gori

The Commission determined on February 10, 2005, that William J. Gori, a part-time Justice of the Duane Town Court, Franklin County, should be admonished for improperly taking and checking the validity of the driver's license of a woman who had driven her sister to court in connection with a Speeding charge. The Commission found that the judge had "no legitimate reason" to summon the woman from the courthouse parking lot in order to investigate her license. The Commission stated that the

the posted speed limit on a particular road because of his personal view that the signs were illegally posted. Judge Wright, who is not a lawyer, did not request review by the Court of Appeals.

judge's actions "conveyed the impression that he was acting in a law enforcement or quasi-prosecutorial role." Judge Gori, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Richard S. Lawrence

The Commission determined on October 20, 2005, that Richard S. Lawrence, a Judge of the Family Court, Nassau County, should be admonished for holding a litigant in contempt for supposedly disruptive behavior (such as sighing and fidgeting) without following the procedures mandated by law, then increasing the sentence from five to ten and then 12 days when the litigant and his attorney objected. Judge Lawrence did not request review by the Court of Appeals.

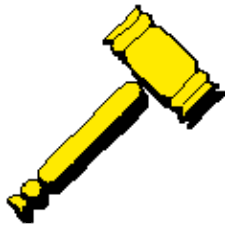
Matter of James R. Pastrick

The Commission determined on August 17, 2005, that James R. Pastrick, a part-time Justice of the Corning Town Court, Steuben County, should be admonished for improperly asserting his judicial influence to help his teenage daughter get a job at a local convenience store. Judge Pastrick, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Gerald P. Sharlow

The Commission determined on March 22, 2005, that Gerald P. Sharlow, a part-time Justice of the Massena Town Court, St. Lawrence County, should be admonished for writing a letter, on his judicial stationery, to the judge handling a case in which Judge Sharlow’s son was charged with Trespass. In the letter, Judge Sharlow, who is not an attorney, entered a not guilty plea on behalf of his son and asked if his son was required to appear for arraignment on the scheduled

date. As a result of the letter, the presiding judge disqualified himself from the case. The Commission concluded that Judge Sharlow’s letter “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.” Judge Sharlow did not request review by the Court of Appeals.



Other Public Dispositions

The Commission completed six other proceedings in 2005 that resulted in a public disposition. The cases are summarized below, and the texts are appended.

The Commission completed six other proceedings in 2005 that

Matter of William Alton

Pursuant to a stipulation, the Commission discontinued a proceeding on October 7, 2005, involving William Alton, a non-lawyer part-time Justice of the Kortright Town Court, Delaware County, after serving the judge with formal charges alleging *inter alia* that he failed to decide cases in a timely manner, failed to deposit and report the receipt of court funds in a timely manner and failed to respond to three Commission inquiries into the matter.

The judge affirmed that he would leave judicial office when his term expired at the end of the year and that he would neither seek nor accept judicial office at any time in the future.

Matter of James E. Brooks

Pursuant to a stipulation, the Commission discontinued a proceeding on December 6, 2005, against James E. Brooks, a non-lawyer part-time Justice of the Moriah Town Court, Essex County, after serving the judge with formal charges alleging that he granted reductions, dismissals or adjournments in contemplation of dismissal in criminal cases without the consent of the District Attorney as required by law, and that he engaged in an unauthorized *ex parte* communication with another judge on an Order of Protection.

The judge resigned from judicial office and affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Richard T. DiStefano

Pursuant to a stipulation, the Commission discontinued a proceeding on November 16, 2005, involving Richard T. DiStefano, a part-time Justice of the Colonie Town Court, Albany County, after serving the judge with

formal charges based upon his having been suspended from the practice of law by the Appellate Division, Third Department, *inter alia* for “substantial conversion of client funds over a period of years.” The judge resigned from judicial office, acknowledged that he could not successfully defend the pending charges and affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Roy M. Dumar

Pursuant to a stipulation, the Commission discontinued a proceeding on September 30, 2005, involving Roy M. Dumar, a non-lawyer part-time Justice of the Mohawk Town Court, Montgomery County, after serving the judge with formal charges alleging *inter alia* that he repeatedly asserted his judicial office in communications with police officers, other judges and court personnel in his own and other courts, in attempting to further his own and his wife’s criminal complaints against her ex-husband and sister-in-law, and in related civil matters.

The judge resigned from judicial office and affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Matthew F. Kennedy

Pursuant to a stipulation, the Commission discontinued a proceeding on March 15, 2005, involving Matthew F. Kennedy, a non-lawyer part-time Justice of the Cossackie Village Court, Greene County,

after serving the judge with formal charges alleging *inter alia* that he released on recognizance two defendants, charged with felonies, without notice to the district attorney concerning bail, as required by law; that he refused to conduct arraignments in four cases when contacted by the police after they had arrested the defendants, and instructed the police to release the defendants instead; that he pressured a state trooper to accord special consideration to a defendant charged with Speeding who had done business with the employer of the judge’s wife; and that he authorized his court staff to collect and disburse monetary judgments on behalf of certain civil litigants in cases before him.

The judge resigned from judicial office and affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Joseph L. Thaxton

Pursuant to a stipulation, the Commission discontinued a proceeding on April 22, 2005, involving Joseph L. Thaxton, a non-lawyer part-time Justice of the Spring Valley Village Court, Rockland County, after serving the judge with seven formal charges of misconduct.

The judge resigned from judicial office and affirmed that he would neither seek nor accept judicial office at any time in the future.



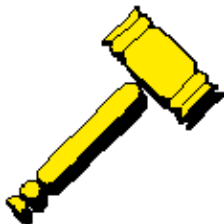
Dismissed or Closed Formal Written Complaints

The Commission disposed of 13 Formal Written Complaints in 2005 without rendering public discipline. Seven complaints were closed upon the resignation of the respondent-judge; five of these were closed pursuant to a stipulation in which the judge waived confidentiality and agreed not to seek judicial office in the future. Four 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. Two complaints were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.



Matters Closed Upon Resignation

Thirteen judges resigned in 2005 while complaints against them were pending at the Commission. Six of them resigned while under investigation and seven 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 2005, the Commission referred 24 matters to other agencies. Fourteen matters were referred to the Chief Administrative Judge or other officials at the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record keeping or other administrative issues. Three matters were referred to an attorney grievance committee. Two matters were referred to a District Attorney. Five additional matters were referred to a United States Attorney, the State Inspector General and the New York City Department of Investigation.



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) and (m). They serve as an educational tool and, when warranted, allow the Commission to address a judge's conduct without making the matter public.

In 2005, the Commission issued 36 Letters of Dismissal and Caution and four Letters of Caution. Twenty-three town or village justices were cautioned, including three who are lawyers. Seventeen 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. Five judges were cautioned for engaging in unauthorized *ex parte* communications. For example, in separate matters, three judges initiated discussions on factual issues with one party's lawyer to the exclusion of the other. A third judge met privately with relatives of a defendant and listened to their concerns when they appeared without appointment to discuss the case with him.

Political Activity. Three 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 and avoiding misrepresentations of their own or their opponent's qualifications. The three cautioned judges committed isolated and relatively mild violations of the applicable rules.

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 2005, two judges were cautioned for presiding over cases in which it at least appeared that their relationships to one of the parties mandated recusal, notwithstanding that their rulings were preliminary and other judges later presided over the matters at issue.

Inappropriate Demeanor. Five judges were cautioned for discourteous, intemperate or otherwise offensive demeanor toward litigants, lawyers or others, in isolated circumstances rather than as part of a discernible pattern.

Failure to Adhere to Statutory and Other Administrative Mandates. Eight judges were cautioned for failing to meet certain mandates of law, either out of ignorance or administrative oversight. For example, one was cautioned for failing to afford a litigant an opportunity to be heard before rendering a decision. Another was cautioned for setting bail in the form of

“cash only,” contrary to the requirements of law.

Public Comment in Pending Cases.

While judges may comment publicly on such matters as court procedures, they are prohibited by the Rules from making public comments on substantive matters pertaining to pending or impending cases in any jurisdiction within the United States. In 2005, two judges were cautioned for doing so.

Charitable Fund Raising. Except as to bar associations, law schools and court employee organizations, the Rules prohibit a judge from being a speaker or guest of honor at an organization’s fund raising event. Three judges were cautioned for lending the prestige of judicial office to the fund raising activities of various charitable organizations.

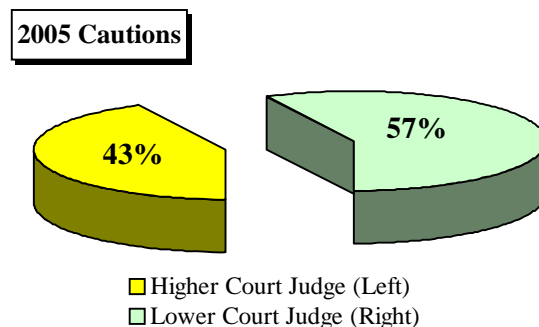
Audit and Control. Three part-time justices were cautioned for failing to make and file timely deposits and reports of court funds and cases to the State Comptroller, as required by law, in situations where the funds and cases were in fact accounted for.

Delay. Two judges were cautioned for lengthy delays in disposing of a significant number of vehicle and traffic cases that had been reassigned to them from other judges.

Miscellaneous. One part-time judge was cautioned for failing to pay appropriate payroll taxes and unemployment insurance for an individual employed by the judge in his private capacity. A full-time judge used judicial stationery to communicate with a travel industry representative in a manner that appeared to seek a discount for the judge’s personal benefit.

Follow Up on Caution Letters. Should the conduct addressed by a cautionary letter

continue or be repeated, the Commission may authorize an investigation on a new complaint, which may lead to formal charges and further disciplinary proceedings. In certain instances, the Commission will authorize a follow-up review of the judge’s conduct, to assure that promised remedial action was indeed taken. 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 2005, the Court decided one such matter, which is summarized below.

Matter of Michael H. Feinberg

The Commission determined on February 10, 2005, that Michael H. Feinberg, Surrogate of Kings County, should be removed for awarding "excessive and overly generous" fees over a five and a half year period to Louis R. Rosenthal, his longtime friend whom he had appointed as Counsel to the Public Administrator, without requiring Mr. Rosenthal to file statutorily-mandated affidavits of legal services and without considering various factors set forth in law as predicate to the award of fees. The Commission concluded that Judge Feinberg's "fundamental failure to attend to his judicial responsibilities permitted the appearance that his actions as a judge were influenced by favoritism."

The Court of Appeals unanimously accepted the determination and removed Judge Feinberg from office in an opinion dated June 29, 2005. 5 NY3d 206 (2005). The Court rejected Judge Feinberg's defense that his failure to adhere to the statutory mandates was an "oversight" based on his having "only 'skimmed through' the Surrogate's Court Procedure Act, never reading the entire Act – the statutory basis for his office and jurisdiction -- claiming that it was 'quite voluminous.'" *Id.* at 212. The Court held that the judge's conduct "debased his office and eroded public confidence in the integrity of the judiciary." *Id.* at 216.



CONSTITUTIONAL CHALLENGES TO THE RULES GOVERNING JUDICIAL CONDUCT AND RELATED CHALLENGES TO THE COMMISSION'S PROCEDURES

In federal proceedings commenced in 2002 and in state proceedings commenced in 2004 by a respondent judge seeking to enjoin the Commission from disciplining him, the Commission litigated significant constitutional and procedural issues into and throughout 2005, pertaining to the political activity constraints imposed on judges by the Rules Governing Judicial Conduct, and the Commission's authority to enforce those Rules. The challenges relied in part on a June 2002 decision of the United States Supreme Court, *Republican Party of Minnesota v. White*, 536 US 765 (2002), which declared unconstitutional a provision of the Minnesota Code of Judicial Conduct that does not exist in the New York Rules. The provision is the so-called "announce clause," which prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues.

Federal Litigation: **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 court 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 for the District Attorney and was owed \$10,000 for such services.

The federal action was transferred to United States District Court Judge David N. Hurd, who considered the plaintiffs' motion for a preliminary injunction. The essence of Judge Spargo's claim was that the specific provisions of the judicial conduct rules charged against him were unconstitutional, relying in part on the decision of the United

States Supreme Court in *Republican Party of Minnesota v. White*, *supra*.

Judge Hurd heard 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 were unconstitutional and ordered that the Commission was 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 appealed Judge Hurd's decision to the United States Court of Appeals for the Second Circuit.

On December 9, 2003, the Second Circuit vacated the judgment of the District Court and remanded the case to Judge Hurd with the instruction that he abstain from exercising jurisdiction. 351 F3d 65 (2003).

Thereafter, Judge Hurd issued an order dismissing the case.

The Second Circuit held that, in declining to abstain under the *Younger* abstention doctrine, the District Court mistakenly concluded there was uncertainty as to whether constitutional claims could be addressed in a judicial disciplinary proceeding.¹ In addition, the New York Court of Appeals had subsequently clarified the scope of available review of constitutional challenges to the Rules Governing Judicial Conduct. *Matter of Raab*, 100 NY2d 305 (2003). The Second Circuit held that Judge Spargo had a sufficient opportunity to raise constitutional claims in proceedings before the Commission and thereafter in the New York State Court of Appeals.

The Second Circuit also held that *Younger* abstention applied to the derivative claims of Judge Spargo's co-plaintiffs, both of whom are non-judges, since their First Amendment interests were inextricably intertwined with the judge's First Amendment interests.

Judge Spargo filed a petition for *certiorari* in 2003, seeking review by the United States Supreme Court. The Court denied his petition on June 7, 2004, thus ending the *Spargo* federal litigation. Related litigation was commenced shortly thereafter in state court, as described in the section below.

¹ The doctrine derives its name from the federal case in which it is articulated: *Younger v. Harris*, 401 US 37 (1971), holding that federal courts should generally refrain from enjoining pending state court proceedings.

State Litigation:
Spargo v. Commission on Judicial Conduct et al.

On August 3, 2004, Judge Spargo commenced proceedings in state court against the Commission. Supreme Court Justice Louis C. Benza of Albany County signed an Order to Show Cause on that date, enjoining the Commission from proceeding as to certain specifications in pending Formal Written Complaints against Judge Spargo. Thereafter, the matter was assigned to Supreme Court Justice Nicholas Colabella of Westchester County.

Judge Spargo's petition alleged *inter alia* that the political activity limitations of the Rules Governing Judicial Conduct charged against him were facially unconstitutional and unconstitutional as applied. On December 9, 2004, Justice Colabella rendered a decision dismissing the petition. The decision noted *inter alia* that the Court of Appeals had already "specifically addressed these issues in *Matter of Raab*, 100 NY2d 305 (2003)...on the identical constitutional grounds asserted by [Judge Spargo] in this proceeding." The decision went on to note that in *Raab* and a companion case, *Matter of Watson*, 100 NY2d 290 (2003), the Court of Appeals applied a strict scrutiny analysis and held that the challenged rules were narrowly tailored to further a number of compelling state interests, "including the state's interest in preventing political bias or corruption of the appearance of political bias or corruption in its judiciary." Moreover, in *Raab*, the

Court addressed and distinguished the *White* case on which both Raab and Spargo relied.

Justice Colabella's decision also cited the Court of Appeals decision in *Matter of Sims*, 61 NY2d 349, 358 (1984), in which the Court noted it had "repeatedly upheld the appearance of impropriety rules and stated that Judges may be held to this admittedly high standard of conduct in performing their duties or even when performing nonjudicial duties."

Justice Colabella also rejected claims by Judge Spargo that the Commission "as a whole is unconstitutional."

Judge Spargo appealed. On November 10, 2005, the Appellate Division, Third Department, upheld Justice Colabella's decision and dismissed Judge Spargo's action. 23 AD3d 808 (3rd Dept 2005). The court held that the prohibitions in the Rules pertaining to partisan political activity do not violate either free speech or equal protection rights. The court also held that the Rules are not so vague as to unconstitutionally restrict participation in the political process.

Judge Spargo did not file any further appeals, leaving the Commission free to resume the disciplinary proceedings against him which had been stayed by virtue of his federal and state law suits.



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.

PUBLIC HEARINGS IN COMMISSION CASES

The Commission has commented on the important subject of public hearings in numerous forums and annual reports, as recently as last year.

All Commission investigations and formal hearings are confidential by law. Commission activity is only made public at the end of the disciplinary process – when a determination of public admonition, public censure or removal from office is rendered and filed with the Chief Judge pursuant to statute – or when the accused judge requests that the formal disciplinary hearing be public.

The subject of public disciplinary proceedings, for lawyers as well as judges, has been vigorously debated in recent years by bar associations and civic groups, and addressed in newspaper editorials around the state that have supported the concept of public proceedings.

The process of evaluating a complaint, conducting a comprehensive investigation, conducting formal disciplinary proceedings and making a final determination subject to review by the Court of Appeals, takes considerable

time. The process is lengthy in part because of the Commission's painstaking efforts to render a determination that is fair and comports with due process, and the lack of adequate funding and staff. If the charges and hearing portion of a Commission matter were open, the public would have a better understanding of the entire disciplinary process. The very fact that charges had been served and a hearing scheduled would no longer be secret.

As it is, maintaining confidentiality is often beyond the Commission's control. For example, in any formal disciplinary proceeding, subpoenas are issued and witnesses are interviewed and prepared to testify, by both the Commission staff and the respondent-judge. It is not unusual for word to spread around the courthouse, particularly as the hearing date approaches. Respondent-judges themselves often consult with judicial colleagues, staff and others, revealing the details of the charges against them and seeking advice. As more "insiders" learn of the proceedings, the chances for "leaks" to the press increase, often resulting in published misinformation

and suspicious accusations as to the source of the “leaks.” In such situations, both confidentiality and confidence in the integrity of the disciplinary system suffer.

Chief Judge Judith Kaye proposed legislation in 2003, as she had previously, to open the Commission’s proceedings to the public at the point that formal disciplinary charges were filed against a judge. The Legislature did not take action. In the past, such legislation has had support in either the Assembly or the Senate at various times, although never in both houses during the same legislative session.

The Commission itself has long advocated that post-investigation formal proceedings should be made public, as they were in New York State until 1978, and as they are now in 35 other states. The Commission hopes that the issue will be revived in the Legislature and not be diverted by ancillary matters or political disputes. The Commission also hopes that renewed efforts to enact such a public proceedings measure will succeed without encumbrances as have been suggested by various legislators in the past, such as the unnecessary introduction of a statute of limitations or increase in the standard of proof from the present “preponderance of the evidence” standard to “clear and convincing evidence.”



SUSPENSION

The power to suspend judges from office is another important subject on which the Commission has previously commented.

Interim Suspension of Judge Under Certain Circumstances

The State Constitution empowers the Court of Appeals to suspend a judge from office, with or without pay as it may determine, under certain circumstances:

- while there is pending a Commission determination that the judge be removed or retired,
- while the judge is charged in New York State with a felony, whether by indictment or information,
- while the judge is charged with a crime (in any jurisdiction) punishable as a felony in New York State, or
- while the judge is charged with any other crime which involves moral turpitude.

New York State Constitution,
Art.6, §22(e–g)

There is no provision for the suspension of a judge who is charged with a misdemeanor that does not involve “moral turpitude.” Yet there are any number of misdemeanor charges that may not be defined as involving “moral turpitude” but that, when brought against a judge, would seriously undermine public confidence in the integrity of the judiciary. Misdemeanor level DWI or drug charges, for example, would seem on their

face to fall in this category, particularly where the judge served on a local criminal court and presided over cases involving charges similar to those filed against him or her.

Fortunately, it is rare for a judge to be charged with a crime, but it does happen. In early 1999, one part-time judge of a busy local court was arrested and charged with DWI and drug possession. The judge voluntarily suspended himself from office, did not run for re-election and formally vacated office at the end of the year, when he accepted a plea and sentence on the DWI charge that disposed of the drug charge.

There are non-felony and even non-criminal categories of behavior that seriously threaten the administration of justice and arguably should result in the interim suspension of a judge. Such criteria might well include significant evidence of mental illness affecting the judicial function, or conduct that compromises the essence of the judge’s role, such as conversion of court funds or a demonstrated failure to cooperate with the Commission or other disciplinary authorities.

The courts already have discretion to suspend an attorney’s law license on an interim basis under certain circumstances, even where no criminal charge has been filed against the respondent. All four departments of the Appellate Division have promulgated rules in this regard. Any attorney under investigation or formal disciplinary charges may be suspended pending resolution of the matter based upon one of the following criteria:

(i) the attorney’s default in responding to the petition or notice, or the attorney’s failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Departmental Disciplinary Committee made in connection with any investigation, hearing, or disciplinary proceeding, or

(ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or

(iii) other uncontested evidence of professional misconduct.

Rules of the Appellate Division, First Department, §603.4(e)(1)²

The American Bar Association’s Model Rules for Judicial Disciplinary Enforcement suggest a broader definition of the type of conduct that should result in a judge’s suspension from office. For example, rather than limit suspension to felony or “moral turpitude” cases, the Model Rules would authorize suspension by the state’s highest court for:

- a “serious crime,” which is defined as a “felony” or a lesser crime that “reflects adversely on the judge’s honesty, trustworthiness or fitness as a judge in other respects,”
- “any crime a necessary element of which ... involves interference with the administration of justice, false swearing,

² See also, Rules of the Appellate Division, Second Department, §691.4(l)(1), Rules of the Appellate Division, Third Department, §806.4(f)(1), and Rules of the Appellate Division, Fourth Department, §1022.19(f)(2).

misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a ‘serious crime’,” and

- other misconduct for which there is “sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice.”

It would require an amendment to the State Constitution to expand the criteria on which the Court of Appeals could suspend a judge from office. The Commission believes that the limited existing criteria should be expanded. We recommend that the Legislature consider so empowering the Court.

Suspension from Judicial Office as a Final Sanction

Under current law, the Commission’s disciplinary determinations are limited to public admonition, public censure or removal from office for misconduct, and retirement for mental or physical disability.

Prior to 1978, when both the Constitution and the Judiciary Law were amended, the Commission, or the courts in cases brought by the Commission, had the authority to determine that a judge be suspended with or without pay for up to six months. Suspension authority was exercised five times from 1976 to 1978: three judges were suspended without pay for six months, and two were suspended without pay for four months.

Since 1978, neither the Commission nor the courts have had the authority to suspend a judge as a final discipline. While the legislative history of the 1978 amendments is not clear on the reason for eliminating suspension as a discipline, there was some

discussion among political and judicial leaders at the time suggesting that, if a judge committed misconduct serious enough to warrant the already momentous discipline of suspension, public confidence in the integrity of that judge was probably irretrievably compromised, thus requiring removal. Nevertheless, at times the Commission has felt constrained by the lack of suspension power, noting in several censure cases in which censure was imposed as a sanction that it would have suspended

the disciplined judge if it had authority to do so.

Some misconduct is more severe than would be appropriately addressed by a censure, yet not egregious to the point of warranting removal from office. As it has done previously, the Commission suggests that the Legislature consider the merits of a constitutional amendment, providing suspension without pay as an alternative sanction available to the Commission.



PUBLIC COURT PROCEEDINGS AND RECORDS

The Commission has previously addressed at length, and rendered both private cautions and public disciplines, on the practice of some judges who conduct arraignments and other court proceedings in private or otherwise inappropriate settings, when by law they should be open and accessible to the public. For example, the Commission censured a judge in 1997 for *inter alia* improperly conducting proceedings in chambers on several occasions, excluding the public from matters which, by law, were public.³ Numerous other incidents have come to the Commission's attention, either through complaints, newspaper reports or petitions filed by newspapers or interested parties, in which such proceedings as arraignments or arguments on motions were conducted in police facilities, chambers or otherwise non-public settings, contrary to law, usually without notice that the proceedings would be closed. Recently, after many years without coming across such a situation, the Commission learned of two town justices who conducted arraignments in police cars.

With certain rare and specific exceptions, state law requires that all court proceedings be public (Section 4 of the Judiciary Law). Court decisions at least as early as 1971 have further addressed the issue, specifically holding that a judge may not hold court in a

police barracks or schoolhouse.⁴ Unfortunately, these standards are still not uniformly observed throughout the state. In one recent situation, a Commission member was among the lawyers barred from the courtroom by a judge while other cases were being heard; lawyers and parties were allowed in the courtroom only when their own cases were called, for proceedings that should have been open to the public.

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

Likewise, public records of the court must also be reasonably available to the public. Repeatedly, however, the Commission has become aware of some judges and court personnel who make it difficult for individual citizens to have such reasonable access to public records. Indeed, Commission investigators sometimes encounter resistance in their endeavors to review public court files associated with a duly-authorized inquiry. The problem usually arises in smaller municipalities – town, village and small city courts – where court staffing is limited. In a recent example, a part-time town justice insisted that the only time the court's public records would be available for inspection by Commission staff would be one evening per month. While the Commission does not believe it should be necessary to subpoena

³ See, *Matter of Westcott* in our 1998 Annual Report, *Matter of Cerbone*, in our 1997 Annual Report, and *Matter of Burr* in our 1984 Annual Report. See also, the discussion in our 1997 Annual Report about the improper practice of automatically barring children from courtrooms.

⁴ *People v. Schoonmaker*, 65 Misc2d 393, 317 NYS2d 696 (Co Ct Greene Co 1971); *People v. Rose*, 82 Misc2d 429, 368 NYS2d 387 (Co Ct Rockland Co 1975).

records that are public and should be available without process, it will issue such subpoenas as necessary. Of course, the average citizen seeking a public record does not have that option.

Sometimes the judge may not be aware that public records are being handled in such a way as to discourage review. To help remedy that, Deputy Chief Administrative Judge Jan Plumadore recently sent a statewide memorandum to the judiciary reminding them of the requirement to make public records available. The Commission

joins Judge Plumadore and reminds all judges, even those whose courts are not heavily staffed, to assure the availability of public court records at reasonable times to the public, without regard to the reason an individual wishes to see such records, and to assure that court personnel observe the same standards of diligence and fidelity to the law and the Rules as are applicable to the judge. *See*, Section 100.3(C)(1) & (2) of the Rules Governing Judicial Conduct.



JUDICIAL CAMPAIGN ETHICS CENTER; NEW CAMPAIGN EDUCATION REQUIREMENTS

The Judicial Campaign Ethics Center (JCEC) was established by the Unified Court System in 2004 and operates in conjunction with the New York State Judicial Institute in White Plains. The Center is a central resource for all judicial candidates and among other things responds promptly to inquiries about campaign conduct and regulations, issuing advisory opinions. (In this regard, the JCEC works in conjunction with a special campaign-issues-related subcommittee of the court system's Advisory Committee on Judicial Ethics.)

The Center defines its mission as helping judicial candidates to navigate the myriad ethics rules pertaining to campaign conduct and to educate the public on judicial campaign ethics. It conducts training sessions throughout the year.

By agreement with the Commission, if a candidate complies with the advice given specifically to him or her by the subcommittee, the conduct will be presumed proper during the candidate's "window

period," for the purposes of any subsequent investigation by the Commission. In other words, when in doubt, a judicial candidate would be wise to seek advice from the JCEC, not only for guidance as to how to proceed but also to be insulated from subsequent disciplinary consequences in the event a complaint is filed with the Commission.

Information about the Center is available on the court system's website at: <http://www.courts.state.ny.us/ip/jcec>.

Email inquiries may be sent to the Center at: contactJCEC@courts.state.ny.us.

To heighten awareness of and fidelity to campaign ethics mandates, the Rules Governing Judicial Conduct were recently amended to require all candidates for judicial office (except those seeking election to town or village courts) to complete an education program approved by the Chief Administrator of the Courts. 22 NYCRR 100.5(A)(4)(f).



RAISING FUNDS FOR CIVIC, CHARITABLE OR OTHER ORGANIZATIONS

Section 100.4(C)(3)(b) of the Rules governs and severely limits a judge's participation in fund-raising activities for civic, charitable or other worthy organizations. For example, a judge "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." Also, the judge "shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation...."

With three exceptions, a judge "may not be a speaker or the guest of honor at an organization's fund-raising events, but the judge may attend such events." The exceptions are that a judge may be a speaker or guest of honor at function held by a bar association, law school or court employee organization. A judge may also accept "at another organization's fund-raising event an unadvertised award ancillary to such event."

Notwithstanding the fact that a judge may attend a law school or bar association fund-raising event, the judge is still prohibited from personally participating in the solicitation of funds or other fund-raising activities associated with the event. Some judges appear unaware of this limitation. For example, the Commission has received complaints indicating that certain judges have directly solicited contributions from fellow judges in connection with bar association fund-raising events. In responding to a Commission inquiry in this regard, one judge suggested that there was no impropriety inasmuch as the judges

solicited were all colleagues of equal rank; none was a supervisor or subordinate of the others.

There is no exception in the Rules permitting one judge to solicit other judges, regardless of the relative rank of the judges involved. Indeed, the Advisory Committee on Judicial Ethics has specifically stated that the Rules prohibit a judge from soliciting other judges for contributions to charitable causes, and prohibit a judge from personally participating in the solicitation of funds or other fund-raising activities, even in connection with a bar association event at which the judge may accept an award and speak. Advisory Opinions 96-83 and 98-38.

With regard to events held by other civic or charitable organizations, the Commission has often come across situations in which the judge who accepts a speaking invitation claims later not to have realized the event was a fund-raiser. The Commission has advised such judges, usually in letters of dismissal and caution, that they are obliged to make inquiries about the nature of the event before accepting an invitation to speak. A simple inquiry or two may be all that is necessary to determine whether the event is a fund-raiser. For example, the judge should inquire about the price of tickets to the event, though further inquiry may be necessary. An organization may, for example, break even on the ticket price but raise money through ads in a souvenir journal, a raffle, a silent auction or other means.

The Commission has also reminded judges that the prohibition on being a speaker at a fund-raising event is not limited to giving a keynote or featured speech. A judge may

not be the emcee or introduce the keynote speaker or similarly perform another ancillary speaking role, such as introducing other judges in the audience.

Where there is any doubt about the propriety of participating, the judge should consult with the Advisory Committee on Judicial

Ethics, either by researching published opinions or requesting an opinion of his or her own. Opinions of the Advisory Committee are available on the court system website at:

http://www.nycourts.gov/search/ethics_opinions.asp.



POTENTIAL CONFLICT IN CASES INVOLVING LOCAL LEGISLATORS

The Commission has considered several recent complaints in which judges have presided over cases involving local legislators who participate in setting the judge's salary. Even where such cases involve the legislator in a personal capacity having no connection to his or her official duties, there is a conflict for the judge to preside.

Sections 100.1 and 100.2(A) of the Rules Governing Judicial Conduct require a judge to avoid the appearance of impropriety and to act at all times in a manner that upholds public confidence in the independence, integrity and impartiality of the judiciary. Section 100.3(C)(1) requires a judge to be disqualified from any case in which the judge's impartiality might reasonably be questioned.

There would be at least an appearance of impropriety for any judge to preside over a

case in which one of the parties, for example, sat on the local town or village board that set the judge's salary. Were the judge called upon to determine guilt or innocence, or to evaluate the party's credibility, it would appear and/or be very difficult to ignore the influence such individual would have on the judge's economic livelihood.

The Advisory Committee on Judicial Ethics has repeatedly opined, and the Commission has concurred, that a judge must self-disqualify in such circumstances, or disclose and obtain from the parties an explicit and independently arrived at remittal of disqualification pursuant to Section 100.3(D) of the Rules. *See*, for example, Advisory Opinions 88-41, 88-126, 94-61 and 94-96.



SETTING BAIL IN ONLY ONE FORM

A judge is obliged by the Sections 100.2(A) and 100.3(B)(1) of the Rules Governing Judicial

Conduct to comply with and be faithful to and professionally competent in the law.

Section 520.10 of the Criminal Procedure Law states that the only forms of bail are the following:

Subdivision 1:

- (a) Cash bail
- (b) An insurance company bail bond
- (c) A secured surety bond
- (d) A secured appearance bond
- (e) A partially secured surety bond
- (f) A partially secured appearance bond
- (g) An unsecured surety bond
- (h) An unsecured appearance bond
- (i) Credit card or similar device where the principal is charged with a violation under the Vehicle and Traffic Law.

Subdivision 2:

The methods of fixing bail are as follows:

(a) A court may designate the amount of bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one;

(b) The court may direct that the bail be posted in any one of **two or more** of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms. (Emphasis added.)

The Commission has cautioned several judges in the past three years for setting bail in one form only, typically by announcing “cash only.” Such “cash only” bail is contrary to CPL 520.10, and since the 1970s, when the statute was enacted, judicial education and training programs run by the Office of Court Administration have stressed the point, which is also reinforced by the court system’s City, Town and Village Resource Center when judges call for guidance on the issue.



THE COMMISSION'S BUDGET

In numerous Annual Reports, we have called attention to the fact that the Commission has been persistently and acutely underfunded and understaffed, for at least a decade. Our 2005-06 fiscal year

budget of \$2.6 million supports a staff of 28½ employees, including 10 lawyers and seven investigators, whereas our 1978-79 appropriation of \$1.64 million supported a full-time staff of 63, including 21 lawyers and 18 investigators.

At the same time, the Commission's workload has exploded, from 641 complaints received and 170 investigations commenced in 1978 to a record-setting 1565 complaints received and 260 investigations commenced in 2005. The average number of complaints handled annually by the Commission in the last ten years is more than twice the number of complaints handled 25 years ago.

The Commission needs at least one additional attorney and one additional investigator in each of its three offices, a full-time IT specialist and additional administrative staff, just to keep pace, let alone allocate resources in a way that would enhance our ability to conduct all investigations thoroughly and to conclude matters more promptly. Indeed, one negative consequence of the Commission's lack of adequate resources is that cases take longer to complete. This means not only that disciplinary consequences for judges whose misconduct is established can be delayed, but also that judges who are

innocent of the claims made against them remain under a cloud of suspicion longer than is appropriate. One complex case can tie up several staff and divert them from other pressing business.

Responsible Budget Management

Since its inception 31 years ago, the Commission has managed its finances with extraordinary care. In periods of relative plenty, we kept our budget small; in times of statewide financial crisis, we made difficult sacrifices. Our average annual increase since 1978 has been about 1.5%, for a virtually no-growth budget. Adjusted for inflation, our \$1.64 million budget in '78 would equal about \$4.99 million today, which is almost twice our actual budget of \$2.6 million.

Our record of fiscal prudence was underscored by an exhaustive audit in 1989 by the State Comptroller, which found the Commission's finances in excellent order and recommended no changes in our fiscal practices. The 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 analysis 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	ATTORNEYS ON STAFF*	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
≈	≈	≈	≈	≈	≈	≈
1992-93	\$1,666,700	1452	180	8	6 f/t, 1 p/t	26
≈	≈	≈	≈	≈	≈	≈
1996-97	\$1,696,000	1490	192	8	2 f/t, 2 p/t	20
≈	≈	≈	≈	≈	≈	≈
2003-04	\$2,266,000	1463	235	9	6 f/t, 1 p/t	27
2004-05	\$2,397,000	1546	255	10	7 f/t	28
2005-06	\$2,609,000	1565	260	10	7f/t	28½

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

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



CONCLUSION

Public confidence in the independence, integrity, impartiality and high standards 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 those ideals, 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,

RAOUL LIONEL FELDER, CHAIR
THOMAS A. KLONICK, VICE CHAIR
STEPHEN R. COFFEY
COLLEEN DIPIRRO
RICHARD D. EMERY
PAUL B. HARDING
MARVIN E. JACOB
DANIEL F. LUCIANO
KAREN K. PETERS
TERRY JANE RUDERMAN

July 1, 2006

APPENDIX



Biographies of Commission Members and Attorneys
Roster of Referees Who Served in 2005
The Commission's Powers, Duties & History
Text of the Rules Governing Judicial Conduct
Text of 2005 Determinations
Statistical Analysis of Complaints



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Commission on Judicial Conduct

Biographies of Commission Members

Raoul Lionel Felder, Esq., *Chair of the Commission*, is a graduate of New York University and the New York University Law School and attended the University of Berne, College of Medicine. He is in private practice in New York City, heading his own law firm. Mr. Felder served previously as an Assistant United States Attorney for the Eastern District of New York. Over the years, he has served on many professional and civic association boards and committees, such as the New York State Trial Lawyers Association, whose Matrimonial Law Committee he chaired, the Association of the Bar of the City of New York, on whose Matrimonial Law Committee he served, the New York State Commission on Child Abuse, the Board of Directors of the New York City Economic Development Corporation and the New York City Cultural Affairs Advisory Commission. Mr. Felder has received awards from, and been honored by many civic and charitable organizations including: Recipient of Defender of Jerusalem Medal from the Israeli Prime Minister (1990); Chairman of USA Day, Washington, D.C. (1991); Grand Marshal of The Israeli Day Parade (1991); Citation of Merit presented by The National Arts Club (1992); Exhibit of Photographs at The National Arts Club (1992); Volunteer Service Award presented by The National Kidney Foundation (1992); Award, 'Man of the Year' from The Brooklyn School for Special Children (1990); Award, Guest of Honor at The Metropolitan Jewish Geriatric Center's Annual Dinner (1991); Chairman of Dinner for The Jewish Reclamation Project; Co-Director of food drive for New York City Homeless (1991); Member, Board of Trustees, National Kidney Foundation; Member, Board of Advisors, Cop Care; Member, Board of Directors, Big Apple Greeters; Member, Board of Directors, Kidney & Urology Foundation of America, Inc. (2003); Award, 12th Annual Joint Meeting of Brandeis Association and The Catholic Lawyers Guild (1999); Award, Child Abuse Prevention Services — Child Safety Institute (1998); Award, The Shield Institute for the Mentally Retarded and Developmentally Disabled (1997). He is the author of seven books (including a legal textbook that has been updated 27 times), and numerous articles on the law and public affairs. He appears regularly on television and radio giving commentaries on the law and contemporary events, as well as lecturing at various bar associations.

Honorable Thomas A. Klonick, *Vice Chair of the Commission*, is a graduate of Lehigh University and the Detroit College of Law, where he was a member of the Law Review. He maintains a law practice in Fairport, New York, with a concentration in the areas of commercial and residential real estate, corporate and business law, criminal law and personal injury. He was a Monroe County Assistant Public Defender from 1980 to 1983. Since 1995 he has served as Town Justice for the Town of Perinton, New York, and has also served as an Acting Rochester City Court Judge, a Fairport Village Court Justice and as a Hearing Examiner for the City of Rochester. From 1985 to 1987 he served as a Town Justice for the Town of Macedon, New York. He has also been active in the Monroe County Bar Association as a member of the Ethics Committee. Judge Klonick is the former Chairman of the Prosecuting Committee for the Presbytery of Genesee Valley and is an Elder of the First Presbyterian Church, Pittsford, New York. He has also served as legal counsel to the New York State Council on Problem Gambling. He serves on the boards of St. John's Home and Main West Attorneys, a

provider of legal services for the working poor. He is a member of the New York State Magistrates Association, the New York State Bar Association and the Monroe County Bar Association. Judge Klonick lectures in the Office of Court Administration's continuing Judicial Education Programs for Town and Village Justices.

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.

Colleen C. DiPirro is President and CEO of the Amherst Chamber of Commerce, which has over 2,300 members. Prior to joining the Chamber, she worked for the Erie County Legislature and as a retail manager. She was the first President of the Western New York Chamber Alliance, an organization for Chamber Executives serving an eight county region. She was identified as one of the 100 most influential people in Western New York by Business First. In 1998, Ms. DiPirro became the first woman honored as the Executive of the Year by the Buffalo Sales and Marketing Executives. That same year Daeman College named her Citizen of the Year. She received the Governor's Award for Excellence in Business in 1999. She served on the Board of Directors of New York State Chamber of Commerce Executives in 1999. Ms. DiPirro serves as event and sponsorship coordinator and a member of the Advisory Board for the Buffalo Bills Alumni and was selected by Bills owner Ralph Wilson to serve on the Project 21 initiative. She served on a committee for Erie County Executive Joel Giambra's Transition Team. She has served on numerous not for profit and community boards of directors, including Western New York Autism Foundation, Hospice Playhouse Project, Executive Women International and the Williamsville Sweet Home Junior Football Association. Additionally, she served as the first Chairwoman of the University of Buffalo Leadership Development Program. Ms. DiPirro was appointed to serve on the Peace Bridge Authority by Governor Pataki in 2002. Ms. DiPirro is the widowed mother of two sons and the proud grandmother of one. She attended Alfred College where she majored in Marketing.

Richard D. Emery, Esq., is a graduate of Brown University and Columbia Law School (*cum laude*), where he was a Harlan Fiske Stone Scholar. He is a partner in the law firm of Emery Celli Brinckerhoff and Abady in Manhattan. *Professional Affiliations:* Association of the Bar of the City of New York, Committee on Election Law, Civil Rights Committee, Advisory Board of the National Police Accountability Project, Criminal Justice Operations Committee, Criminal Advocacy Committee, Criminal Courts Committee. Association of Trial Lawyers of America, Municipal Arts Society Legal Committee, Governor's Commission on Integrity in Government. *Honors:* Common Cause/NY, October 2000, "I Love an Ethical New York" Award for recognition

of successful challenges to New York's unconstitutionally burdensome ballot access laws and overall work to promote a more open democracy; New York Magazine, March 20, 1995, "The Best Lawyers In New York" Award for recognition of successful Civil Rights litigation; Park River Democrats Public Service Award, June 1989; David S. Michaels Memorial Award, January 1987, for Courageous Effort in Promotion of Integrity in the Criminal Justice System from the Criminal Justice Section of the New York State Bar Association.

Paul B. Harding, Esq., is a graduate of the State University of New York at Oswego and the Albany Law School at Union University. He is the Managing Partner in the law firm of Martin, Harding & Mazzotti, LLP in Albany, New York. He is on the Board of Directors of the New York State Trial Lawyers Association and the Marketing and Client Services Committee for the American Association for Justice. He is also a member of the New York State Bar Association and the Albany County Bar Association. He is currently on the Steering Committee for the Legal Project, which was established by the Capital District Women's Bar Association to provide a variety of free and low cost legal services to the working poor, victims of domestic violence and other underserved individuals in the Capital District of New York State.

Marvin E. Jacob, Esq., is a graduate of Brooklyn College and New York Law School (*cum laude*). Mr. Jacob was a partner in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP, until his recent retirement. His practice included litigation in the bankruptcy courts and federal district and appellate courts. Mr. Jacob currently serves as a consultant and mediator in bankruptcy, litigation and SEC matters. Mr. Jacob was formerly Associate Regional Administrator, New York Regional Office, US Securities & Exchange Commission (1964-1979). He has served as adjunct professor of law at New York Law School and recently received a Distinguished Service Award for twenty-five years of service as a faculty member. Mr. Jacob is Chairman of the Board of Legal Assistance for the Jewish Poor, a member of the Advisory Board of Chinese American Planning Council, a member of and counsel to the Board of the Memorial Foundation For Jewish Culture, secretary and counsel to YouthBridge NY. Mr. Jacob has published and lectured extensively on bankruptcy issues and has been recognized with many legal and community awards.

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 from August 1954 to July 1956, 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. Justice Luciano is one of the founders of the Alexander Hamilton Inn of Court and served as a Director of the Suffolk Academy of Law. He was the Presiding Member of the New York State Bar Association Judicial Section, and served as a Delegate to the House of

Delegates of the New York State Bar Association. Justice Luciano served as President and all other elected offices in the Association of Justices of the Supreme Court of the State of New York and is currently a member of the Executive Committee. Justice Luciano was a Director of the Suffolk County Women's Bar Association. Additionally, he is a member of the Dean's Advisory Council of the Touro College, Jacob D. Fuchsberg Law Center. 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, Justice Luciano was appointed by Governor George E. Pataki as an Additional Justice to the Appellate Division, Second Judicial Department. After he was re-elected to the Supreme Court in November of 1996, Governor Pataki redesignated him as an Additional Justice to the Appellate Division, Second Judicial Department. Upon reaching the age of 70, Justice Luciano was Certified by the State of New York Administrative Board of the Courts for an additional two year term as a retired Justice of the Supreme Court, and was redesignated by Governor Pataki to serve as an Additional Justice of the Appellate Division, Second Judicial Department, for a two year term commencing January 1, 2001. In 2002, after having been again Certified by the State of New York Administrative Board of the Courts for an additional two year term as a retired Justice of the Supreme Court, Justice Luciano was redesignated by Governor Pataki to serve as an Additional Justice of the Appellate Division, Second Judicial Department, for a second two year term, commencing January 1, 2003. Justice Luciano was appointed to the Commission by Governor Pataki in 1996, reappointed by Governor Pataki to a four year term in 1999, and reappointed in 2003 for a third term expiring March 31, 2007.

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.

Honorable Terry Jane Ruderman graduated *cum laude* from Pace University School of Law, 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. At the time she was the Principal Law Clerk to a Justice of the Supreme Court. Previously, she served as an Assistant District Attorney and a Deputy County Attorney in Westchester County, and later she was in the private practice of law. Judge Ruderman is President of the New York State Association of Women Judges, a member of the New York State Committee on Women in the Courts and Chair of the Gender Fairness Committee for the Ninth Judicial District. She was the Presiding Member of the New York State Bar Association Judicial Section, served as a Delegate to the House of Delegates of the New York State Bar Association and on the Ninth Judicial District Task Force on Reducing Civil Litigation Cost and Delay. Judge Ruderman is also a board member and former Vice President of the Westchester Women's Bar Association, was President of the White Plains Bar Association and was a State Director of the Women's Bar Association of the State of New York. She also sits on the Alumni Board of the Pace University School of Law and the Cornell University President's Council of Cornell Women.

Recent Members

Honorable Frances A. Ciardullo served on the Commission from 2001 to 2005 and as Vice Chair from 2003-05. She 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. Since 1989 she has served 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.

Lawrence S. Goldman, Esq., served on the Commission from 1990 to 2006, and as Chair from 2004-06. He 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. He is a past president of the National Association of Criminal Defense Lawyers, co-chair of its white-collar committee and former chair of its ethics advisory committee. He is also a past president of the New York State Association of Criminal Defense Lawyers and the New York City Criminal Bar Association. He is a member of the Executive Committee of the Criminal Justice Section of the New York State Bar Association, the Advisory Committee on the New York Criminal Procedure Law, and the

New York State Commission on the Future of Indigent Defense Services. He has received outstanding criminal law practitioner awards from the National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense Lawyers and the New York Criminal Bar Association. He has lectured at numerous bar associations and law school programs on various aspects of criminal law and procedure, trial tactics and ethics. He was an assistant district attorney in New York County and a consultant to the Knapp Commission. He is an honorary trustee of Congregation Rodeph Sholom in New York City. He and his wife Kathi have two adult children and live in Manhattan.

Christina Hernandez, MSW, is a member of the New York State Board of Parole. She previously served as a member of the New York State Crime Victims Board. She received a Bachelor of Arts from Buffalo State College, a Masters in Social Work Management from the Rockefeller College 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. Presently she is enrolled 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. She served on the Board of Directors of the National Association of Crime Victim Compensation Boards and is a member of the Capital District Coalition for Crime Victims Rights, the Sex Offender Management Grant Steering Committee, and the New York State Hispanic Heritage Month Committee. A native of New York City, Ms. Hernandez resides in the Capital Region.

Alan J. Pope, Esq., served on the Commission from 1997 to 2006, as Vice Chair from 2005-06 and as Acting Chair and Chair from April 1 to May 16, 2006. He is a graduate of the Clarkson College of Technology (cum laude) and the Albany Law School. He is a partner in the Binghamton law firm of Pope, Schrader & Murphy. Mr. Pope is a member of the Broome County Bar Association, where he co-chairs the Environmental Law Committee; the New York State Bar Association, where he serves on the Insurance, Negligence and Compensation Law Section, the Construction and Surety Division, and the Environmental Law Section; and the American Bar Association, where he serves on the Tort & Insurance Practice Section and the Construction Industry Forum Committee. Mr. Pope is also an Associate Member of the American Society of Civil Engineers, a member of the New York Chapter of the General Contractors Association of America, and a past member of the Broome County Environmental Management Council.

Biographies of Commission Attorneys

Robert H. Tembeckjian, *Administrator and 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. Mr. Tembeckjian serves on the Advisory Committee to the American Bar Association Commission to Evaluate the Model Code of Judicial Conduct. He is a member of the New York State Bar Association and also serves on the Government Ethics Committee of the Association of the Bar of the City of New York and on the Board of Directors of the Association of Judicial Disciplinary Counsel. He was previously a Trustee of the Westwood Mutual Funds and the United Nations International School, and on the Board of Directors of the Civic Education Project.

Alan W. Friedberg, *Chief Attorney (New York)*, 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, *Chief Attorney (Albany)*, 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.

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.

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. She departed the Commission staff on June 23, 2006, for an in-house counsel position in private industry.

Kathryn J. Blake, *Staff Attorney*, is a graduate of Lafayette College and Cornell Law School, where she was a Note Editor for the *Cornell Journal of Law and Public Policy* and a member of the Moot Court Board. Prior to joining the Commission staff, she served as an Assistant Attorney General for the State of New York and was in private practice in New York, California and New Jersey.

Jennifer Tsai, *Staff Attorney*, is a graduate of Columbia University and Cornell Law School, where she was an Editor of the Law Review and a member of the Moot Court Board. Prior to joining the Commission's staff, she practiced as a criminal defense attorney at The Legal Aid Society (Appeals Bureau) and the Neighborhood Defender Service of Harlem.

Melissa R. DiPalo, *Staff Attorney*, is a graduate of the University of Richmond and Brooklyn Law School, where she was a Lisle Scholar and a Dean's Merit Scholar. Prior to joining the Commission's staff, she was an Assistant District Attorney (Appeals Bureau) in Bronx County.

Stephanie A. McNinch, *Staff Attorney*, is a graduate of the State University of New York at Brockport and Quinnipiac College School of Law in Connecticut. Prior to joining the Commission staff she was in private practice focusing on civil litigation and professional liability at Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, in Manhattan, and, Connors & Corcoran, LLP, in Rochester. She serves on the Executive Committee of the Monroe County Bar Association Board of Trustees, and the Bishop Kearney High School Board of Trustees. Ms. McNinch received the President's Award for Professionalism from the Monroe County Bar Association in 2004 for her participation with the ABA "Dialogue on Freedom" initiative. She is a member of the New York State Bar Association and Greater Rochester Association of Women Attorneys (GRAWA). Ms. McNinch is an adjunct professor at St. John Fisher College.

* * *

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 and is a member of its advisory board.

REFEREES WHO SERVED IN 2005

Referee	City	County
Eleanor Breitel Alter, Esq.	New York	New York
William I. Aronwald, Esq.	White Plains	Westchester
William C. Banks, Esq.	Syracuse	Onondaga
G. Michael Bellinger, Esq.	New York	New York
Howard Benjamin, Esq.	New York	New York
Peter Bienstock, Esq.	New York	New York
Bruno Colapietro, Esq.	Binghamton	Broome
Robert L. Ellis, Esq.	Scarsdale	Westchester
Vincent D. Farrell, Esq.	Mineola	Nassau
Paul A. Feigenbaum, Esq.	Albany	Albany
Maryann Saccomando Freedman, Esq.	Buffalo	Erie
David M. Garber, Esq.	Syracuse	Onondaga
Ronald Goldstock, Esq.	Larchmont	Westchester
Trevor L. F. Headley, Esq.	Brooklyn	Kings
Victor J. Hershendorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
Nancy Kramer, Esq.	New York	New York
Gerard LaRusso, Esq.	Rochester	Monroe
C. Bruce Lawrence, Esq.	Rochester	Monroe
Roger Juan Maldonado, Esq.	New York	New York
Richard M. Maltz, Esq.	New York	New York
Hugh H. Mo, Esq.	New York	New York
Hon. John A. Monteleone	Brooklyn	Kings
James C. Moore, Esq.	Rochester	Monroe
Malvina Nathanson, Esq.	New York	New York
Philip C. Pinsky, Esq.	Syracuse	Onondaga
John J. Poklemba, Esq.	Albany	Albany
Hon. Ernst H. Rosenberger	New York	New York
Shirley A. Siegel, Esq.	New York	New York
Robert J. Smith, Esq.	Binghamton	Broome
Robert Straus, Esq.	New York	Kings
Nancy F. Wechsler, Esq.	New York	New York
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

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



2006 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

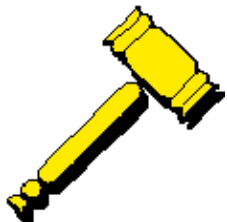
The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of judicial misconduct in New York State. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding their right to decide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

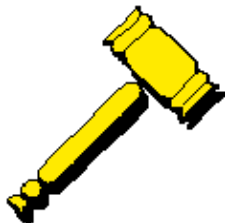
The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one by each of the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and 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 (1988-2004)
- *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 (2001-2005)
- Hon. Carmen Beauchamp Ciparick (1985-93)
- E. Garrett Cleary (1981-96)
- Stephen R. Coffey (1995-present)
- Howard Coughlin (1974-76)
- Mary Ann Crotty (1994-98)
- Dolores DelBello (1976-94)
- Colleen C. DiPirro (2004-present)
- Richard D. Emery (2004-present)
- Hon. Herbert B. Evans (1978-79)
- *Raoul Lionel Felder (2003-present)
- *William Fitzpatrick (1974-75)

*Lawrence S. Goldman (1990-2006)
 Hon. Louis M. Greenblott (1976-78)
 Paul B. Harding (2006-present)
 Christina Hernandez (1999-2006)
 Hon. James D. Hopkins (1974-76)
 Marvin E. Jacob (2006-present)
 Hon. Daniel W. Joy (1998-2000)
 Michael M. Kirsch (1974-82)
 Hon. Thomas A. Klonick (2005-present)
 *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 (2002-2003)
 Hon. Juanita Bing Newton (1994-99)
 Hon. William J. Ostrowski (1982-89)
 Hon. Karen K. Peters (2000-present)
 *Alan J. Pope (1997-2006)
 *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.

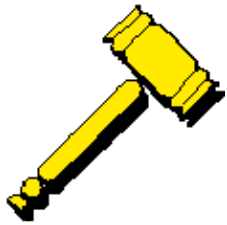
If the Commission finds after an investigation that the circumstances so warrant, it will direct its Administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint institutes the formal disciplinary proceeding. After receiving 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.

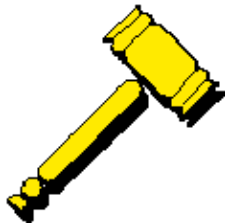
The former Commission also initiated formal disciplinary proceedings in the Court on the Judiciary against 45 judges and continued six proceedings left pending by the temporary Commission. Those proceedings resulted in the following:

- 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.

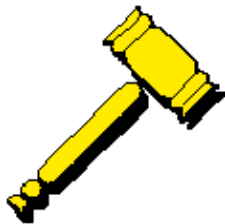


Continuation from 1978 to 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions

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, 34,323 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 27,712 were dismissed upon initial review or after a preliminary review and inquiry, and 6,611 investigations were authorized. Of the 6,611 investigations authorized, the following dispositions have been made through December 31, 2005:

- 908 complaints involving 703 judges resulted in disciplinary action. (See details below and on the following page.)
- 1336 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1247, 74 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 532 complaints involving 378 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 418 complaints were closed upon vacancy of office by the judge other than by resignation.
- 3196 complaints were dismissed without action after investigation.
- 221 complaints are pending.

Of the 908 disciplinary matters against 703 judges as 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. Also, these figures take into account those decisions by the Court of Appeals that modified a Commission determination.)

- 148 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);
- 279 judges were censured publicly;
- 213 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission.

**Text of the Rules
Governing Judicial Conduct**



**2006 Annual Report
New York State
Commission on Judicial Conduct**

RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR § 100 *et seq.* (2006)

Rules of the Chief Administrator of the Courts Governing Judicial Conduct

Preamble

Section 100.0 Terminology.

Section 100.1 A judge shall uphold the integrity and independence of the judiciary.

Section 100.2 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

Section 100.3 A judge shall perform the duties of judicial office impartially and diligently.

Section 100.4 A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

Section 100.5 A judge or candidate for elective judicial office shall refrain from inappropriate political activity.

Section 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.

Historical Note

Added Preamble on 1/01/96.

§ 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 more than de minimis legal or equitable interest, 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.

(5) "De minimis" denotes an insignificant interest that could not raise reasonable questions as to a judge's impartiality.

(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) "Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic 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, nonpartisan 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.

(R) "Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

(S) An "independent" judiciary is one free of outside influences or control.

(T) "Integrity" denotes probity, fairness, honesty, uprightness and soundness of character. "Integrity" also includes a firm adherence to this Part or its standard of values.

(U) A "pending proceeding" is one that has begun but not yet reached its final disposition.

(V) An "impending proceeding" is one that is reasonably foreseeable but has not yet been commenced.

Historical Note

Sec. filed Feb. 1, 1996 eff. Jan. 1, 1996.

Amended (D) and (D)(5) on Sept. 9, 2004.
Added (R) - (V) on Feb. 14, 2006

§ 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 are to be construed and applied to further that objective.

Historical Note

Sec. filed Aug. 1, 1972; renum. 111.1, new added by renum. and amd. 33.1, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

§ 100.2 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities

(A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

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

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

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

Historical Note

Sec. filed Aug. 1, 1972; renum. 111.2, new added by renum. and amd. 33.2, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

§ 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, religion, national origin, disability, marital status 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:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(10) 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.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic 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 Administrator of the Courts, which may be given upon a showing of good cause.

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

(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: (i) 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) the judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to

(i) an issue in the proceeding; or

(ii) the parties or controversy in the proceeding.

(g) 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 make 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.

1.

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

Amended 100.3 (B)(9)-(11) & (E)(f) -(E)(g) Feb. 14, 2006

Amended 100.3(C)(3) and 100.3(E)(1)(d) & (e) Feb. 28, 2006

§ 100.4 A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations

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

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

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

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

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

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

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

(a) A judge shall not serve as an officer, director, trustee or nonlegal 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) of this Part;

(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 subdivision (H) of this section.

(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) of this subdivision 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 designated 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 in excess of \$ 150, 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) of this Part, or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.

Historical Note

Sec. filed Aug. 1, 1972; amd. filed Nov. 26, 1976; renum. 111.4, new added by renum. and amd. 33.4, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996; amds. filed: Feb. 27, 1996; Feb. 9, 1998 eff. Jan. 23, 1998. Amended (C)(3)(b)(ii).

§ 100.5 A judge or candidate for elective judicial office shall refrain from inappropriate political activity

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

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

(b) except as provided in paragraph (3) of this subdivision, 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, provided that the cost of the ticket to such dinner or other function shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is \$ 250 or less. A candidate may not pay more than \$ 250 for a ticket unless he or she obtains a statement from the sponsor of the dinner or function that the amount paid represents 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 impartiality, 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 paragraph (A)(5) of this section, 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 that are inconsistent with the impartial performance of the adjudicative 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 (a) and (d) of this paragraph.

(f) shall complete an education program, either in person or by videotape or by internet correspondence course, developed or approved by the Chief Administrator or his or her designee within 30 days after receiving the nomination or 90 days prior to receiving the nomination for judicial office. The date of nomination for candidates running in a primary election shall be the date upon which the candidate files a designating petition with the Board of Elections. This provision shall apply to all candidates for elective judicial office in the Unified Court System except for town and village justices.

(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.

(6) A judge or a non-judge who is a candidate for public election to judicial office may not permit the use of campaign contributions or personal funds to pay for campaign-related goods or services for which fair value was not received.

(7) Independent Judicial Election Qualifications Commissions, created pursuant to Part 150 of the Rules of the Chief Administrator of the Courts, shall evaluate candidates for elected judicial office, other than justice of a town or village court.

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

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

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

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding \$ 500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions, except that this \$ 500 limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference also shall be made to appropriate sections of the Election Law;

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

(4) political conduct prohibited by section 50.5 of the Rules of the Chief Judge (22 NYCRR 50.5).

Historical Note

Sec. filed Aug. 1, 1972; renum. 111.5, new added by renum. and amd. 33.5, filed Feb. 2, 1982; amds. filed: Dec. 21, 1983; May 8, 1985; March 2, 1989; April 11, 1989; Oct. 30, 1989; Oct. 31, 1990; repealed, new filed; amd. filed March 25, 1996 eff. March 21, 1996. Amended (A)(2)(v).

Amended 100.5 (A)(2)(v), (A)(4)(a), (A)(4)(d)(i)-(ii), (A)(4)(f), (A)(6), (A)(7) Feb. 14, 2006

§ 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) of this Part;

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

proceeding related thereto;

(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law;

(4) may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties.

(C) Administrative law judges. The provisions of this Part are not applicable to administrative law judges unless adopted by the rules of the employing agency.

(D) Time for compliance. A person to whom these rules become applicable shall comply immediately with all provisions of this Part, except that, with respect to sections 100.4(D)(3) and 100.4(E) of this Part, 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.

Historical Note

Sec. filed Aug. 1, 1972; repealed, new added by renum. 100.7, filed Nov. 26, 1976; renum. 111.6, new added by renum. and amd. 33.6, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

Amended 100.6(E) Feb. 14, 2006

**Text of the Commission's
2005 Determinations**



**2006 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 **RICHARD N. ALLMAN**, a Judge of the Criminal Court of the City of New York, Kings County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Vickie Ma, Of Counsel)
Andrea G. Hirsch for Respondent

The respondent, Richard N. Allman, a Judge of the Criminal Court of the City of New York, Kings County, was served with a Formal Written Complaint dated July 1, 2004, containing one charge. Respondent filed an answer dated July 14, 2004.

On November 17, 2004, the administrator of the Commission, respondent's counsel 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. The Commission approved the agreed statement on December 10, 2004. Each side submitted memoranda as to sanction.

On February 7, 2005, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent received interim appointments to the Civil Court of the City of New York in July 1999, December 1999, December 2000 and December 2001, during which time he was assigned to the Criminal Court of the City of New York. In December 2002, respondent was appointed a Judge of the Criminal Court of the City of New York, for a term that expires in December 2007.

2. On June 8, 2004, respondent presided over a combined calendar with a domestic violence part and two all purpose parts. On that date, respondent presided over *People v. Winston Roach*, a Vehicle and Traffic matter. Legal Aid attorney Steven Terry appeared with Mr. Roach. Mr. Roach, who owed a balance on an outstanding fine, had voluntarily returned on the fourth warrant issued in his case.

3. Respondent noted that previous warrants had been issued for Mr. Roach's arrest in the case and asked Mr. Roach directly whether he could think of a way to insure his future appearances in court.

4. Mr. Roach offered excuses for his absences, citing a new job and a recent illness. Respondent replied that Mr. Roach's answer was non-responsive and again asked him whether he could think of a way to insure his future appearances in court.

5. Mr. Terry attempted several times to object, to note his presence on his client's behalf and to state that it was improper for respondent to address his client directly, but was repeatedly interrupted by respondent. When Mr. Terry attempted to object a third time, respondent screamed at Mr. Terry that he did not want Mr. Terry to speak and that he did not need Mr. Terry's interference. The transcript states:

MR. TERRY: Judge, I don't think –

RESPONDENT: I have a question for him. I want to know from him.

MR. TERRY: I am recommending to him --

RESPONDENT: If you want to advise him on answering the question, but don't speak for him. I am not addressing you Mr. Terry.

MR. TERRY: I would not speak for him, but I point out --

RESPONDENT: I don't want you to speak, then. I don't want you to speak. I really don't need your interference.

MR. TERRY: I am here as an advocate. If you consider me interfering -- I am advocating on his behalf. You are questioning him improperly.

I understand that you have your position. I have a position, also, with regard to whether he knows of his responsibilities. It is my opinion that he has upheld his responsibilities.

6. Respondent then stood up angrily, leaned over the bench, and made the following demeaning comment to Mr. Terry in a loud voice: "Did you go to law school, Mr. Terry? Did you go to law school, yes or no?" Before Mr. Terry could respond, respondent interrupted him and announced that the case would be recalled later that day.

7. While still angry at Mr. Terry, respondent left the bench during the ensuing break in the proceedings. Respondent approached Mr. Terry, who was standing at counsel's table inside the well area of the courtroom, and grabbed Mr. Terry firmly, placing his left hand on Mr. Terry's right arm, a few inches above Mr. Terry's right elbow, and placing his right hand on Mr. Terry's left arm a few inches above Mr. Terry's left elbow. Now standing face-to-face with Mr. Terry, respondent stated in a raised voice, "All I want you to do is listen to me." When Mr. Terry rightly protested that respondent was touching him, respondent removed his hands from

Mr. Terry and yelled, “This is my courtroom! You will do what I want you to do in my courtroom! Do you understand?” Respondent then resumed the bench and directed Mr. Terry to leave the courtroom, whereupon Mr. Terry left.

8. The transcript (Exhibit 1 to the Agreed Statement of Facts) reveals the sole basis for respondent’s actions. Respondent concedes, and has conceded throughout this matter and before he heard from the Commission, that his conduct was highly improper and not warranted by anything that Mr. Terry did.

9. The incident was observed by court staff, several attorneys and several defendants.

10. Immediately after the incident, respondent, recognizing that his conduct was profoundly wrong, sought to rectify the situation. Without any prompting from anyone, respondent immediately telephoned both Mr. Terry and Dawn C. Ryan, Attorney-in-Charge of the Legal Aid Society’s Criminal Defense Division in Brooklyn, and apologized without hesitation or reservation. Respondent separately and unequivocally apologized to everyone else in court: the court officers, court staff, the prosecutors and the court reporter. Respondent apologized again on the following day, June 9th, on the record in open court before an audience that included Legal Aid attorneys and a Legal Aid supervisor.

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)(2), 100.3(B)(3) and 100.3(B)(6) of the Rules Governing Judicial Conduct and Sections 700.5(a) and 700.5(e) of the Rules of the Supreme Court, Appellate Division, Second Department, and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

After berating an attorney from the bench and abruptly calling a recess, respondent left the bench, walked into the well of the courtroom and firmly grabbed the lawyer by both arms while continuing to yell at him. As respondent has frankly conceded, such injudicious conduct is highly improper and utterly inexcusable.

A physical confrontation, initiated by the judge, has no place in a courtroom, where every judge is obliged to maintain dignity and decorum and to preside over disputes in a lawful, orderly manner. *See Matter of Richter*, 42 NY2d (aa), 409 NYS2d 1013 (Ct. on the Judiciary 1977); Rules Governing Judicial Conduct §100.3(B)(3); Rules of the Supreme Court, Appellate Division, Second Department §§700.5(a) and 700.5(e). Intemperate language or impatient, undignified demeanor, standing alone, may subject a judge to discipline, but crossing the line from verbal to physical confrontation is not just improper, but fundamentally inimical to the role of a judge.

Here, the confrontation began when respondent angrily admonished Steven Terry, a Legal Aid attorney, for interfering with respondent’s efforts to speak directly to Mr. Terry’s client, a defendant in a Vehicle and Traffic case who was appearing on a fourth warrant. When

Mr. Terry, asserting his role as the defendant's advocate, said that the defendant had acted responsibly and that it was improper for respondent to question the defendant, respondent asked Mr. Terry whether he had gone to law school, a demeaning comment that was entirely inappropriate. Respondent then called a recess and, instead of composing himself and defusing the situation, angrily left the bench, walked over to Mr. Terry and firmly grabbed him, placing both hands on Mr. Terry's upper arms. In a raised voice, respondent said, "All I want you to do is listen to me." When Mr. Terry protested that respondent was "touching" him, respondent removed his hands while continuing to yell at the attorney. Respondent should not have needed a reminder from Mr. Terry that it was improper to have placed his hands, in anger, on an attorney.

The seriousness of respondent's misconduct requires little elaboration. Self-control is an essential element of judicial temperament. In confronting the attorney during a court recess, respondent should have been mindful that his judicial robes conferred upon him a superior status that required him to exercise particular restraint.

As previous decisions have stated, "[T]he purpose of judicial disciplinary proceedings is 'not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents.'" *Matter of Waltemade*, 37 NY2d (a), (III) (Ct. on the Judiciary 1975); *Matter of Reeves*, 63 NY2d 105, 111 (1984). While respondent's misconduct is extremely serious, we have concluded that it does not establish that he is "unfit to remain in office." *Matter of Reeves*, supra, 63 NY2d at 111. We reach this conclusion upon consideration of several factors.

First, the record indicates that, within minutes of the incident, respondent recognized his misconduct and telephoned Mr. Terry and his supervisor to apologize; he also apologized personally to everyone he remembered being present in court, and apologized in open court the next day. Respondent's immediate and unprompted contrition is a significant mitigating factor. See, e.g., *Matter of Watson*, 100 NY2d 290, 303 (2003); *Matter of LaBelle*, 79 NY2d 350, 363 (1992); *Matter of Feinman*, 2000 Annual Report 105 (Comm. on Judicial Conduct).

Second, respondent is a capable, hard-working judge, and the record reflects that he has served as a judge for six years with diligence and dedication. His misconduct appears to have been an isolated lapse in an otherwise unblemished record. See, e.g., *Matter of Edwards*, 67 NY2d 153, 155 (1986) (judge's misconduct was a "single incident" which was "an aberration").

Third, respondent has been forthright and cooperative throughout this proceeding. In this regard, we note respondent's frank recognition that his misconduct warrants a strong public rebuke and his pledge that it will not be repeated.

We conclude that, under the circumstances, this single incident, while constituting a serious breach of judicial decorum, does not irretrievably damage respondent's effectiveness on the bench and that he should be censured rather than removed from office. We are of the opinion that respondent recognizes the valuable lessons to be learned from this episode and thus can continue to serve as a respected member of the judicial community.

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

Mr. Goldman, Judge Ciardullo, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Pope dissent only as to the sanction and vote that respondent be admonished.

Dated: March 23, 2005

DISSENTING OPINION BY MR. COFFEY AND MR. POPE

We appreciate the concerns expressed in the majority opinion. Nonetheless, we believe that respondent's misconduct should be viewed in light of several substantial mitigating factors, not the least of which was his almost immediate recognition that he had grossly overreacted during a court recess by placing his hands on an attorney while urging the attorney to listen to him. In fact, there is no dispute that when the attorney advised the judge that he was "touching" the attorney's arms, respondent immediately removed his hands.

Undeniably, the frustration respondent felt in dealing with a defendant who had not paid a fine in 18 months and whose failure to appear in court four times caused the issuance of four bench warrants did not justify respondent's conduct, as respondent himself has frankly acknowledged. Nor was respondent's conduct justified by his anger at the attorney's expressed belief that his client had acted responsibly. But respondent freely admits his improper behavior, and did so immediately after the incident, which we believe is a compelling factor in determining an appropriate sanction for his behavior. Moreover, we would be remiss not to acknowledge respondent's strong work ethic and one of the strongest mitigation defenses in our collective memory.

Respondent has never been disciplined before and, as Commission Counsel has conceded, is a capable and hardworking judge who has shown sincere contrition and apologized to everyone who was in court on the date of the incident. Furthermore, since it is apparent from the record before us that the misconduct was an aberration that lasted just a few seconds, this case calls for compassion in arriving at a suitable disciplinary sanction. As the Court of Appeals has noted, the purpose of a disciplinary sanction "is not punishment" (*Matter of Watson*, 100 NY2d 290, 304 [2003]), and we therefore fail to see what is gained by an unduly-severe penalty when respondent has already excoriated himself and has demonstrated that he understands that what he did was improper. Accordingly, we vote that respondent be admonished.

An admonition would not suggest to the judiciary that we take lightly physical confrontations, challenges or assaults (*see, Matter of Richter*, 42 NY2d [aa], 409 NYS2d 1013 [Ct. on the Judiciary 1977] and *Matter of Tyler*, 75 NY2d 525 [1990]). Nor would it stand as a precedent for a case where a judge engages in conduct described in those decisions. Rather, in view of the fact that there is every indication in this record that respondent has learned from this experience and is an intelligent, capable and hardworking judge, we believe that admonition, hardly an insignificant punishment, would be the appropriate penalty.

Dated: March 23, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **WILLIAM ALTON**, a Justice of the Kortright Town Court, Delaware County.

DECISION AND ORDER

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Michael A. Jacobs for the Respondent

The matter having come before the Commission on September 30, 2005; and the Commission having before it the Formal Written Complaint dated May 25, 2004, respondent's Answer dated June 14, 2004, and the Stipulation dated September 13, 2005; and the Commission having designated Bruno Colapietro, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and a hearing having been scheduled to commence on September 16, 2005; and respondent having affirmed that he will not seek re-election and will vacate his office when his term of office expires on December 31, 2005, and that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if approved by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued and the matter closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: October 7, 2005

STIPULATION

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **WILLIAM ALTON**, a Justice of the Kortright Town Court, Delaware County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter "Commission"), William Alton, the respondent in this proceeding, and his attorney Michael A. Jacobs, Esq.

This Stipulation is presented to the Commission in connection with a formal proceeding pending against respondent.

1. Respondent has been a Justice of the Kortright Town Court since November 1997. He is not an attorney.
2. Respondent is the only judge of the Kortright Town Court and from October 2000 to August 2003, he had no court clerk.
3. Respondent was served with a Formal Written Complaint, dated May 24, 2004, containing two charges, which alleged that from November 1997, through November 2003, respondent failed to dispose of numerous cases, failed to deposit certain court funds in a timely manner, failed to report dispositions of traffic cases to the Department of Motor Vehicles as required, and failed to maintain a cashbook. In addition, it was also alleged that respondent failed to cooperate with the Commission, in that he failed to respond to three letters from the Commission during its investigation of his conduct.
4. Respondent submitted a verified Answer, admitting in part and denying in part the allegations of the Formal Written Complaint, and offering various defenses and mitigating factors.
5. A hearing was scheduled to commence before a referee, Bruno Colapietro, Esq., on September 16, 2005.
6. Respondent's current term of office expires on December 31, 2005. Respondent hereby affirms that he will not seek re-election and will vacate his office when his term expires on December 31, 2005.
7. Respondent also affirms that he will neither seek nor accept judicial office at any time in the future.
8. All parties to this Stipulation respectfully request that in light of the foregoing, the Commission close the pending matter based upon this Stipulation.
9. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if accepted by the Commission.

Dated: September 13, 2005

s/ **Honorable William Alton**
Respondent

s/ **Michael A. Jacobs, Esq.**
Attorney for Respondent

s/ **Robert H. Tembeckjian, Esq.**
Administrator & Counsel to the Commission
(**Cathleen S. Cenci**, Of Counsel)

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JO ANNE ASSINI**, a Judge of the Family Court, Schenectady County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Alan J. Pope, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn J. Blake, Of Counsel) for the Commission
Thuillez, Ford, Gold, Johnson & Butler (by Donald P. Ford, Jr.) for the Respondent

The respondent, Jo Anne Assini, a judge of the Family Court, Schenectady County, was served with a Formal Written Complaint dated April 19, 2005, containing five charges.

On September 29, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be censured and waiving further submissions and oral argument.

On November 10, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Schenectady County Family Court since January 2001.

As to Charge I of the Formal Written Complaint:

2. On or about June 17, 2002, in *Grandy v. Birch*, the parties Jennifer Grandy and Donald J. Birch, Sr. appeared without counsel before respondent on a petition concerning visitation as to their daughter. Ms. Grandy was seeking to preclude Mr. Birch's son from being present when Mr. Birch exercised visitation as to their daughter.

3. Notwithstanding the requirements of Section 262 of the Family Court Act, respondent failed to advise them of their right to counsel, the right to an adjournment to confer with counsel and the right to have counsel assigned by the court where the parties are financially unable to retain counsel of their own.

4. After summarizing the contents of the petition for Mr. Birch, who had not received it, respondent entered a denial on his behalf and engaged the parties in a discussion of Ms. Grandy's petition. When the parties addressed each other, respondent stated, "Shhh. What do you two think you're doing?" Thereafter, Mr. Birch apologized to respondent.

5. Respondent admonished Ms. Grandy, who had had knee surgery and had difficulty sitting in a chair, to "sit up straight."

6. Mr. Birch, who worked as a security guard for a local college, appeared before respondent in his uniform shirt. Mr. Birch had come to court from work and planned to return from court to work.

7. Respondent criticized Mr. Birch for appearing before her dressed in his college security shirt. Respondent told Mr. Birch that he looked like a "slob" and said that he could have brought something "decent" to wear, which is what "normal" people do. She also stated that Mr. Birch could buy a shirt or necktie at the City Mission for fifty cents.

8. When Mr. Birch politely requested a copy of a court document that he believed existed from a previous proceeding, respondent (a) admonished him for acting as if he were in charge of the court, (b) warned that he might be held in contempt, (c) read to him the contempt statute and (d) again admonished him for wearing his college uniform shirt to court.

9. When Ms. Grandy stated that she had consulted with her attorney who advised that she should proceed *pro se*, respondent sarcastically stated, "Oh, okay. All right, I'll look forward to meeting her."

10. When Mr. Birch indicated that he did not believe he could afford counsel, respondent instructed him to first contact five attorneys before she would consider assigning counsel to him. Respondent adjourned the matter.

11. Shortly thereafter, Ms. Grandy discontinued her petition because of respondent's impatience and discourtesy toward her and Mr. Birch.

As to Charge II of the Formal Written Complaint:

12. On or about June 17, 2002, in *Nicole M. Moore v. Richard E. Moore*, the parties appeared before respondent on a petition concerning visitation. The petitioner appeared with counsel, Brian DeLaFleur. The defendant appeared with counsel, James S. Martin.

13. Respondent asked Ms. Moore if she would be willing to agree to the current visitation schedule, and when Ms. Moore said she would not, respondent said in a raised, angry voice, "Okay, then I'm gonna give him more time. Understand?"

14. When respondent noticed that the Moore child was present in the courtroom, accompanied by her grandfather, respondent angrily raised her voice in directing that the child be removed.

15. Just after the child was removed from the court, the attorney for Mr. Moore attempted to speak, but respondent interrupted him and stated, “No. Mr. Martin, we’re done. We’re done. I am so sick of this. I am so bored with this. Yes, bored with having – coming in here and then they [the parties] start to talk.” Respondent then adjourned the matter.

As to Charge III of the Formal Written Complaint:

16. On or about September 22, 2003, in *Niccole Barros v. Paul M. Barros and Mary Jane Brown*, the incarcerated petitioner appeared *pro se* before respondent, seeking visitation with her nine children during the period of her confinement in the Schenectady County Jail.

17. Notwithstanding the requirements of Section 262 of the Family Court Act, respondent failed to advise Ms. Barros of her right to counsel, the right to an adjournment to confer with counsel and the right to have counsel assigned by the court if she were financially unable to retain counsel.

18. Ms. Barros’ husband, who had custody of the children, twice stated that he would not oppose the children’s visitation with their mother, but that he was concerned that visitation in jail would be detrimental to the mental stability of the children. Respondent granted Ms. Barros bi-monthly visitation, with the law guardian’s approval, and asked Ms. Barros if the schedule was satisfactory. Ms. Barros replied that she had no choice but to accept the agreement. Respondent informed her that she did have a choice and allowed her to ask for what she wanted. Ms. Barros stated that her husband had not cared about the children’s mental stability when the children had, on several occasions, been taken into New York state prisons to visit their paternal uncles. Respondent replied, “Okay, Ms. Barros. We’re not going to have any visitation then.”

19. After Ms. Barros became disorderly, respondent stated that at her next appearance, Ms. Barros would be held in contempt and that counsel would be assigned. Respondent adjourned the proceeding to October 8, 2003.

20. On October 8, 2003, respondent did not consider the matter of Ms. Barros’ petition for visitation with the nine children. Respondent did consider Ms. Barros’ request for joint custody of and visitation with her tenth child.

21. On October 8, 2003, Ms. Barros, who was still incarcerated, appeared before respondent, seeking joint custody of her tenth child. Ms. Barros was represented by assigned counsel, James S. Martin. Ms. Barros’ tenth child was in the custody of a relative, Vicky Vice, who was also present.

22. Ms. Vice told the court she would have no problem bringing the child to jail to visit with the petitioner. Mr. Martin suggested that respondent prepare an order for the jail because the jail might not permit a child to visit the incarcerated mother without a court order. When Ms. Barros stated that Ms. Vice had no problem bringing the baby to the jail on the weekend, respondent stated to her, “You do this again, you are going to add on to your sentence.”

23. After respondent had determined that the petitioner could have visitation with her child, respondent sought to end the proceeding. Ms. Barros stated, "That's not what I was askin'. I was coming in for joint custody." Respondent stated, "I'm not hearing this case." Respondent then concluded the proceeding without issuing an order of visitation.

As to Charge IV of the Formal Written Complaint:

24. On or about November 5, 2001, the parties in *Edward H. Spain, IV v. Brandee Spain* appeared before respondent on cross petitions for custody. There was also a pending divorce proceeding in another court. When respondent asked the parties if they were represented by counsel, Mr. Spain stated that he had spoken to an attorney but had expected an uncontested divorce. Respondent put the matter down for trial in order to give the parties enough time to file for divorce and stated that she would not hear the petitions but would transfer the matter to Albany County where the divorce proceeding would be held. Respondent told the parties that they should return to court on January 4, 2002, with their attorneys, or if they did not retain counsel, they should request that she assign counsel.

25. On January 4, 2002, when the parties appeared, respondent noted that Mr. Spain was present without counsel and demanded to know why. Mr. Spain informed respondent that he had discussed the matter with his attorney and they had decided that it was not necessary to have his attorney represent him in the custody matter, so he wanted to proceed to trial *pro se*. Respondent inquired in a harsh tone if Mr. Spain knew how to put documents into evidence or how to cross-examine witnesses. Respondent advised Mr. Spain that she would hold him to the same standards that she would hold all attorneys to in a trial and directed Mr. Spain to make an immediate effort to find an attorney during a short recess. When court reconvened, Mr. Spain indicated that he had been unable to speak with any attorneys. Respondent lectured Mr. Spain that he had used up the court's valuable time and adjourned the matter.

26. The parties later discontinued their action because of respondent's impatience and discourtesy in court.

As to Charge V of the Formal Written Complaint:

27. The charge is not sustained and is therefore dismissed.

Additional findings of fact:

28. When respondent assumed the bench in 2001, she was the only Family Court judge in Schenectady County. The court had been a two-judge court for many years. Respondent inherited a large caseload, and many cases were already delayed beyond the court system's standards and goals. Respondent discovered upon assuming the bench that in excess of 400 Department of Social Services orders had not been completed, many years old, leaving children in jeopardy. Respondent cleared up this backlog single-handedly. The stress of this backlog contributed to respondent's lack of patience and improper demeanor.

29. Respondent has changed a number of her procedures, including the manner in which she advises litigants of their rights to counsel. Respondent now informs all statutorily

eligible litigants of their rights to counsel, to an adjournment and to assigned counsel at the outset of each proceeding, and provides the necessary forms so that counsel is assigned by the court where appropriate.

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), 100.3(B)(3) and 100.3(B)(6) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent’s misconduct is established. Charge V is not sustained and is therefore dismissed.

Every judge has an obligation to respect and comply with the law and to act in a manner that inspires public confidence in the fair-mindedness and impartiality of the judiciary. *Matter of Esworthy*, 77 NY2d 280 (1991); Rules, §100.2(A). In Family Court, “where matters of the utmost sensitivity are often litigated by those who are unrepresented and unaware of their rights” (*Id.* at 283), such a duty is self-evident and compelling. In several cases respondent violated these ethical standards by neglecting to inform litigants of their statutory rights and by addressing them in an intemperate, demeaning manner.

Section 262 of the Family Court Act provides that “[w]hen [a litigant] first appears in court, the judge shall advise such person before proceeding that he has the right to be represented by counsel of his own choosing, of his right to have an adjournment to confer with counsel, and of his right to have counsel assigned by the court in any case where he is financially unable to obtain the same.” In the cases cited herein, where issues of custody and visitation were being determined, respondent ignored this important duty to insure that the litigants’ rights were adequately protected. Her omissions, and her directive to one litigant that he contact five attorneys before she would consider assigning counsel, did not comport with the court’s obligation under the statute. As the Commission and the Court of Appeals have repeatedly held, a pattern of failing to advise litigants of the right to counsel and assigned counsel is serious misconduct. *Matter of Bauer*, 3 NY3d 158 (2004); *Matter of Reeves*, 63 NY2d 105 (1984); *Matter of Sardino*, 58 NY2d 286 (1983).

The record also establishes that respondent violated her duty to be “patient, dignified and courteous” to litigants in her court (Rules, §100.3[B][3]). The transcripts depict a series of rude, demeaning remarks by respondent to litigants in custody and visitation proceedings who came to Family Court seeking a fair hearing before an impartial jurist. In one case respondent told the litigants that she was “so bored” and “so sick” of the case and spoke to the litigants angrily and impatiently when they could not agree on a visitation schedule. In another case she criticized a litigant who was wearing his college security shirt, telling him that he looked like a “slob,” that “normal people” would have worn something “decent” and that he could buy a shirt or tie at the City Mission for fifty cents. It appears that respondent was particularly harsh towards unrepresented litigants, addressing them in an intimidating, sarcastic manner. Indeed, in two cases (Charges I and IV) the parties actually discontinued their proceedings because of respondent’s impatience and discourtesy, apparently despairing of receiving a fair and just hearing in respondent’s court.

While court congestion and the stress of dealing with a large backlog she inherited may have adversely affected respondent's judicial performance, these factors do not excuse her demeaning comments to litigants and her disregard of important statutory procedures. *See, Matter of Reeves, supra.*

In mitigation, we note that respondent has expressed remorse for her actions and that she now appropriately advises all statutorily eligible litigants of the right to counsel and assigned counsel.

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

Mr. Goldman, Mr. Pope, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Judge Luciano were not present.

Dated: November 18, 2005

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

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
David Lenefsky for the Respondent

The respondent, Vincent Barringer, a justice of the Olive Town Court, Ulster County, was served with a Formal Written Complaint dated June 28, 2005, containing three charges.

On August 1, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be censured and waiving further submissions and oral argument.

On August 11, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Olive Town Court from 1970 to 1973, and from 1985 to the present. His present term of office expires on December 31, 2005. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about April 9, 2002, respondent signed a letter on court stationery, a copy of which is annexed as Exhibit 1 to the Agreed Statement of Facts, which he sent to the Town of Olive Police, the New York State Police, the New York State Department of Environmental Conservation, the Ulster County Sheriff's Department and the New York City Department of Environmental Protection Police. Respondent stated in the letter that the Olive Town Court would "no longer enforce the 35 mph speed zone along Route 28A and Reservoir Road," and that "[a]ny tickets written for a speed under 55 mph [would] be dismissed," because "these speed zones [were] illegally posted."

3. Between April 1, 2002 and November 2004, respondent dismissed several charges issued to defendants for Speeding on Route 28A or Reservoir Road, including *People v. Danielle Barrie*, in which the defendant had pled guilty in writing; *People v. Thomas Huppert*, in which the defendant's driver's license had previously been suspended for failure to appear on the ticket; and *People v. L. W. Anderson*, which respondent dismissed in the interest of justice without setting forth on the record the reasons therefor as required by Section 170.40(2) of the Criminal Procedure Law.

4. On or about April 6, 2004, respondent stated at a meeting of the Olive Town Board that he and his co-judge had discussed the speed limit on Route 28A and felt it should be 45 miles per hour.

As to Charge II of the Formal Written Complaint:

5. From in or about July 2003 to in or about May 2004, in connection with his activities in opposition to the closure of the road across the Ashokan Reservoir by the New York City Department of Environmental Protection (DEP), respondent engaged in the following extra-judicial activities.

6. On or about July 1, 2003, at an Olive Town Board meeting, respondent suggested that the town board send New York City a notice that if any person was injured on the detour section of Route 28A, New York City would be held responsible.

7. On or about September 12, 2003, respondent acted as master of ceremonies at an organized public protest against the closure of the road across the Ashokan Reservoir by the DEP, and made statements critical of the DEP and of its police chief, Ed Welch, notwithstanding that respondent presided over cases filed in his court by the DEP.

8. On September 12, 2003, at the organized public protest, respondent made statements that could be interpreted as publicly advocating (a) blowing up barriers across the closed road, (b) lying down in front of paving machines scheduled to work on the detour road (Route 28A) and (c) polluting the Ashokan Reservoir.

9. At the organized public protest on September 12, 2003, respondent publicly discussed a DEP case that was pending in the Olive Town Court, made statements prejudicial to the DEP, and referred to his judicial position.

10. At the organized public protest on September 12, 2003, respondent, who was not a candidate for election, introduced individuals whom he identified as candidates for elective office in the November 2003 elections and urged voters not to support those candidates who did not attend the protest.

11. On or about October 11, 2003, respondent told a reporter for the *Kingston Daily Freeman* that the death of a motorcyclist on the detour road around the Ashokan Reservoir, at a location within respondent's jurisdiction, was the sole fault of the DEP Police Chief Ed Welch,

who had ordered the main road across the reservoir closed. Respondent's statement was reported in the *Daily Freeman* on October 12, 2003.

12. On or about October 12, 2003, respondent acted as master of ceremonies at an organized public protest of the DEP's closure of the road across the Ashokan Reservoir and stated to the assemblage that he did not respect DEP Police Chief Ed Welch, who respondent said made his officers look like "idiots." Respondent also stated in reference to Chief Welch, "We know he lies; it's not the first time he's lied to us."

13. On or about April 6, 2004, at a meeting of the Olive Town Board, respondent *inter alia* made the following statements:

A. Respondent asked the board for a "commitment" regarding filing an Article 78 action against the City of New York for its alleged failure to adhere to the 1905 Watershed Act;

B. Respondent stated that he had spoken with Peter Graham, the Assistant District Attorney assigned to his court, and that Mr. Graham felt the Article 78 action "could be viable"; and

C. Respondent asked the members of the town board whether they were willing to pay \$1,000 toward attorney fees in an Article 78 action.

14. On or about May 4, 2004, at a meeting of the Olive Town Board, respondent *inter alia* made the following statements:

A. Respondent attempted to poll the members on the question of whether they would support a lawsuit against New York City;

B. Respondent stated that he had spoken with attorney Richard Riseley about representing the town in such an action;

C. Respondent asked whether the board would commit to paying an attorney \$15,000 for such a lawsuit; and

D. Respondent suggested making the lawsuit a referendum issue on the November 2004 ballot.

15. On or about May 5, 2004, just before a scheduled session of the Olive Town Court, respondent met with his co-judge Ronald Wright, several Olive Town Board members and attorney Peter Graham, who was scheduled to appear in a case before respondent that night, and discussed the possibility of legal action against the City of New York over the Ashokan Reservoir road closure.

As to Charge III of the Formal Written Complaint:

16. From on or about January 1, 2004, to the present, in cases involving charges filed by DEP Police against alleged trespassers at the Ashokan Reservoir, respondent has rendered dispositions favorable to the defendants and contrary to law, in that he has granted adjournments in contemplation of dismissal without the consent of the prosecution and imposed fines lower than the minimum required by law.

17. From on or about March 27, 2004, to on or about August 23, 2004, in six Trespass cases brought by DEP Police as specified on Schedule A annexed to the Agreed Statement of Facts, respondent granted adjournments in contemplation of dismissal without the consent of the prosecution, as required by Section 170.55 of the Criminal Procedure Law.

18. Between May 2004 and February 2005, in 21 cases filed by DEP Police against alleged trespassers for violations of Environmental Conservation Law Section 11-2113, *i.e.* Posted Land Violations, as specified on Schedule B annexed to the Agreed Statement of Facts, respondent imposed fines of \$20, notwithstanding that the minimum penalty for this violation was \$25 pursuant to Environmental Conservation Law Section 71-0925.

19. Respondent's conduct set forth in paragraphs 17 and 18 above appeared to be the result of his bias against the DEP and the DEP Police, stemming from respondent's disagreement with the DEP over its decision to close the road over the Ashokan Reservoir.

Additional findings:

20. Respondent affirms that he will not remain in office beyond the expiration of his term on December 31, 2005.

21. Respondent affirms that he will neither seek nor accept judicial office at any time in the future.

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)(3), 100.3(B)(6), 100.3(B)(8), 100.4(A)(1), 100.4(A)(2), 100.4(A)(3), 100.5(A)(1)(c) and 100.5(A)(1)(e) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The ethical standards require a judge to avoid extra-judicial conduct that casts doubt on the judge's impartiality, interferes with the proper performance of judicial duties or detracts from the dignity of judicial office (Rules Governing Judicial Conduct, §§100.4[A][1], [2], [3]). Respondent's public advocacy against a local road closure by the New York City Department of Environmental Protection (DEP) violated these standards by demonstrating that he no longer had the ability to be and appear to be impartial in matters involving the DEP.

Upon assuming the bench, a judge surrenders certain rights and must refrain from certain conduct that may be permissible for others. Even otherwise laudable conduct must be avoided if

it creates the appearance that a judge is lending the prestige of judicial office to advance private interests or impairs public confidence in judicial impartiality and independence. Respondent's highly visible public role on this local issue – as master of ceremonies at several organized public protests and as an outspoken critic of the DEP – was political in nature and inconsistent with the role of a judge. He spoke at the protests, introduced candidates for elective office and encouraged the audience to remember the missing candidates on Election Day. Respondent's advocacy on this issue extended to making statements in which he appeared to be promoting civil disobedience, including statements that could be interpreted as advocating the audience to blow up barriers across the closed road, lie down in front of paving machines scheduled to work on the detour road and pollute the reservoir. Respondent's highly inflammatory statements about the DEP Chief of Police included an accusation to a reporter that the police chief was responsible for the death of a motorist on the alternate route. He also urged the town board to bring a lawsuit against the City of New York, consulted with the ADA in his the court about the lawsuit, and suggested to the town board that a referendum on the matter be placed on the November ballot. As respondent has acknowledged, such conduct was improper and inconsistent with his judicial role.

It was also improper for respondent to announce, in a letter signed by respondent and his co-judge and sent to law enforcement agencies, that in future cases he will not enforce the speed limit on a particular road because the speed limit signs were illegally posted. In the absence of a definitive ruling on the issue, such a pronouncement is inconsistent with the role of a judge in our legal system, which is to apply the law in each case in an impartial manner, regardless of the judge's personal views (Sections 100.2[A] and 100.3[B][1] of the Rules). *See Matter of Tracy*, 2002 Annual Report 167 (Comm. on Judicial Conduct); *see also, Matter of Wright* (determination issued today). Respondent's dismissal of charges in several such cases, including one case in which the defendant had pled guilty and another in which the defendant failed to appear, indicate that his decisions were based on prejudgment, consistent with his announced intent, not the individual merits of the cases.

In numerous cases brought by the DEP, respondent rendered dispositions contrary to law, in that he granted adjournments in contemplation of dismissal (ACDs) without the consent of the prosecution as required (Crim. Proc. Law §170.55) and imposed fines lower than the minimum required by law. As a judge for more than two decades, respondent was presumably aware of the statutory requirements. His conduct not only was contrary to law but appeared to be the result of respondent's bias against the DEP and the DEP Police. *See, e.g., Matter of More*, 1996 Annual Report 99 (Comm. on Judicial Conduct) (judge dismissed cases without notice to the prosecution).

In imposing a sanction less than removal, we note that respondent has affirmed that he will neither seek nor accept judicial office beyond the expiration of his current term of office at the end of this year.

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Mr. Pope and Judge Ruderman concur.

Judge Peters did not participate.

Judge Luciano was not present.

Dated: October 11, 2005

Schedules A, B and C are available on the Commission's website at:
<http://www.scjc.state.ny.us/Determinations/B/barringer.htm>

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **LAURA D. BLACKBURNE**, a Justice of the Supreme Court, Queens County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Alan J. Pope, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg and Jennifer Tsai, Of Counsel) for the Commission
Richard Godosky and David M. Godosky for the Respondent

The respondent, Laura D. Blackburne, a justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated August 5, 2004, containing one charge. Respondent filed a verified answer dated September 10, 2004.

By Order dated September 14, 2004, the Commission designated Honorable Ernst H. Rosenberger as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 30 and December 1, 2004, in New York City. The referee filed a report on August 23, 2005.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended a sanction no greater than censure. On September 30, 2005, 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 Supreme Court, Queens County, since 2000. Prior to that, from 1996 through 1999, she served as a judge of the Civil Court of the City of New York.
2. On June 10, 2004, respondent was presiding over cases in the Drug Treatment Court, Queens County, where she had served for several months. There were approximately 25 cases on the calendar that day. One of the cases involved Derek Sterling, a defendant charged with selling drugs who had been enrolled in a treatment program since early 2003.
3. Treatment Court proceedings are available as an alternative to incarceration to defendants who are charged with a non-violent felony and have a history of addiction. In such proceedings in Queens County, the defendant pleads guilty to a felony and sentencing is deferred

while the defendant is enrolled in a treatment program; upon successful completion of the program, the plea is withdrawn and the charge is dismissed. The defendant is required to appear in court on a regular basis so that the treatment can be monitored.

4. On June 10, 2004, at around 10:00 A.M., Detective Leonard Devlin arrived at the courthouse for the purpose of arresting Mr. Sterling on charges of robbery and assault, unrelated to the case on respondent's calendar.

5. Detective Devlin told a court officer, Sergeant Richard Peterson, that he was there to question Mr. Sterling in connection with a robbery. As a result, the sergeant believed that the detective was going to take Mr. Sterling into custody. Sergeant Peterson referred the detective to Jeffrey Martinez, a representative from Treatment Alternatives for a Safer Community ("TASC"). Sergeant Peterson and Mr. Martinez explained to the detective that Mr. Sterling was in a residential treatment program in Queens and provided the location of the residence, which the detective wrote down. The assistant district attorney ("ADA"), Sharon Scott Brooking, was also notified.

6. Thereafter, the detective waited outside the public entrance to respondent's courtroom in order to arrest Mr. Sterling after his case was concluded. It was the accepted protocol that the police not arrest a defendant at the court until the calendar call of the defendant's case was finished.

7. Sergeant Peterson went to see respondent in chambers and informed her that a detective was in the courtroom to question Mr. Sterling in connection with a robbery.

8. Respondent told Sergeant Peterson that the defendant's attorney had to be notified and that the detective should not discuss anything with Mr. Sterling until the defendant's attorney was present. A short while later, respondent told Sergeant Peterson to advise the detective that the defendant's attorney was coming and that the detective should not speak to the defendant.

9. Mr. Sterling's assigned counsel, Joseph Justiz, was unavailable; a substitute was contacted but was also unavailable; ultimately, Warren M. Silverman, a court-appointed 18-B attorney, was notified to appear on behalf of Mr. Sterling.

10. After the calendar call began, Mr. Sterling left the courtroom twice for brief periods and passed Detective Devlin, who was in the hallway.

11. Respondent told Sergeant Peterson to arrange for Mr. Silverman and Detective Devlin to speak together. When Mr. Silverman arrived, he spoke to Detective Devlin in the hallway. Mr. Silverman asked the detective if he wanted to speak to Mr. Sterling "as a subject or as a witness." The detective indicated "subject." Mr. Silverman informed the detective that Mr. Sterling declined to speak to the detective, was represented by counsel and should not be questioned without counsel. Mr. Silverman gave the detective his card. The detective replied, "Then he is going to the 106th," referring to his precinct. Mr. Silverman asked the detective if he intended to arrest Mr. Sterling, and the detective said "yes." Mr. Silverman asked what the

charges concerned, and the detective declined to say. Mr. Silverman spoke briefly with the defendant.

12. In the courtroom, respondent called Mr. Silverman to a sidebar and had a private conversation with him. Mr. Silverman told respondent that the detective had indicated that he was going to arrest Mr. Sterling. Respondent asked what crimes would be charged, and Mr. Silverman said that the detective did not tell him that information. Respondent then said that she was going to have Mr. Sterling taken out of the courtroom and out of the building through a side entrance.

13. Respondent called Sergeant Peterson to the bench and directed him to take Mr. Sterling “out the back stairwell” at the end of the calendar call. The back area is a secure hallway used by judges, jurors and court staff, and has a stairwell that leads from the third floor to the first floor, to the judges’ parking lot. Sergeant Peterson was “stunned” by the instruction and did not reply.

14. Sergeant Peterson was concerned because he felt he could get in trouble for either following or not following respondent’s instruction. He discussed the matter with another court officer and with ADA Sharon Scott Brooking. The sergeant asked the ADA whether following respondent’s direction would be considered an obstruction of justice.

15. Sergeant Peterson approached respondent again, stated that he was “uneasy” about her directive and asked respondent to speak to the ADA.

16. Respondent summoned ADA Scott Brooking to the bench. The prosecutor told respondent that taking the defendant out the back would not be appropriate and that defendants should be arrested at court, not at the treatment programs, since defendants were encouraged to feel safe at the programs. Respondent responded that she was insulted that the detective, whose actual intention was to make an arrest, had entered the courtroom under the “ruse” of questioning Mr. Sterling.

17. On the record, in open court but outside the presence of the detective, respondent accused Detective Devlin of coming to court under the “ruse” of wanting to ask questions when, in fact, he intended to arrest the defendant. Out of anger, respondent ordered that Mr. Sterling be escorted out of the court through a private exit in order to avoid arrest. The record of the proceeding states as follows:

THE COURT: Good afternoon, Mr. Silverman, and thanks again for standing up on behalf of Mr. Justiz.

MR. SILVERMAN: My pleasure.

MR. MARTINEZ: Your Honor, we have a good update from the program. He also tested negative for all substances at the TASC office.

THE COURT: Mr. Sterling, I don’t know what else is going on. That’s why I asked Mr. Silverman to be here to represent you. I understand that there is a

detective on the premises who has some reason to believe that he ought to arrest you. I'm not going into that. That's not before me at this time.

It is my hope that, whatever the issue is, it's not something that's going to effect your ability to continue in this program.

I have directed that you be escorted out of the building by Sgt. Peterson because I -- and I'm putting this on the record -- specifically, I resent the fact that a detective came to this court under the ruse of wanting to ask questions when, in fact he had it in his head that he wanted to arrest you. If there is a basis for him arresting you, he will have to present that in the form of a warrant.

And it may occur at your program. I'm not saying it won't. But what I am saying to you is that if you go back to your program and you do everything you are supposed to do at your program, if they appear with a legitimate warrant for your arrest then you follow that. I'm not trying to keep you from being arrested. I'm trying to keep you from being arrested today in my courtroom based on obvious misrepresentation on the part of the detective.

You have your opportunity to speak to Mr. Silverman and I'm sure Mr. Silverman will convey to Mr. Justiz what's going on so that you will be appropriately represented if you are, in fact, arrested at the program.

MR. SILVERMAN: Judge, if I may, for the record, I have spoken to the detective. I gave him my card and indicated to him that Mr. Sterling is represented by Mr. Justiz. I have spoken to Mr. Sterling and he has indicated that he is following my advice to adhere to his Fifth Amendment rights and not to speak to the police. And I've instructed the police detective should there be an arrest in the future that he is not to question Mr. Sterling in the absence of his attorney.

THE COURT: And, Mr. Sterling, that advice works as long as you keep your mouth shut. Once you start talking you are basically waiving your right to be represented by counsel.

All right. The next court date on this case for Mr. Sterling will be July 15th.

18. Respondent was annoyed and angry because she believed, based on the information presented to her, that Detective Devlin had given two different versions of his intentions. Respondent never saw Detective Devlin that day or questioned him about the matter. There is no indication in the record that Detective Devlin acted improperly.

19. When the proceeding ended, Sergeant Peterson approached respondent, again related that he felt uneasy, and expressed his concern that her direction amounted to an obstruction of justice. Respondent interrupted him and, while starting to stand up at the bench, stated that he had been given a direction and that if he did not take Mr. Sterling out through the back exit, she would do it herself. Sergeant Peterson replied that he would do it. Sergeant

Peterson concluded that he, rather than respondent, should escort the defendant since he did not want to compromise respondent's safety. Sergeant Peterson then escorted Mr. Sterling out the side doorway, through the secure hallway and stairwell, and out the door to the parking lot.

20. When Detective Devlin learned that Mr. Sterling had left through a back exit, he hurriedly left through the front door to try to locate him but was unable to do so.

21. After escorting Mr. Sterling from the courthouse, Sergeant Peterson went to the security office, where he met with his captain and informed him that he was going to prepare an "unusual occurrence report." Sergeant Peterson submitted several reports memorializing the event.

22. Mr. Sterling was arrested the following day at the treatment center and was taken into custody. Bail was set at \$50,000. The charges against him were ultimately dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C) and 100.3(B)(1) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Abdicating the proper role of a judge, respondent directed a court officer to escort a defendant out of the courthouse through a non-public, back stairway in order to elude a police detective who was waiting to effect a lawful arrest. In doing so, respondent inexplicably ignored several alarms that were raised by experienced court personnel, including the prosecutor and court officer, and persisted in directing the officer to comply with her improper order. Respondent's conduct not only compromised the safety of others, but severely damaged public confidence in her impartiality and ability to administer the law she is sworn to protect.

The salient facts, as set forth in the above findings, are largely uncontested; only respondent's motivation is in dispute. Having concluded that the detective had come to the court under a "ruse" of wanting only to question the defendant, respondent determined to thwart the arrest at the courthouse by arranging for the defendant to leave through a private exit with a court officer escort. While respondent asserts that she was motivated by a desire to protect the perception of the integrity and independence of the court from being tainted by the so-called "ruse," it seems clear that her hasty conclusion that the detective acted improperly was based upon secondhand information that was at best incomplete.

Although the detective apparently told a court officer that he wanted to question the defendant, that officer and other court personnel readily understood that "question" meant "arrest." Respondent, without seeking to question the detective himself, concluded that a subterfuge had occurred. In any event, respondent's ill-conceived actions were entirely unjustified by the perceived "ruse," as she herself has conceded.

We agree with the conclusion of the referee, a respected former jurist, that respondent's actions arose out of anger and annoyance toward the police (Rep. 12). From the moment she learned that the police wanted to question the defendant, respondent made considerable efforts to protect the defendant's interests and to keep the detective away from him. She arranged for the defendant's lawyer to come to court, and she told the court officer to advise the detective not to speak to the defendant until the attorney arrived. Even after the attorney had arrived and advised the defendant of his rights, respondent admonished the defendant not to speak to the police without his attorney ("[k]eep your mouth shut"). Respondent's actions provide a context for her decision to have the defendant escorted out the back door of the courthouse (a decision she initially confided to the defendant's attorney in a private meeting at the bench).

It is ironic that after accusing the detective in open court of a "ruse," respondent employed a devious maneuver to whisk the defendant out of the courtroom and out of the detective's grasp. Her behavior not only violated her duty as a judge to act in a manner that reflects respect for the law she is duty-bound to uphold, but set a reprehensible example for court officers and other court personnel who were aware of what she was doing. She also created an enormous conflict for the court officer under her command, who was understandably hesitant to comply with her directive, concerned that doing so might constitute an obstruction of justice. It is striking that respondent failed to recognize the impropriety of her directive, which was readily apparent to court personnel; it is more striking that even when the court officer and prosecutor expressed their concerns to respondent, she failed to reconsider her plan.

We are unpersuaded by respondent's contention that the special nature of the Treatment Court, where trust and accountability between the court and its "clients" are of paramount importance, in any way mitigates or explains her conduct. We are mindful of the unique dynamics of Treatment Court proceedings, its laudable goals and record of success (*see* Resp. Ex. C and D), and we note respondent's testimony that the court should be viewed as a "safe haven" by defendants (Ref. Ex. 1, p. 67). Nonetheless, we fail to see how public confidence in the court is advanced when a judge actively helps a defendant to avoid arrest by sneaking him out the back door. Respondent's behavior in this case far exceeded the norm of acceptable conduct by any judge in any court.

The repercussions of respondent's conduct were considerable. A suspect facing charges of robbery and assault was permitted to walk through a highly restricted area escorted by a single court officer, and then was allowed to avoid imminent arrest and remained at liberty for another 24 hours, until arrested by police. The fact that Mr. Sterling was ultimately arrested without incident, and that the charges against him were later dismissed, should not inure to respondent's credit; despite her testimony that she "fully expected" that Mr. Sterling would return to the treatment center (Tr. 168), she obviously had no way of knowing what would occur once he left the court. The incident itself, which understandably became widely known throughout the courthouse, brought the judiciary into disrepute.

Not until respondent learned later that day that her actions had created a "hullabaloo" throughout the courthouse did she recognize that her conduct was improper (Oral argument, p. 58). Although respondent has expressed regret and remorse for her actions, we note that the referee, after hearing her testimony, concluded that respondent lacked forthrightness at the hearing and sought to minimize her responsibility (Rep. 7). Moreover, as the Court of Appeals

has stated with respect to contrition, in some instances “no amount of it will override inexcusable conduct.” *Matter of Bauer*, 3 NY3d 158, 165 (2004).

As reflected by respondent’s admission of wrongdoing and her request for a disciplinary sanction no greater than censure, it is apparent that the sole issue is whether respondent’s misconduct was so egregious that the ultimate sanction of removal is warranted. We conclude that respondent’s behavior was such a gross deviation from the proper role of a judge that it justifies the sanction of removal, notwithstanding her lengthy career of public service, her previously unblemished record on the bench, and the testimony of distinguished witnesses, including public officials and members of the judiciary, as to her character and reputation. Comparable conduct by an attorney, court staff or any officer of the court would certainly subject the individual to the severest sanctions. For a judge, whose enormous powers and commensurate responsibilities require the judge to be held to the highest standards of behavior, it is simply intolerable.

We recognize that removal is not normally to be imposed for conduct that amounts to poor judgment, even extremely poor judgment. *Matter of Sims v. Comm. on Judicial Conduct*, 61 NY2d 349, 356 (1984); *Matter of Shilling v. Comm. on Judicial Conduct*, 51 NY2d 397, 403 (1980). This is especially so where, as in this case, the conduct was not venal or abusive but rather consists of a single episode of aberrant behavior.

We believe that respondent’s conduct was not simply an egregious error in judgment, but an act that transcended the boundaries of acceptable judicial behavior. She placed herself above the law she is sworn to uphold and abused the power of her office, utilizing court personnel and court facilities to accomplish her goal of thwarting a lawful arrest. We need not determine whether her conduct was unlawful (*see* Penal Law §195.00 [Official Misconduct]; §195.05 [Obstructing Governmental Administration]; §205.50 [Hindering Prosecution]) since, manifestly, behavior that even raises such questions is inconsistent with the role of a judge and brings the judiciary into disrepute. *See, Matter of Backal v. Comm. on Judicial Conduct*, 87 NY2d 1 (1995); *Matter of Gibbons v. Comm. on Judicial Conduct*, 98 NY2d 448 (2002). Difficult as it may be to impose a sanction that marks the end of any judicial career, we conclude that the sanction of removal is appropriate.

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

Mr. Goldman, Ms. DiPirro, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Emery dissent only as to the sanction and vote that the appropriate sanction is censure.

Mr. Pope was not present.

Dated: November 18, 2005

CONCURRING OPINION BY MS. HERNANDEZ, IN WHICH JUDGE PETERS JOINS

I concur that respondent's serious misconduct warrants a severe sanction. It is a judge's responsibility to abide by proper procedures, to follow the law the judge is sworn to administer, and to respect the roles of others involved in the administration of justice in our system. Respondent clearly violated those standards.

In concluding that removal, rather than censure, is the appropriate sanction, I have considered several factors. Respondent placed herself above the law and failed to respect the roles of others within the framework of our justice system. She obstructed the detective from performing his duty, which was to make a lawful arrest at the court. She placed the court officer who was under her command in an awkward position by directing that he take the defendant out through the judges' private entrance, thus causing him to be deeply concerned that following her directive might constitute a crime. Her total lack of consideration in that regard is unacceptable.

In addition, it is incomprehensible to me that respondent ignored the concerns expressed by experienced court personnel, including the prosecutor and court officer. I find it inexplicable that when the court officer told her, in two separate conversations, that he was uneasy about her directive and even said that he was concerned about whether it would be an obstruction of justice, she did not think to reconsider her decision.

On a personal level, the decision to remove respondent is extremely difficult, especially in light of her long career of public service and her unblemished record as a judge. I take into consideration that respondent has been a role model for women of color. I also believe that respondent was genuinely trying to protect the interests of a defendant who, as she testified, she "believed at the time needed protecting" (Ref. Ex. 1, p. 67). However, it is clear to me that in doing so, she crossed over the line and became not just the defendant's advocate, but an adversary of the police. That is completely inconsistent with the role of a judge in our system of justice.

Accordingly, I respectfully concur that respondent should be removed.

Dated: November 18, 2005

DISSENTING OPINION BY MR. COFFEY

The decision reached by the majority in this matter is unprecedented and I believe unwarranted. The mistake made by the respondent, while wrong and while sanctionable, was in all respects a classic case of an error of judgment, which we as a Commission historically have been very cautious in criticizing. For a single error of judgment, in the absence of a breach of trust, to result in removal from office is unduly harsh.

It is indisputable that the respondent's action was based on what she in part felt was a ruse perpetrated by an arresting officer. While this does not condone her action, it should not be the basis of removal from office. Unfortunately, the majority does so, even though the respondent acted in her official capacity in open court, has an absolutely unblemished judicial record, has a character so exemplary that an impressive array of witnesses testified in her

defense, and acted with no malice, with no hope of personal gain, and not out of any personal vindictiveness. While her decision was admittedly wrong, the record reflects that her motive, in large part, was essentially to protect what she perceived to be the rights of the defendant. In addition, within hours of her order, she recognized her mistake, and long before she was charged by the Commission with misconduct, freely acknowledged her culpability, a position which she has consistently and persistently adhered to throughout this entire process.

I recognize the concerns of the majority and acknowledge the gravity of the respondent's error. But our goal in establishing an appropriate punishment for an offense is to examine the entire constellation of factors and circumstances in a case while searching for a just result. Even though the majority views her act as egregious, it does not, at least in my view, pay proper deference to the actor herself. This is particularly unfortunate since, in the ten years that I have served on this Commission, I cannot recall a single instance where we have voted to remove another judge who made a basic error in judgment and who has come before us with the extensive and compelling mitigating factors that are present in this record.

I do not find the respondent unfit, unethical, or lacking in judicial temperament. Rather, under the circumstances, I find her merely human. As I result, I respectfully dissent.

Dated: November 18, 2005

DISSENTING OPINION BY MR. EMERY

The removal of Justice Laura Blackburne^[1] is both unprecedented and unfair. It is unprecedented because, until this case, neither this Commission nor the Court of Appeals has ever removed a judge based on a single event of misconduct, no matter how egregious, unless the misconduct was based upon breach of trust, venal conduct, moral turpitude or personal gain for the judge. It is unfair because this Commission is imposing career capital punishment upon an experienced, highly-respected and accomplished jurist, with an unblemished disciplinary history, who, indisputably, is unlikely to engage in this type of misconduct again.

I

A survey of the applicable precedent makes the first point. As the Commission's majority decision accurately states:

[R]emoval is not normally to be imposed for conduct that amounts to poor judgment, even extremely poor judgment. (Citations omitted). This is especially so where, as in this case, the conduct was not venal or abusive but rather consists of a single episode of aberrant behavior. (Majority decision, pp. 12-13)

This description of the applicable law reflects the heretofore unwavering holdings of both the Commission and the Court of Appeals. I do not see any basis in this record or in the majority decision to deviate from these principles in this case.

The Commission staff in urging respondent's removal relies virtually exclusively on *Matter of Gibbons*, 98 NY2d 448 (2002), in which a judge issued a search warrant and then

immediately told his ex-boss at his ex-law firm that an ex-client was about to be searched. But for the restraint of the judge's ex-boss, this warning would have allowed the ex-client to avoid the surprise appropriate for a search pursuant to a warrant. Moreover, the judge made numerous attempts to reach his former boss, and each such occasion was an act of misconduct. Commission counsel characterizes *Gibbons* as the equivalent of Justice Blackburne's misconduct—facilitating the ability of a defendant to avoid arrest in drug court because she was angry at the arresting officer—based on the assertion, accepted in *Gibbons*, that the judge was motivated by his anger at his former client, rather than venal intent.

But it is plain that *Gibbons* is quite different. In *Gibbons*, the judge was, at a minimum, engaging in an inappropriate relationship with his former firm, no matter what his motivation. Moreover, the appearance was that he was currying favor with his ex-colleagues. The Court of Appeals aptly described *Gibbons*' conduct in contacting his ex-law firm as a "serious breach of trust" (*Id.* at 450). In this case, there is no contention, nor is there even an appearance, that respondent had any special relationship with anyone, or was motivated by personal gain or favoritism.

Had Justice Blackburne had a relationship with the defendant, other than as a litigant before her, I would unhesitatingly vote for her removal. Rather, her misconduct was a serious misjudgment motivated by her angry reaction to a police officer who she believed had attempted to deceive her. Additionally, Justice Blackburne had a misconceived, but good faith, view of the best way to maintain the trust between the judge and the defendant which she viewed as critical to the success of her specialized Drug Treatment Court, namely, to delay the arrest she felt was a product of the detective's ruse (*See* Majority decision, pp. 9-10). Finally, Justice Blackburne's on-the-record explanation for her actions (Majority decision, pp. 6-7) demonstrates her good faith beyond cavil. Respondent plainly acted openly and forthrightly in pursuing her misguided course of action. Thus, unlike *Gibbons*, Justice Blackburne's misconduct was a serious misjudgment that cannot fairly be characterized as a "serious breach of trust." She was, in fact, attempting to uphold the "trust" repositied in her office.

In order to support her removal, the Commission is, therefore, forced to adopt the unprecedented position that Justice Blackburne's misconduct, absent any breach of trust, inappropriate relationship or advantage to her, is so "egregious" that neither her good faith nor mitigating circumstances will be considered. In the majority's view, her conduct "transcended the boundaries of acceptable judicial behavior" (Majority decision, p. 13). Notably, during the argument before the Commission, staff counsel refused to answer the hypothetical question of whether it would be appropriate to remove the judge if she had reasonably believed that the police officer was about to beat the defendant (Oral argument, p.12). As I view the majority decision, it relies on a similarly ostrich-like position.

While I agree in the abstract that certain extreme misconduct may be so "egregious" as to warrant removal notwithstanding a judge's good faith intent, the Commission and Court of Appeals precedents make clear that this is not such a case. The facts in *Blackburne* are undisputed: the judge's motive was a selfless attempt to uphold the "legal system [s]he was duty-bound to protect and administer" (*Matter of Gibbons, supra* at 450) even if her attempt betrayed "extremely poor judgment." Given that the Court's basic command to us is that

removal “is not normally to be imposed for poor judgment, even extremely poor judgment” (*Matter of Sims v. Comm. on Judicial Conduct*, 61 NY2d 349, 356 [1984]), a review of the applicable single-incident misconduct cases plainly demonstrates that removal is not proper in this case.

The Commission and the Court of Appeals have imposed removal based on a single incident when there has been some aspect of the conduct that was, or appeared to be, venal. *Matter of Molnar*, 1989 Annual Report 115 (sexual favor solicited); *Matter of Scacchetti*, 56 NY2d 980 (1982) (bribe solicited); *Matter of Reedy*, 64 NY2d 299 (1985) (attempt to fix son’s ticket by a judge with a prior history of misconduct); *Matter of Levine*, 74 NY2d 294 (1989) (*ex parte* promise to political leader to adjourn a case and lying to the FBI); *Matter of Heburn*, 84 NY2d 168 (1994) (falsely subscribed designating petitions); *Matter of Benjamin*, 77 NY2d 296 (1991) (sexual assault); *Matter of Stiggins*, 2001 Annual Report 123 (conviction for abuse of an incompetent person); *Matter of Westcott*, 2004 Annual Report 160 (conviction for sexual relations with a mentally disabled person); *Matter of Brownell*, 2005 Annual Report 129 (issuing a court check to pay a judgment after mishandling the case). Similarly, we have not tolerated overt racism. *Matter of Bloodgood*, 1982 Annual Report 69 (reference to a Jewish defendant as “kikie” in a letter on court stationery); *Matter of Cerbone*, 61 NY2d 93 (1984) (racial epithets threatening African-Americans if they ever appeared in judge’s court). Finally, in a context arguably not properly characterized as a single incident, we have found abandonment of judicial duties to be cause for removal. *Matter of Fiore*, 2006 Annual Report __ (judge left for a job in Iraq). Thus, along with *Matter of Gibbons*, this is the sum total of the single-incident removal cases that I have found.

By contrast, there are at least three cases in which we have censured, rather than removed, judges for single-incident misconduct that was more egregious than that of Justice Blackburne. In *Matter of Friess*, 1982 Annual Report 109, a highly publicized case, the judge released a murder defendant into his own custody, took her to his home overnight (although with no ulterior sexual motive) and provided her with counsel for a subsequent court appearance. The Commission stated that Judge Friess “exhibited extraordinarily poor judgment and a serious misunderstanding of the role of a judge in our legal system...diminish[ing] public confidence [and] bring[ing] the judiciary into disrepute.” In that case, the Commission concluded that the judge’s “capacity to serve and regain public confidence had not been irreparably harmed.”

In *Matter of Mills*, 2005 Annual Report 185, a majority of the Commission censured a judge who held an acquitted, unrepresented defendant in an isolation cell for five days, during which he doctored his contempt order to cover up the illegal basis for the punishment. In addition, in another incident before the Commission at the same time, Judge Mills jailed a litigant’s father after the judge overheard him use an expletive in a courthouse parking lot. Notwithstanding the Commission’s characterization of Mills’ misconduct as a “travesty of justice,” he remains a judge to this day.

Finally, the result in *Matter of Dusen*, 2005 Annual Report 155, is particularly instructive. In *Dusen* we censured the judge after he arranged the release of an incarcerated defendant by knowingly issuing an illegal court order and fabricating a conviction in order to facilitate his deportation. Dusen’s misuse of his judicial authority to pervert the result in a

particular case in order to accomplish what the judge believed was the best outcome was, in my view, a “serious breach of trust” and abuse of authority more “egregious” than that engaged in by Justice Blackburne.

Dusen raises the question of what Justice Blackburne’s sanction would have been if she had facilitated an illegal arrest rather than frustrated a proper arrest. Apparently, the majority’s view is that frustrating a proper arrest is more “egregious” than facilitating an illegal conviction and deportation. This stands logic on its head, for the consequences to the deported defendant are so profound compared with the short delay of a proper arrest.

In the end, the essential point is that before this case, neither this Commission nor the Court of Appeals has ever removed a judge in a single-incident misconduct case for acts that were not venal or did not constitute a “serious breach of trust.” Justice Blackburne’s misconduct was neither; rather, it was a misguided attempt to protect the sanctity of her court and uphold her oath of office.

II

Removal of Justice Blackburne is also unfair for an additional reason: she has had a lengthy career of public service and a ten year career as a jurist marred only by her “aberrant” misjudgment in this case (Majority decision, p. 13).

Given that the Court of Appeals directs the Commission to mete out discipline “not [as] punishment but ... to safeguard the Bench from unfit incumbents” (*Matter of Reeves*, 63 NY2d 105, 111 [1984], citing *Matter of Waltemade*, 37 NY2d [a],[111]), it is error to remove Justice Blackburne based on this single incident of misconduct that is unlikely to be repeated.

Respondent’s accomplished career as a judge and the testimony of seven eminent witnesses at respondent’s hearing make it unequivocally clear that Justice Blackburne is the furthest thing from an “unfit incumbent.” Not only has she served as a judge with an unblemished disciplinary record since 1995, but she has also continued to serve without incident since June 2004, when this misconduct occurred.

Particularly impressive to me is the list of those who testified on her behalf—John Carro, Basil Paterson, Milton Mollen, Seymour Boyers, Steven Fisher, David Dinkins and Charles Rangel. Each of these people has known respondent for years. Several served with her on boards; Justice Fisher is one of her supervisors and selected her for the Drug Treatment Court; Mayor Dinkins appointed her to chair the New York City Housing Authority; and Justice Mollen appointed her to the Second Department Committee on Character and Fitness. Particularly notable is the fact that Justice Fisher urges her retention even after this misconduct, when it was he who entrusted her with the Drug Treatment Court assignment.

This is no ordinary collection of character witnesses. None of these eminent and accomplished jurists and leaders would vouch for Justice Blackburne in the face of her clear misconduct unless each believed it was aberrant and that it was in the public interest for her to

remain on the bench. Loyalty or personal relationship, in my view, could not distort the recommendations and predictions of any of these esteemed witnesses.

Finally, of utmost importance to the proper result in this case is the undisputed prognostication that Justice Blackburne will not engage in this type of behavior again: the majority concedes that respondent's behavior was "aberrant" (Majority decision, p. 13) and Commission counsel concedes that her behavior is unlikely to be repeated (Oral argument, p. 69). In my view, these concessions, along with the assessments of the eminent character witnesses and the evidence of Justice Blackburne's accomplishments and continuing service, render the majority's sanction a violation of our mandate to limit removal to "unfit incumbents" (*Matter of Reeves, supra*). Plainly, Justice Blackburne's distinguished career does not have to be extinguished to protect the public or the judiciary in the future.

No doubt the majority's decision is driven by its understandable sense of outrage at the shocking nature of Justice Blackburne's aberrant action. But this is just the sort of case where, because her actions were aberrant, we are mandated to consider more factors than the misconduct alone. This is a case where all the circumstances relating to the misconduct, as well as a judge's past and likely future contributions, should bear on the sanction decision. Justice Blackburne has made significant contributions and has much more to contribute. Regrettably, the majority's choice to exclude these crucial factors in the analysis is both legally and equitably wrong.

For these reasons, I dissent and vote to censure Justice Blackburne.

Dated: November 18, 2005

^[1] Justice Blackburne was a member of the board of the New York Civil Liberties Union where I was employed during the mid-1980s. I have never had any personal contact with her and my professional contact was limited to observing her as board member. When I informed the Commission, staff and respondent's counsel of these facts, there was no objection to my participation. I have independently concluded that there is no reason to recuse myself.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JAMES E. BROOKS**, a Justice of the Moriah Town Court, Essex County.

DECISION AND ORDER

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Alan J. Pope, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the Commission
Brennan & White LLP (by Joseph R. Brennan) for Respondent

The matter having come before the Commission on December 1, 2005; and the Commission having before it the Superseding Formal Written Complaint dated February 1, 2005, respondent's Verified Answer dated February 22, 2005, the Supplemental Formal Written Complaint dated May 6, 2005, respondent's Verified Answer dated June 10, 2005, and the Stipulation dated October 19, 2005; and the Commission, by order dated June 24, 2005, having designated Paul A. Feigenbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and a hearing been scheduled to commence in October 2005; and respondent having resigned from judicial office by letter dated October 3, 2005, effective December 31, 2005, and having affirmed that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if accepted by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued and the case closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: December 6, 2005

STIPULATION

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter “Commission”), the Honorable James E. Brooks, the respondent in this proceeding, and his attorney Joseph R. Brennan.

1. This Stipulation is presented to the Commission in connection with a formal proceeding pending against respondent.
2. Respondent has been a Justice of the Moriah Town Court, Essex County, since January 1992. He is not an attorney.
3. In November 2004, respondent was served by the Commission with a Formal Written Complaint, alleging *inter alia* that respondent wrote a letter on court stationery on behalf of a defendant facing charges in another town court and that respondent granted reductions, dismissals or adjournments in contemplation of dismissal in criminal cases without obtaining the prior consent of the district attorney.
4. On February 2, 2005, the Commission served respondent with a Superseding Formal Written Complaint, which alleged that respondent reduced a charge at arraignment without obtaining the district attorney’s consent.
5. On May 9, 2005, the Commission served respondent with a Supplemental Formal Written Complaint, which *inter alia* alleged that respondent engaged in an *ex parte* communication with another judge with regard to an order of protection issued previously in a matter transferred to respondent’s court.
6. Respondent filed Verified Answers denying most of the allegations of the Formal Written Complaint, Superseding Formal Written Complaint and Supplemental Formal Written Complaint.
7. The Commission designated Paul A. Feigenbaum, Esq., as referee to hear and report to the Commission with respect to all of the charges against respondent. The Referee has scheduled the hearing to commence in October, 2005.
8. Respondent tendered his resignation, dated October 3, 2005, effective December 31, 2005, and affirms that he will neither seek nor accept judicial office at any time in the future. A copy of respondent’s letter of resignation is attached.
9. Pursuant to law, the Commission has 120 days from the date of a judge’s resignation to complete the proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals. Pursuant to law, removal from office disqualifies a judge from holding judicial office in the future.
10. In view of respondent’s resignation and affirmation that he will neither seek nor accept judicial office in the future, all parties to this Stipulation respectfully request that the Commission close the pending matter based upon this Stipulation.
11. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if accepted by the Commission.

- s/ **Honorable James E. Brooks**
Respondent
- s/ **Joseph R. Brennan, Esq.**
Brennan & White
Attorney for Respondent
- s/ **Robert H. Tembeckjian, Esq.**
Administrator & Counsel to the Commission
(**Kathryn J. Blake**, Of Counsel)

LETTER OF RESIGNATION

October 3, 2005

Ms. Elaine C. Adkins
Town of Moriah – Town Clerk
38 Park Place
Port Henry, New York 12974

Dear Lanie,

Under the provisions of Public Officers Law, Section 31(2), I hereby official notify you that I will retire on December 31st of 2005.

I wish also to express my thanks to you and your staff at the Town Hall for the friendship and assistance which I have enjoyed over the past 14 years. If there is ever anything I can ever do to assist you, I would always be more than willing.

Sincerely,

s/ James E. Brooks

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MARIE A. COOK**, a Justice of the Chateaugay Town Court, Franklin County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Hughes & Stewart, PC (by Brian S. Stewart) for the Respondent

The respondent, Marie A. Cook, a justice of the Chateaugay Town Court, Franklin County, was served with a Formal Written Complaint dated February 1, 2005, containing three charges. Respondent filed an answer dated February 8, 2005.

On April 4, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be censured and waiving further submissions and oral argument.

On April 21, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Chateaugay Town Court since January 2002. She is employed as a school bus driver. She is not an attorney.

As to Charge I of the Formal Written Complaint:

2. In or about January 2003, Francis Helm was charged with Aggravated Harassment, on the complaint of Katie Chase. The matter was returnable before respondent.

3. Respondent was acquainted with both Francis Helm and Katie Chase, who were, respectively, a former and current student in the school district where respondent was employed as a school bus driver. Respondent is also Mr. Helm's distant cousin but is not related to Mr. Helm within the sixth degree of relationship.

4. On consent of the District Attorney, respondent adjourned the charge against Mr. Helm to May 20, 2003, when the defendant was scheduled to return from college. Respondent issued an order of protection for the defendant to stay away from Ms. Chase's home, school and school functions.

5. On or about May 19, 2003, a day before the adjourned date, the defendant came to respondent's court, spoke *ex parte* to respondent and submitted to respondent several items of alleged correspondence purportedly germane to the case involving Mr. Helm, Ms. Chase and Fallon Crawford, a friend of Ms. Chase.

6. Thereafter on May 19, 2003, based upon respondent's *ex parte* communication with the defendant and upon respondent's personal observations of Ms. Chase during school trips in which she was a passenger on respondent's school bus, respondent dismissed the charge against the defendant, without notice to or the consent of the District Attorney, as was required by Sections 170.40, 170.45 and 210.45 of the Criminal Procedure Law.

7. On May 19, 2003, without notice to the District Attorney or to Ms. Chase, respondent also issued an amended order of protection, which, *inter alia*, allowed Mr. Helm to play basketball at the gymnasium where Ms. Chase was a student.

8. In or about June 2003, after the District Attorney moved to restore the *Helm* case to the calendar and to disqualify respondent from the case, respondent restored the case to the calendar and recused herself.

As to Charge II of the Formal Written Complaint:

9. In or about March 2003, Eric Lamb was charged with Speeding, returnable before respondent.

10. In or about March 2003, respondent received a telephone call from Clinton Town Justice Daniel LaClair, who requested that respondent grant special consideration to Eric Lamb.

11. On or about March 31, 2003, as a result of her conversation with Judge LaClair, respondent allowed Mr. Lamb to plead guilty to a parking violation in satisfaction of the Speeding charge. Respondent recorded in her docket that the charge had been "reduced in the interest of Justice Danny LaClair."

12. Respondent failed to obtain the consent of the prosecution for the reduction in the *Lamb* case, as was required by Sections 220.10 and 340.20 of the Criminal Procedure Law.

As to Charge III of the Formal Written Complaint:

13. Between January 2002 and April 2004, in the 40 cases identified on Schedule A appended hereto, respondent engaged in unauthorized *ex parte* communications and/or reduced or dismissed the charges without the consent of the prosecution as required by Sections 170.40, 170.45, 170.55(1), 210.45, 220.10 and 340.20 of the Criminal Procedure Law.

Supplemental findings:

14. Respondent was new to the bench during the period at issue in these charges.

15. At the time, she had no regularly scheduled court date for the appearance of the district attorney in her court. Consequently, many defendants appeared in the absence of a prosecutor, on the return date of tickets issued by the police. When these defendants proffered explanations to respondent, she often accepted such explanations and disposed of the charges, in the belief she could do so because the defendants appeared in court on the date originally chosen by the ticket-issuing police officers.

16. Respondent now recognizes that she may not discuss the merits of a case *ex parte*, and that the prosecution must be accorded an opportunity to be heard before she reduces or dismisses charges against a defendant.

17. Respondent now has a regularly scheduled monthly court date for appearances in her court by the District Attorney's Office. The District Attorney of Franklin County confirms that respondent is now diligent about scheduling trials and notifying his office of matters requiring his participation.

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)(6) and 100.3(E)(1) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent disposed of numerous cases by dismissing or reducing the charges, or granting an adjournment in contemplation of dismissal, without notice to or the consent of the prosecution as required by law. Prior to the dispositions in many cases, respondent also solicited or received unauthorized, *ex parte* information. Respondent's conduct was contrary to statutory requirements (Crim. Proc. Law §§170.40, 170.45, 170.55(1), 210.45, 220.10 and 340.20) and to ethical standards requiring a judge to accord to every person with a legal interest in a proceeding the right to be heard according to law (Rules Governing Judicial Conduct, §100.3[B][6]). *See, e.g., Matter of More*, 1996 Annual Report 99 (Comm. on Judicial Conduct) (judge engaged in *ex parte* communications and dismissed cases without notice to the prosecution); *Matter of VonderHeide*, 72 NY2d 658 (1988) (judge, *inter alia*, routinely made telephone calls outside of court in order to determine the facts in pending matters).

Respondent's misconduct was particularly egregious in the *Helm* case, where, one day prior to the scheduled court date, she dismissed a charge of Aggravated Harassment and issued an amended order of protection, without notice to or the consent of the District Attorney, based upon her inappropriate, *ex parte* discussion with the defendant, her *ex parte* examination of documents the defendant provided, and her own previous observations of the complaining witness. Such a one-sided disposition, with no opportunity for the prosecution or complaining

witness to be heard, is totally contrary to basic principles governing the fair and proper administration of justice.

It was also egregious misconduct for respondent to grant a reduction in the *Lamb* case based upon an *ex parte* request from another judge seeking special consideration for the defendant. Such conduct constitutes ticket-fixing, which is a form of favoritism that has long been condemned. In *Matter of Byrne*, 47 NY2d (b), (c) (1979), the Court on the Judiciary declared that “a judicial officer who accords or requests special treatment or favoritism to a defendant in his court or another judge's court, is guilty of *malum in se* misconduct constituting cause for discipline.” See also, e.g., *Matter of Bulger*, 48 NY2d 32 (1979). Respondent underscored the favoritism underlying the disposition by noting on the docket that the charge had been “reduced in the interest of Justice Danny LaClair.” By acceding to a request for special consideration, respondent engaged in conduct that subverts the entire system of justice, which is based on the impartiality and independence of the judiciary. In this case, respondent again imposed the disposition without the required consent of the prosecution.

Respondent’s handling of these cases suggests a fundamental misunderstanding of important statutory procedures and a misapprehension of the proper role of a judge. A pattern of misconduct contrary to basic statutory procedures may result in removal, especially where the judge’s actions deprive individuals of liberty. There was no such deprivation here, where respondent’s dispositions were based, in large part, upon a mistaken belief that she could accept defendants’ explanations and reduce or dismiss charges in the absence of the prosecution.

In mitigation, respondent was new to the bench during the period at issue and now recognizes the importance of avoiding *ex parte* communications and ensuring that the prosecution is appropriately accorded an opportunity to be heard. Respondent now has a regularly scheduled monthly court date for appearances by the District Attorney’s office, which has confirmed that respondent is now diligent about scheduling trials and notifying his office of matters requiring his participation. Respondent has acknowledged her misconduct and appears to have made sincere efforts to ensure that her procedures are in compliance with statutory requirements.

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

Mr. Goldman, Mr. Coffey, Mr. Felder, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Emery and Judge Klonick dissent and vote to reject the Agreed Statement of Facts on the basis that the disposition is too lenient and that respondent should be removed. Mr. Emery files a dissenting opinion which Judge Klonick joins insofar as it concludes that respondent’s conduct warrants removal.

Ms. DiPirro and Ms. Hernandez were not present.

Dated: August 31, 2005

Schedule A is available on the Commission's website at:
http://www.scjc.state.ny.us/Determinations/C/cook,_marie.htm

DISSENTING OPINION BY MR. EMERY, IN WHICH JUDGE KLONICK JOINS IN PART

The *Cook* and *LaClair* cases pose the issue of what is the proper sanction for judges who decide cases, not based upon the law and the facts, but for their personal benefit or for the benefit of their friends. I consider this category of judicial misconduct to be the most serious of any that comes before the Commission. The question these cases raise is whether a sanction less than removal is supportable for judges who abuse their power by making decisions that are devoid of legal analysis, contrary to the facts as presented, and designed knowingly and solely to further their own personal interests.

The Court of Appeals has defined the purpose of disciplinary proceedings as “not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents” (*Matter of Reeves*, 63 NY2d 105, 111 [1984], citing *Matter of Waltemade*, 37 NY2d [a], [III]). In essence, our duties are protective rather than punitive. Our goal is to preserve the integrity and perception of judicial integrity within the justice system for litigants, victims, the state and other participants in the process by upholding the Rules on Judicial Conduct. In doing so, we must be fair to the judges who are charged and sanctioned. We must realistically evaluate the individual circumstances of each violation. Regularly, judges assert that their misconduct is mitigated by a myriad of factors such as provocation by litigants or lawyers (*Matter of Mills*, 2005 Annual Report 185 [Comm. on Judicial Conduct]; *Matter of Bauer*, 3 NY3d 158 [2004]); personal, medical, family or psychological circumstances (*Matter of Horowitz*, 2006 Annual Report ___ [Comm. on Judicial Conduct]; *Matter of Washington*, 100 NY2d 873 [2003]); good faith mistakes of law (*Matter of Bauer, supra*; *Matter of Feinberg*, __ NY3d __, No. 125 [June 29, 2005]); an absence of personal, financial or other economic benefit (*Matter of DiStefano*; 2005 Annual Report 145 [Comm. on Judicial Conduct]; *Matter of Feinberg, supra*); and speedy and spontaneous acknowledgment of the violation and sincere apology to those affected (*Matter of Allman*, 2006 Annual Report ___ [Comm. on Judicial Conduct]; *Matter of DiStefano, supra*).

But excuses and exceptions cannot be allowed to eviscerate the fundamental rule animating the Commission's work: that judging must be fair, unbiased, untainted, and driven by the law and the facts, and that the personal desires and interests of individual judges can have no role whatsoever in decision-making. How to uphold this rule in the face of competing interests and individual circumstances, and how to determine the appropriate sanction based upon a legally supportable neutral principle, is a constant struggle for the members of the Commission. The *Cook* and *LaClair* cases present what I believe is an opportunity to clarify how the Commission should make sanction decisions in a critical category of the cases.

In *LaClair*, Judge LaClair concedes that he telephoned Judge Cook and asked her to “help” a friend, Eric Lamb, who had received a Speeding ticket. In *Cook*, it is undisputed that Judge Cook received a phone call from Judge LaClair seeking special consideration for Mr. Lamb and that, as a result of the call, Judge Cook reduced Lamb's Speeding charge to a parking

violation. Remarkably, Judge Cook noted on the court docket that the charge had been “reduced in the interest of Justice Danny LaClair.”

Both justices also admit to other violations. Judge Cook concedes that *ex parte* she dismissed charges and amended a protective order as well as reduced or dismissed charges in 40 cases. In mitigation, she notes she is not an attorney, is new to the bench, and claims that the court schedule required her to deal *ex parte* with defendants. She also says she has reformed her practices to include the District Attorney.

Judge LaClair admits that he also asked a now-deceased town justice to fix a Speeding ticket for LaClair's wife with the result that the charge was adjourned in contemplation of dismissal. In mitigation, Judge LaClair asserts that he has been cooperative with the Commission and that he spontaneously confessed.

I dissent from the Commission’s determination of censure in these cases for one simple reason: removal is the only sanction available to the Commission that is commensurate with the corrosive effect of judicial decisions perverted by a judge's personal interest. This is a category of misconduct that strikes at the heart of our justice system. Decisions based on the personal interests of the judges, rather than the law and the facts, corrupt the system in two different and equally corrosive respects: they deny justice -- the simple but profound idea that acts contrary to law have consequences, no matter who the wrongdoer may be -- in the individual case at issue; and they infect the public with outrage and a depressing sense of despair when it becomes known that justice is not, in fact, blind in these cases. But, in contrast to judges whose misconduct is personal -- misbehavior off the bench that does not involve distortions of the justice system itself -- judges who pervert decision-making and abuse their power or discretion in their official capacity for their personal gain breed a special form of public cynicism and anger. I find it difficult, if not impossible, to excuse this category of judicial misconduct. And I simply cannot accept the proposition that misconduct of this sort is victimless. In fact, its victims are all of us, and the justice system itself.

With respect specifically to ticket-fixing, this Commission 28 years ago condemned this practice and demonstrated how the system of justice was “subverted” by such conduct (*Ticket Fixing: The Assertion of Influence in Traffic Cases*, Interim Report 1977 at p. 17). In that report the Commission stated: “The fixing of traffic tickets creates an illicit atmosphere within the courts which could easily carry over to other cases” (p. 19). The Commission discovered hundreds of judges who had engaged in ticket-fixing, either by seeking favors of other judges or by granting favors at the request of persons with influence. The practice was so routine that it was not unusual for Commission investigators to find letters requesting special consideration in the court files, clipped to copies of the tickets or dockets. By releasing its Interim Report and by imposing public discipline in over 140 cases, the Commission placed every judge in the State on notice that ticket-fixing would not be tolerated, and by the early 1980s, ticket-fixing had all but ended in this State.

Thereafter, incidents of ticket-fixing were treated with particular severity, since judges now had the benefit of a significant body of case law concerning the impropriety of ticket-fixing. In 1985 the Court of Appeals upheld the Commission’s determination of removal of a judge who had interceded on two Speeding tickets issued to his son and his son’s friend, stating

that “ticket-fixing is misconduct of such gravity as to warrant removal, even if this matter were petitioner’s only transgression” (the judge had previously been disciplined for similar misconduct) (*Matter of Reedy*, 64 NY2d 299, 302 [1985]). In a later case, the Court reiterated that “as a general rule, intervention in a proceeding in another court should result in removal,” although, citing mitigating factors, the Court censured a town justice who had inquired about procedures in connection with his son’s case but had not made an overt request for special treatment. *Matter of Edwards*, 67 NY2d 153, 155 (1986). Surely, the message from those cases must be that ticket-fixing will no longer be tolerated in this State and that a judge who engages in such conduct faces removal.

The respondents here had the lesson of recent history. They may be contrite when caught, but no amount of contrition can override such inexcusable conduct. *See, Matter of Bauer, supra*, 3 NY3d at 165. Neither the administration of justice nor the people of the state of New York can afford the message that ticket-fixing will result in a mere public censure. Only removal from office will demonstrate the Commission’s view of how harmful this conduct is to the administration of justice.

We are fortunate that, despite occasional misconduct of this type, we still have a judicial system that is the envy of the world and trusted and respected by most of those who participate in it and, more importantly, society at large. But cynicism and alienation are lurking dangers that will be the inevitable consequence of any tolerance for judicial misconduct of this sort. Judges who have every opportunity, and a fundamental obligation, to obey the rules should not escape removal when they intentionally pervert justice for their own benefit.

I believe that focusing the Commission's ultimate sanction on those who fall into this narrow category properly fulfills the Court of Appeals’ mission for us (‘to safeguard the Bench from unfit incumbents’). This is not a punitive role for the Commission. We are entrusted with attempting to preserve the honor and integrity of the judicial function and to thereby engender public trust and respect. If we abdicate this responsibility by allowing judges who use the system for personal gain to remain in office, we will have failed in our own legal obligation to uphold the principles embodied in the misconduct Rules. Worse, we will fail, in the larger sense, to protect the system of justice.

Cook and *LaClair* are poster-cases for application of these principles. *Cook* knowingly and intentionally distorted her judicial decision to curry favor with her fellow justice. *LaClair* twice knowingly and intentionally used his position as a judge to have another judge render a decision that *LaClair* wanted. All of this occurred in flat contravention of the law and of the facts of the cases which these judges have sworn to decide fairly. This is not tolerable -- no matter how apologetic, cooperative or unsophisticated these respondents claim to be. Had either of these judges accepted a bribe -- no matter how small -- from a third party, they would face imprisonment. That they have corrupted the judicial process for the approbation of their friends, without money changing hands, warrants no less than our most severe sanction.

For me, proven misconduct of this sort that invidiously distorts judicial decision-making presumptively warrants removal. Were the sanction of suspension available, I might also consider it in certain compelling cases. However, a sanction of less than removal under the current array of available sanctions, which leaves a judge in office who has knowingly abdicated

his/her official decision-making for personal gain, is simply inconsistent with a justice system rooted in procedural and substantive fairness, and with the Commission's duty to protect the system and the public that relies upon it.

Therefore, I respectfully dissent and vote to reject the Agreed Statement in both cases on the basis that the proposed disposition of censure is insufficient.

Dated: August 31, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **BRIAN F. DE JOSEPH**, a Justice of the Supreme Court, Onondaga County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Emil M. Rossi for Respondent

The respondent, Brian F. DeJoseph, a Justice of the Supreme Court, Onondaga County, was served with a Formal Written Complaint dated December 13, 2004, containing one charge. Respondent filed an answer dated January 12, 2005.

On May 6, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be admonished and waiving further submissions and oral argument.

On June 23, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Supreme Court, Onondaga County since January 1, 2001. Prior to that, he served as a Syracuse City Court Judge and Supervising Judge of the Syracuse City Court. Respondent is an attorney.
2. Respondent and Robert Tisdell, an attorney who practices law in Syracuse, New York, have known each other and been friends for more than 35 years. Together, they attended the same high school, college and law school.
3. Robert L. Tisdell, II, is the son of Robert Tisdell.
4. On or about October 19, 2000, Robert L. Tisdell, II, who was 21 years old, was arrested in Syracuse on charges of Disorderly Conduct and Resisting Arrest. At the time, respondent was the Supervising Judge of the Syracuse City Court.

5. At approximately 3:00 AM, the defendant's mother, Anna Tisdell, telephoned respondent at his home and reported that the defendant had been arrested, was incarcerated and was injured. The defendant's mother was distraught and crying. Respondent said he would drive to the jail to meet the defendant's father, Robert Tisdell.

6. Respondent was concerned about whether the defendant's injuries were serious. Respondent was also concerned about the well-being of the defendant's parents.

7. The jail is located in the Public Safety Building on State Street in Syracuse. Respondent drove to the building alone and met Mr. Tisdell outside.

8. Mr. Tisdell told respondent that his son had been beaten. Mr. Tisdell asked respondent to have his son released.

9. Respondent refused Mr. Tisdell's request that he issue an order releasing the defendant.

10. Mr. Tisdell then asked respondent for the telephone number of the judge who was assigned to arraignments. Respondent did not have the number, so he took Mr. Tisdell into his chambers, also located in the Public Safety Building on State Street.

11. While in his office with Mr. Tisdell, respondent telephoned Syracuse City Court Judge Jeffrey R. Merrill. As the Supervising Judge of the Syracuse City Court, respondent was Judge Merrill's administrative superior.

12. Respondent was aware that Judge Merrill was "on-call" for after-hours arraignments and applications. Respondent told Judge Merrill that Robert Tisdell's son had been arrested, charged and held in jail. Respondent said that Mr. Tisdell was in respondent's office and wanted to speak with Judge Merrill. Respondent gave the telephone to Mr. Tisdell, who spoke to Judge Merrill, described his observation of the defendant's physical condition and requested that the defendant be ordered released from jail.

13. A short time thereafter, Judge Merrill telephoned respondent's chambers and told respondent that he had ordered the defendant released from custody.

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) and 100.2(C) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By contacting a judge on behalf of a friend whose son had been arrested and was being held in jail, respondent lent the prestige of judicial office to advance his friend's private interests. Such assertion of special influence is clearly prohibited by the ethical standards (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):

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.

After receiving a call from the defendant's mother, respondent had ample opportunity to consider his conduct as he drove to the jail to meet with the defendant's father. Although respondent appropriately refused his friend's request that he personally order the defendant's release, he telephoned the judge who was "on call" for after-hours arraignments and applications, told the judge that he was calling from his office, identified the defendant's father and then handed the phone to the father, who requested the defendant's release. As an experienced attorney, the defendant's father was presumably capable of placing the call himself and asking for the defendant's release without respondent's introduction and assistance. Instead, by initiating the call and introducing the attorney, respondent lent his implicit endorsement to the attorney's request, which was granted a short time thereafter. As the judge's administrative superior, respondent should have recognized that his after-hours call on behalf of a defendant would have particular impact on the recipient.

Notwithstanding that respondent did not make any specific request for favorable treatment, his conduct conveyed the appearance that he was lending the prestige of judicial office in order to influence the judge to grant his friend's request. Such favoritism, or even the appearance of favoritism, "is wrong, and always has been wrong," and undermines the administration of justice. *Matter of Byrne*, 420 NYS2d 70, 71 (Ct on the Judiciary 1979). *See also, Matter of LoRusso*, 1988 Annual Report 195 (Comm. on Judicial Conduct) (judge called the police station to request the release of his friend's son); *Matter of McGee*, 1985 Annual Report 176 (Comm. on Judicial Conduct) (judge spoke to the judge and prosecutor handling his nephew's case in order to influence the bail decision); *Matter of Young*, 2001 Annual Report 129 (Comm. on Judicial Conduct) (judge contacted a Family Court hearing examiner at the request of a friend whose case was pending, acted as his friend's advocate and attempted to advance his friend's interests).

Difficult as it may be to refuse a request for help from a long-time friend under such circumstances, 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.

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano, Mr. Pope and Judge Ruderman concur.

Judge Peters was not present.

Dated: July 5, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RICHARD T. DI STEFANO**, a Justice of the Colonie Town Court, Albany County.

DECISION AND ORDER

BEFORE:

Lawrence S. Goldman, Esq., Chair
Alan J. Pope, Esq., Vice Chair
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
E. Stewart Jones, Jr., for the Respondent

The matter having come before the Commission on November 10, 2005; and the Commission having before it the Formal Written Complaint dated August 12, 2005, and the Stipulation dated October 17, 2005; and respondent having resigned as Colonie Town Justice on August 17, 2005, having acknowledged that he cannot successfully defend the pending charge, and having affirmed that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if approved by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued and the matter closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: November 16, 2005

STIPULATION

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RICHARD T. DI STEFANO**, a Justice of the Colonie Town Court, Albany County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission on Judicial Conduct ("Commission"), and the Honorable Richard T. DiStefano ("respondent"), who is represented by E. Stewart Jones Jr., Esq., as follows:

1. Respondent, who is an attorney, has served as a Justice of the Colonie Town Court since January 2002.

2. On August 16, 2005, respondent was served by the Commission with a Formal Written Complaint, which alleged that by Order dated August 4, 2005, a copy of which is attached hereto as Exhibit A, respondent was suspended from the practice of law by the Supreme Court, Appellate Division, Third Department, for allegations of professional misconduct by respondent as an attorney. The Formal Written Complaint further alleged that, by reason of the foregoing, respondent should be disciplined for cause, pursuant to the New York State Constitution and the Judiciary Law, in that he failed to abide by Sections 100.1 and 100.2(A) of the Rules Governing Judicial Conduct, and lacks fitness for judicial office.

3. On August 17, 2005, respondent tendered his resignation as Colonie Town Justice.

4. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from the date of a judge's resignation to complete the proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.

5. The parties to this Stipulation respectfully request that the Commission close the pending matter based on (a) respondent's acknowledgement, by this Stipulation, that he cannot successfully defend the charge pending against him, and (b) his resignation from judicial office.

6. Respondent affirms that he will neither seek nor accept judicial office at any time in the future.

7. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if approved by the Commission. All parties to this Stipulation agree that under the present circumstances and in view of respondent's resignation from judicial office, this resolution is in the best interest of the public.

Dated: October 17, 2005

s/ **Honorable Richard T. DiStefano**
Respondent

s/ **E. Stewart Jones, Esq.**
Attorney for Respondent

s/ **Robert H. Tembeckjian**
Administrator and Counsel to the Commission
Cathleen S. Cenci, Esq., Of Counsel

EXHIBIT A

State of New York
Supreme Court, Appellate Division
Third Judicial Department
Decided and Entered: August 4, 2005 D-46-05

In the Matter of RICHARD T. DI STEFANO, an Attorney.

COMMITTEE ON PROFESSIONAL STANDARDS,
Petitioner;

RICHARD T. DI STEFANO,
Respondent.

Calendar Date: July 11, 2005

Before: Mercure, J.P., Mugglin, Rose, Lahtinen and Kane, JJ.

Mark S. Ochs, Committee on Professional Standards, Albany
(Michael Creaser of counsel), for petitioner.

Richard T. Di Stefano, Albany, respondent pro se.

Per Curiam.

Respondent was admitted to practice by this Court in 1986. He maintains an office for the practice of law in the City of Albany.

Petitioner has filed nine charges of professional misconduct against respondent, including allegations of substantial conversion of client funds over a period of years which continued as late as April of this year. Simultaneously with the filing of the petition of charges, petitioner moves to suspend respondent from the practice of law pending consideration of the disciplinary charges against him, pursuant to this Court's rules (see 22 NYCRR 806.4 [f]). Respondent admits the charges and specifications, except for specification 1 of charge VI, which petitioner withdraws. Respondent has submitted an affirmation in opposition to petitioner's motion. We find that respondent is guilty of professional misconduct immediately threatening the public interest and therefore grant petitioner's motion. Although respondent professes reform, the motive and means for continuing his pattern of misconduct are still present. We also note that respondent has been previously cautioned by petitioner on two occasions and censured by this Court in 2003 (see Matter of Di Stefano, 309 AD2d 1060 [2003]).

Mercure, J.P., Mugglin, Rose, Lahtinen and Kane, JJ., concur.

ORDERED that petitioner's motion is granted; and it is further

ORDERED that respondent is suspended from practice, effective upon service on respondent of this decision and order and until further order of this Court; and it is further

ORDERED that respondent, for the period of suspension, is commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another; and respondent is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority; or to give to another an opinion as to the law or its application, or any advice with relation thereto; and it is further

ORDERED that respondent shall comply with the provisions of this Court's rules regulating the conduct of suspended attorneys (see 22 NYCRR 806.9).

ENTER:

Michael J. Novack
Clerk of the Court

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROY M. DUMAR**, a Justice of the Mohawk Town Court, Montgomery County.

DECISION AND ORDER

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Robert E. Abdella for the Respondent

The matter having come before the Commission on September 30, 2005; and the Commission having before it the Formal Written Complaint dated June 20, 2005, respondent's Answer dated August 9, 2005, and the Stipulation dated September 16, 2005; and respondent having resigned from judicial office on September 7, 2005, effective October 15, 2005, and having affirmed that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if approved by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued and the matter closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

October 7, 2005

STIPULATION

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROY M. DUMAR**, a Justice of the Mohawk Town Court, Montgomery County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter

“Commission”), Roy M. Dumar, the respondent in this proceeding, and his attorney Robert E. Abdella, Esq.

1. This Stipulation is presented to the Commission in connection with a formal proceeding pending against respondent.

2. Respondent has been a Justice of the Mohawk Town Court since September 1999. He is not an attorney.

3. On June 21, 2005, respondent was served with a Formal Written Complaint, containing two charges, alleging that between September 2002 and September 2004, respondent repeatedly asserted his judicial office in communications with police officers, other judges and court personnel in his own and other courts, in attempting to further his own and his wife’s criminal complaints against her ex-husband and sister-in-law, and in related civil matters. The Complaint further alleged that from on or about March 31, 2004, to on or about September 3, 2004, respondent improperly lent the prestige of judicial office in connection with his and his wife’s personal disputes with her former husband, notwithstanding that respondent was on notice that such conduct was improper, in that the Commission instituted proceedings against him on February 11, 2004, culminating in a determination dated May 18, 2004, that he be publicly censured for invoking his judicial office in connection with a private dispute. Respondent submitted an Answer dated August 9, 2005.

4. Respondent tendered his resignation, dated September 7, 2005, effective October 15, 2005, and affirms that he will neither seek nor accept judicial office at any time in the future. A copy of respondent’s letter of resignation is attached to this Stipulation.

5. Pursuant to law, the Commission has 120 days from the date of a judge’s resignation to complete the proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.

6. All parties to this Stipulation respectfully request that the Commission close the pending matter based upon this Stipulation.

7. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if accepted by the Commission.

Dated: September 16, 2005

s/ **Honorable Roy M. Dumar**
Respondent

s/ **Robert E. Abdella, Esq.**
Attorney for Respondent

s/ **Robert H. Tembeckjian, Esq.**
Administrator & Counsel to the Commission
(**Cathleen S. Cenci**, Of Counsel)

LETTER OF RESIGNATION

September 7, 2005

To: Chief Administrator of the Courts

From: Roy M. Dumar

Subject: Position of Town Justice, Town of Mohawk

Please accept this as notification of my resignation from position of Town Justice, Town of Mohawk effective October 15, 2005.

s/ **Roy M. Dumar**

cc: Cathleen S. Cenci, Chief Attorney
Karen A. Ford, Town Clerk, Town of Mohawk

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MICHAEL H. FEINBERG**, Surrogate, Kings County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg, Melissa DiPalo and Jennifer Tsai, Of Counsel) for the Commission
Harvey L. Greenberg for Respondent

The respondent, Michael H. Feinberg, Surrogate of Kings County, was served with a Formal Written Complaint dated March 18, 2003, containing one charge. Respondent filed a verified answer dated August 12, 2003.

By Order dated May 22, 2003, the Commission designated Honorable Felice K. Shea as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 5 to 9, 26 and 27, 2004, in New York City, and the referee filed a report dated July 13, 2004.

The parties submitted briefs and replies with respect to the referee's report. On September 23, 2004, 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 the Surrogate of Kings County since January 1, 1997. Prior to that, he served as a Civil Court judge from 1981 to 1990 and as a Supreme Court justice from 1990 through 1996.

2. Louis R. Rosenthal, an attorney, is a former Civil Court judge, Criminal Court judge and assistant United States attorney, and holds a Master of Laws degree. Mr. Rosenthal's father had been the Public Administrator of Kings County from 1958 to 1964. While Mr. Rosenthal was in private practice from 1982 to 1997, approximately 5% of his work was in the field of Surrogate's Court litigation.

3. Respondent and Mr. Rosenthal met while they were students at Brooklyn Law

School from 1964 to 1967. Over the years they maintained a friendly relationship. From 1981 to 2001 they lived five blocks away from each other. Occasionally they lunched together, dined together and drove to work together. Respondent attended Mr. Rosenthal's daughter's wedding and the bar mitzvahs of Mr. Rosenthal's sons, and they celebrated other family milestones together, such as housewarming and birthday parties.

4. Mr. Rosenthal supported respondent's campaign for election to the Surrogate's Court. He gave respondent advice and solicited political support, votes and money for respondent's candidacy.

5. After respondent won the Democratic Party primary election for Surrogate in 1996, Mr. Rosenthal told respondent that he would like to be Counsel to the Public Administrator ("Counsel"), an office which the Surrogate fills by appointment pursuant to Section 1108(2)(a) of the Surrogate's Court Procedure Act ("SCPA").

6. Sometime after Mr. Rosenthal made this request and shortly after respondent took office as Surrogate, respondent discharged the longtime prior Counsel, the law firm of Hesterberg and Keller, and appointed Mr. Rosenthal as Counsel. Before appointing Mr. Rosenthal, respondent did not interview any candidates for the position. Mr. Rosenthal has served as Counsel since that time and, as of the date of this determination, continues to serve in that position. In addition to serving as Counsel, Mr. Rosenthal maintains a private practice of law.

7. The Public Administrator administers the estates of decedents who die without a will or where there is no qualified individual who has petitioned to administer the estate. Counsel's duties include petitioning for letters of administration, marshaling the estate assets, searching for heirs, conducting kinship hearings, disposing of real property, filing tax returns, and generally representing the interests of the Public Administrator in all aspects of administration of estates. Counsel's compensation is paid from the assets of the estate and approved by the Surrogate (SCPA §1108[2][b], [c]).

8. Respondent testified that, shortly after his election as Surrogate, he "skimmed through" the SCPA. He further testified that he "overlooked" and "missed" Section 1108(2)(c), which provides that any legal fee allowed by the Surrogate to Counsel:

...shall be supported by an affidavit of legal services setting forth in detail the services rendered, the time spent, and the method or basis by which requested compensation was determined. In fixing the legal fees, the court shall consider the time and labor required, the difficulty of the questions involved, the skill required to handle the problems presented, the lawyer's experience, ability and reputation, the amount involved and benefit resulting to the estate from the services, the customary fee charged by the bar for similar services, the contingency or certainty of compensation, the results obtained, and the responsibility involved.

9. From January 1997 to May 2002, notwithstanding that Mr. Rosenthal did not file

any affidavit of legal services when requesting a fee, respondent awarded legal fees to Mr. Rosenthal in hundreds of Public Administrator cases without an affidavit of legal services.

10. From September 9, 1993, the effective date of Section 1108(2)(c), the fee applications of Hesterberg and Keller to respondent's predecessor, Surrogate Bernard M. Bloom, were supported by affidavits of legal services in all Public Administrator matters where the fee request exceeded \$5,000. These affidavits contained information about the legal and non-legal work performed by Hesterberg and Keller in each case.

11. From January 1997 to May 2002, in the other four counties of New York City, the Surrogates required affidavits of legal services submitted by Counsel before awarding fees in Public Administrator matters.

12. After an article in the *Daily News* raising the issue of the affidavit requirement came to respondent's attention in May 2002, respondent ordered that all future requests for fees from Counsel be accompanied by an affidavit of legal services. Respondent also ordered that Mr. Rosenthal file *nunc pro tunc* affidavits of legal services in all previous matters in which a fee had been awarded, and Mr. Rosenthal did so. As a result of such affidavits, no fee awards were repaid or otherwise changed.

13. From January 1997 to May 2002, on Public Administrator matters for which he was to be compensated, Mr. Rosenthal regularly requested and received a legal fee of 6% of the gross value of the estate when he filed an initial accounting with the court. Often, Mr. Rosenthal requested and obtained advance payments of a portion of his fee from the Public Administrator during the pendency of a matter before the filing of an initial accounting.

14. When he submitted the final decree to the Court, Mr. Rosenthal regularly requested and received an additional 2% fee with no submission specifying legal services performed to justify the additional amount. The fee request was for a dollar amount that would make the total fee equal 8% of the appreciated gross value of the estate at the time of the decree. For estates valued at less than \$25,000, there was a minimum fee of \$1,500.

15. After receiving Mr. Rosenthal's requests for fees, the Chief Clerk of the Surrogate's Court regularly reviewed the files and calculated the value of the estate, the fee paid to Mr. Rosenthal at the time of the initial accounting, and the dollar amount and percentage needed to make Mr. Rosenthal's fee equal to 8% of the value of the gross estate. The Clerk brought the files to respondent's chambers with a Post-It note attached to each file showing the calculations made by the Clerk or Mr. Rosenthal. The Post-It note was prepared sometimes by Mr. Rosenthal's office, sometimes by the Clerk, and sometimes by both. The Clerk summarized each case and answered any questions respondent asked.

16. Respondent customarily adopted the figures on the Post-It notes and awarded a legal fee to Mr. Rosenthal totaling 8% of the total value of the gross estate, or very close to that amount. (Often the figures were rounded off.)

17. Respondent did not examine individual files before he signed the decrees. The files were on respondent's desk, with the decree on the outside ready to be signed.

18. In awarding legal fees to Mr. Rosenthal from January 1997 to May 2002, respondent did not give individualized consideration to each request for fees from Mr. Rosenthal and failed to weigh the factors set forth in SCPA Section 1108(2)(c). He did not weigh the time and labor expended, the difficulty of the questions involved, the degree of skill required to handle the problems presented, the amount involved and the benefit to the estate from the legal services, the customary fee charged by the bar for similar services, the contingency or certainty of compensation, the results obtained and the responsibility involved in each case, as specifically required by Section 1108(2)(c).

19. From January 1997 to May 2002, respondent awarded fees to Mr. Rosenthal totaling approximately \$9,000,000, which were paid from estate assets in Public Administrator matters.

20. In addition to the legal fees respondent awarded to Mr. Rosenthal, Mr. Rosenthal received compensation for representing estates at real estate closings. He also received referral fees from wrongful death cases he referred to other attorneys. For example, in the *Estate of Bertha Kallman*, Mr. Rosenthal received a referral fee in a wrongful death action of approximately \$33,000 in addition to a fee of approximately \$70,000 for legal services. The referral fees were not paid from estate assets, but rather from the attorney's fee in the wrongful death cases. The amount of additional compensation for real estate closings and the total net value of the wrongful death proceeds were not included in the value of the estate for purposes of computing Mr. Rosenthal's 8% legal fee award.

21. Unlike Counsel in Kings County, Counsel in New York County do not receive any such additional fees. The record does not indicate whether Counsel in other counties receive such additional fees.

22. The Attorney General of the State of New York has an interest in estates handled by the Public Administrator and in the fees awarded to Counsel because the value of an estate may be transferred to the State if heirs are not located.

23. The Attorney General attempted to place a cap of 6% on the fees of Counsel in Kings County in order to conform the fees in Brooklyn with the fees awarded by Surrogates to Counsel in the other counties of New York City. On January 13, 1988, respondent's predecessor, Surrogate Bloom, approved an agreement between Hesterberg and Keller and the Office of the Attorney General limiting Counsel's fees to 6% of the gross estate in estates over \$7,500, but permitting Counsel to request an additional fee for specified "litigation or special services" such as kinship hearings.

24. By letter to the Attorney General dated August 4, 1994, Hesterberg and Keller confirmed its agreement with the Attorney General's office to limit Counsel's fees to 6% of the first \$300,000 of estate assets and 5% of the excess over \$300,000. The agreement permitted Hesterberg and Keller to request an additional fee for additional legal services performed after the accounting.

25. In both the 1988 and the 1994 agreements, the maximum fee was set at 6%, although Hesterberg and Keller negotiated a proviso under which they could apply for additional

fees under some circumstances. In practice, an additional 2% fee was regularly applied for. Surrogate Bloom generally granted the requests and set total fees in most fee-generating cases at 8%, but did not grant 8% automatically.

26. Although the Attorney General was served in all fee-generating Public Administrator matters with notice of the accounting and of the decree showing the amount of Counsel's fees, there is no evidence in the record that the Attorney General's office objected to any fees awarded to Counsel by respondent.

27. Although respondent was not a party to the 1988 and 1994 agreements with the Attorney General's office, he knew of the 1988 agreement and should have known of the 1994 agreement, and he should have considered the agreements when awarding legal fees to Mr. Rosenthal.

28. In the other four counties of New York City, the legal fees awarded to Counsel by the Surrogates did not exceed 6% during the period from January 1997 to May 2002.

29. Respondent's fees of 8% to Mr. Rosenthal from January 1997 to May 2002 (a) exceeded the percentage awarded to Counsel in the other New York City counties during that period, (b) exceeded the guidelines outlined in the 1988 and 1994 agreements with the Attorney General, and (c) were not tailored in each case to the factors enumerated in SCPA Section 1108(2)(c).

30. According to respondent, the fees of 8% were intended in part to compensate Counsel for administrative work that the government-funded Public Administrator's office should have done. Respondent, who appointed the Public Administrator, did not require the Public Administrator's office to do this work. Counsel in New York County also performed non-legal administrative tasks.

31. The additional 2% in fees from estate assets that respondent awarded to Mr. Rosenthal from January 1997 to May 2002 amounted to over \$2,000,000.

32. Respondent's conduct in routinely awarding Counsel an 8% legal fee (6% at the time of the initial accounting and 2% at the time of the final decree), in addition to closing and referral fees, circumvented the 1988 and 1994 agreements with the Attorney General's office.

33. In October 2002, The Interim Report and Guidelines of the Administrative Board for the Offices of the Public Administrators Pursuant to SCPA Section 1128 imposed a 6% cap on the legal fees requested by Counsel, with smaller percentages for larger estates. Since that date, the fees awarded by respondent to Mr. Rosenthal have not exceeded 6%.

34. Respondent gave testimony at the hearing that was incredible, evasive and unreliable, including the following:

(a) Respondent's testimony that during the period covered by the Formal Written Complaint he was not aware that SCPA required the filing of affidavits of legal services by Counsel was not credible;

(b) Respondent's testimony that in awarding fees to Counsel in every Public Administrator case he considered the factors enumerated in SCPA Section 1108(2)(c) was not credible, and his specific testimony, when questioned about dozens of individual cases in which he awarded fees of 8%, that in each case he evaluated each of the statutory factors in determining the fee was not credible;

(c) Respondent denied that he ever saw a Post-It note from Mr. Rosenthal attached to a final decree, yet Mr. Rosenthal regularly attached a Post-It note to the final decree indicating the fee he requested, and when respondent examined a file he had brought to the hearing, a Post-It note from Mr. Rosenthal was affixed to the decree (Comm. Ex. 485);

(d) Respondent initially testified that, as stated in his Answer, he had no knowledge of the 1988 agreement with the Attorney General, then testified that the agreement "may have come up in a conversation" with his Chief Clerk, then testified that the Clerk told him of the agreement early in his tenure as Surrogate, and testified further that the agreement permitted him to set fees at 6% plus 2%.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.2(B), 100.3(B)(1) and 100.3(C)(3) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. 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.

In awarding fees to his long-time friend whom he had appointed to the lucrative position of Counsel to the Public Administrator, respondent had a responsibility to make sure that the fees were appropriate and untainted by an appearance of favoritism. Respondent had a duty to give individualized consideration to each case based on statutorily-mandated factors, to make sure that Counsel's fees were supported by affidavits of legal services as required by law, and to set reasonable fees that were within the existing standards in New York City. By violating those duties, respondent committed a gross dereliction of his duties to be faithful to the law and maintain professional competence in it, and he conveyed an appearance that his actions were affected by favoritism and friendship, in violation of well-established ethical standards (Rules Governing Judicial Conduct §100.2[B], 100.3[B][1] and 100.3[C][3]). We reject respondent's excuses that he was unfamiliar with the statutory requirement of affidavits and with the agreements of his predecessor setting guidelines for Counsel's fees, and we find his testimony in that regard incredible and unconvincing.

The statutory framework of the Surrogate's Court Procedure Act makes clear that detailed, sworn statements of legal services are required in order to ensure that the fees awarded are appropriate. Thus, we agree with the referee that respondent's failure to require such affidavits by Counsel constitutes judicial misconduct. As the referee stated:

Legal error and judicial misconduct are not mutually exclusive. *Matter of Reeves*, 63 NY2d 105, 110 (1984). The error was repeated in hundreds of cases over a period of more than five years. The SCPA is not an obscure piece of legislation but rather

the primary legal guide in the practice of the Surrogate's Court, a statute with which a Surrogate is presumed to be familiar. (Referee's report, p. 8)

In *Reeves*, a Family Court judge was removed for, among other conduct, disregarding "important statutory procedures," including requiring litigants to submit sworn financial disclosure statements as required by law (63 NY2d at 110).

Respondent's professed ignorance of the statutory requirement of affidavits (SCPA §1108[2][c]) is unconvincing and, if true, inexcusable. Every judge is required to "be faithful to the law and maintain professional competence in it" (Section 100.3[B][1] of the Rules), and it is incredible for respondent to claim, in defense of his misconduct, that he was unfamiliar with Section 1108(2)(c) because he "missed" it when he "skimmed through" the Surrogate's Court Procedure Act early in his career as Surrogate. The provision is part of an important statute which, as a Surrogate, he was required to interpret and apply. Respondent acknowledged seeing Section 1108, as well as subdivision (2)(b), when he read the statute (Tr. 73, 74). Moreover, as an experienced lawyer and judge, respondent would be expected to know that fiduciaries and other judicial appointees are generally required to submit affidavits and related written submissions to justify fee requests. A judge's misconduct cannot be excused by inattention or oversight. As the Court of Appeals has stated, "[i]gnorance and lack of competence do not excuse violations of ethical standards," even for a lay justice who claimed his lapses were due to a lack of training (*Matter of VonderHeide*, 72 NY2d 658, 660 [1988]). For a law-trained Surrogate with a long record of judicial service, it is inexcusable. *See also, Matter of Reeves, supra* (63 NY2d at 111) (Court rejected the claim of a Family Court judge that his errors were attributable in part to "inexperience").

It is readily apparent that, as long as respondent continued to award generous fees to Counsel without requiring the filing of supporting affidavits, there was no incentive for Counsel to file them. Respondent's legal error resulted in a flagrant violation of the statutory requirement in hundreds of cases over more than five years.

We find no mitigation in respondent's testimony that when he learned of his error, he required Counsel to file affidavits in all cases *nunc pro tunc*. This was apparently a meaningless exercise since, as a result of such affidavits, there was no change or repayment of any of the fees respondent had awarded, *i.e.*, a flat fee of 8%, regardless of the services actually performed.

The evidence establishes that in almost every matter in which fees were awarded, no matter how simple or complicated, respondent gave Counsel a fee equal to 8% of the gross estate (or very close to that amount), adopting the calculations of his Chief Clerk and Mr. Rosenthal which appeared on a "Post-It" note placed on the file. Those awards, based on a percentage that respondent testified had been the customary fee awarded in Kings County for 30 years or more, belie respondent's testimony that he gave each case individualized consideration in setting Mr. Rosenthal's fees. Although respondent testified, in case after case, that he specifically considered the individual enumerated statutory factors, in each case the result was the same fee equaling 8% of the gross estate. The results of such rote calculations were at times perverse. For

example, in the *Estate of Pettit*, Mr. Rosenthal's fee of \$16,000 was actually more than the total amount distributed to the decedent's heirs.

Notably, one of the statutory factors to be considered in the setting of fees is "the customary fee charged by the bar for similar services." While respondent argues that 8% was the customary award in Kings County, it was not established that respondent's predecessor always awarded fees of 8%; and, even if it were established, we are not bound to conclude that such fees were appropriate. The existing standard elsewhere in New York City during the same period was a *maximum* of 6%, the amount awarded to Counsel by the other New York City Surrogates. That amount was presumably sufficient to attract capable individuals to serve in that position. [1] Moreover, unlike the New York County Counsel, Mr. Rosenthal also received additional fees for real estate closings and referral fees for wrongful death actions arising from the estates assigned to him.

We further reject respondent's contention that 8% was justified in Kings County because Counsel provided additional administrative services to assist the Public Administrator. There is evidence in the record that Counsel in other counties also performed administrative duties. And, as the referee observed, if it is true that Mr. Rosenthal received an additional 2% of each estate to do work that the government-financed Public Administrator's office should have done, we cannot condone a practice where "the estates of intestate decedents were paying for work that was the responsibility of salaried public employees" (Referee's report, p. 18). Moreover, as the individual empowered to appoint and remove the Public Administrator (SCPA §1102), respondent bears responsibility for the operation of the Public Administrator's office.

Respondent's award of 8% to Mr. Rosenthal also exceeded the guidelines outlined in the 1988 and 1994 agreements between prior Counsel and the Attorney General's office. Respondent had a duty to be aware of the agreements signed or endorsed by his predecessor on behalf of the Surrogate's Court. Those agreements, which provided for a maximum 6% fee at the accounting and additional fees only under certain specified circumstances, are relevant in establishing the standard for fee awards. By routinely awarding Counsel 6% upon the filing of the initial accounting and an additional 2% upon the final decree, respondent conveyed the appearance that he was complying with the terms of the agreements while, in fact, he was flouting the agreements by awarding fees that exceeded the specified limits. While the agreements permitted Counsel to request fees above 6% in limited, specified circumstances, here an additional 2% was awarded in every case without individualized consideration or any submission justifying the additional amount.

The inescapable conclusion is that respondent's awards of 8% to Mr. Rosenthal were excessive and overly generous in that they exceeded the existing standard awarded to Counsel in the other New York City counties, exceeded the guidelines outlined in the 1988 and 1994 agreements between Counsel and the Attorney General's office, were derived from a flat formula without individualized consideration of the statutory factors and were given without the required affidavits of legal services.

The net result of respondent's largesse to Mr. Rosenthal is far from insignificant. The additional 2% that respondent awarded meant, in actual dollars, more than \$2,000,000 from

estate assets paid to Mr. Rosenthal, rather than to the decedents' heirs (or, in cases with no heirs, to the State). These excessive fees came from the pockets of beneficiaries of estates that respondent had a duty to protect.

Respondent should have realized that under the circumstances here, the excessive fees he approved for Mr. Rosenthal, without consideration of the statutory factors and without the required affidavits supporting fee requests, conveyed the appearance of favoritism. This appearance of impropriety, created by respondent's glaring inattentiveness to his obligations as a judge, undermines the public's confidence in the objectivity of our judiciary. While there is no evidence that Mr. Rosenthal did not perform his duties in a competent manner, the fact that for five and a half years he was compensated so generously for performing his duties without having filed the required, sworn documentation casts a serious pall over respondent's role in this unseemly affair. Every judge must be held to the highest standards of probity in order to maintain public confidence in the integrity of the judiciary as a whole. For a Surrogate, entrusted with enormous power over the lives and fortunes of many, the ethical transgressions revealed in this record are simply intolerable.

In imposing sanction, we recognize 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 Waltemade*, 37 NY2d [a], [III] [Ct. on the Judiciary 1979]). While removal from office is "rarely warranted...[i]n cases involving [only] the appearance of impropriety," it may be necessary in egregious circumstances when "[such] an appearance diminishes public confidence in the integrity of the judiciary and destroys [the judge's] usefulness on the bench" (*Matter of Cohen*, 74 NY2d 272, 278 (1989)). See also, *Matter of Sims*, 61 NY2d 349, 358 (1984) ("When a judge acts in such a way that she appears to have used the prestige and authority of judicial office to enhance personal relationships, or for purely selfish reasons, or to bestow favors, that conduct is to be condemned whether or not the Judge acted deliberately and overtly..."). Moreover, in this case there is far more than appearance at issue.

Respondent's fundamental failure to attend to his judicial responsibilities permitted the appearance that his actions as a judge were influenced by favoritism, for which he bears responsibility. And his failure to attend to his responsibilities cost certain Brooklyn beneficiaries a total of at least \$2,000,000. Such conduct seriously erodes public confidence in the integrity of the judiciary as a whole. As the Court of Appeals has stated:

Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct which is all too often popularly attributed to the judiciary. To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a very subjective and often faulty public perception would be to fail to comprehend the principle. The community, and surely the judges themselves, are entitled to insist on a more demanding standard. As Chief Judge Cardozo wrote in *Meinhard v Salmon* (249 NY 458, 464): "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." And there is no higher

order of fiduciary responsibility than that assumed by a Judge.
Matter of Spector, 47 NY2d 462, 468 (1980).

Respondent's conduct is aggravated by his lack of candor at the hearing in this proceeding. *Matter of Intemann*, 73 NY2d 580 (1989); *Matter of Mason*, 100 NY2d 56 (2003). We agree with the referee's conclusion that respondent's testimony in certain respects was "not credible," "inconsistent and evasive." In case after case respondent testified that in setting fees he gave individualized consideration to the statutory factors, although the evidence shows that he set fees by rubber-stamping the amounts set forth on Post-It notes provided by Mr. Rosenthal's office and respondent's Chief Clerk, who calculated the amounts based on a fixed percentage of the estate. The referee found, in essence, that respondent testified untruthfully each time he claimed he considered the statutory factors, and we agree. As we have also noted, respondent's professed ignorance of the statutory requirement of affidavits was not credible, and his testimony about his knowledge of the 1988 Attorney General agreement was contradictory and evasive.

While we recognize that lack of candor as an aggravating circumstance "should be approached cautiously" so as not to "unfairly deprive [] an investigated Judge of the opportunity to advance a legitimate defense" (*Matter of Kiley*, 74 NY2d 364, 371 [1989]), this is not such a case. We are constrained to conclude that much of respondent's testimony was part of a calculated, sustained effort, over several days as a witness, to avoid responsibility for his malfeasance by evasiveness, lack of candor, and professing ignorance of the standards he violated. Respondent's dereliction of his duties as a judge and his subsequent failure to be candid in this proceeding were in conflict with the standards of integrity and propriety required of members of the judiciary, and inimical to his role as a judge (*see, Matter of Gelfand*, 70 NY2d 211, 216 [1987]).

We reject respondent's assertions that his conduct should be excused because it is not significantly different from that of other judges and because his fee awards followed a practice started 30 years ago by a respected Surrogate. It has not been established that other judges follow respondent's practices, and even if true, "the fact that others may be similarly derelict can provide no defense" (*Matter of Sardino*, 58 NY2d 286, 291 [1983]). Further, while respondent relies on the practice of the former Kings County Surrogates in awarding Counsel fees of 8%, he professes a total unawareness that his predecessor required affidavits before setting fees.

We are mindful that within the existing system there has been too much opportunity for lucrative fees to be doled out by judges to their friends and political associates. However, the conduct of other judges is not before us. We note that the court system has focused on patronage-related problems, initiated certain reforms and appointed an Inspector General to investigate abuses. These efforts are continuing. In our view, respondent's failure to observe even the formalities required by law constitutes an extreme dereliction of his duties of a judge.

In sum, we believe that respondent's actions have "irredeemably damaged public confidence in the integrity of his court" (*see, Matter of Steinberg*, 51 NY2d 74, 84 [1980]). By awarding fees to his appointee in hundreds of cases totaling millions of dollars while ignoring statutory mandates that go to the core of his judicial role, respondent engaged in misconduct that cannot be countenanced. A public sanction less than removal for such egregious misconduct

would be wholly inadequate. The public deserves more from its judges, and we believe that the only disciplinary sanction that demonstrates the seriousness of respondent's misconduct is his removal from office.

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

As to respondent's misconduct, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Judge Luciano, Judge Peters and Judge Ruderman concur. Mr. Goldman concurs in part and dissents in part.

As to sanction, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Judge Peters and Judge Ruderman concur. Mr. Goldman, Mr. Felder and Judge Luciano dissent and vote that the appropriate disposition is censure.

Mr. Goldman and Mr. Felder file separate opinions, in which Judge Luciano concurs to the extent of the censure.

Ms. Hernandez and Mr. Pope were not present.

Dated: February 10, 2005

* * * * *

OPINION BY MR. GOLDMAN, CONCURRING IN PART AND DISSENTING IN PART

I agree with the majority on the basic facts in this matter: respondent, the Surrogate of Kings County, for a period of over five years awarded the Counsel to the Public Administrator ("Counsel"), his friend and appointee Louis R. Rosenthal, legal fees equal or virtually equal to 8% of the adjusted gross value of estates Mr. Rosenthal handled -- 2% more than the maximum paid in the other counties of New York City -- without receiving from Mr. Rosenthal the affidavit of legal services required by statute and without considering the various criteria for payment set forth in the statute. I disagree with the majority, however, over the extent of respondent's misconduct and the appropriate sanction for his misconduct.

The referee, in a thorough report, found that respondent committed judicial misconduct by awarding fees without receiving the mandated affidavits, by failing to consider the statutory factors, and by awarding excessive fees. The referee specifically found that those allegations in the Complaint which charged favoritism and the appearance of favoritism had not been proven. The majority, although its opinion does not track the Complaint or the referee's decision by specification, apparently agrees with the referee in her findings of misconduct but does not accept her findings of lack of misconduct based on favoritism or the appearance of favoritism.

I agree that respondent's award of fees without the supporting affidavits was such a fundamental legal error that it constitutes judicial misconduct. I agree with the factual finding that respondent did not consider the statutory criteria in determining fees and instead set a

uniform fee. I do not agree, however, that such a practice – a prevalent (but not universal) practice in the Surrogate’s Courts of New York City – constitutes judicial misconduct. I am troubled by respondent’s awarding higher fees than the other Surrogates in New York City, but do not find judicial misconduct because there is no specification in the Complaint that respondent awarded excessive fees, and, therefore, such a finding would violate basic notions of fair notice and due process. Even if respondent had been charged with awarding excessive fees, however, I would find that the evidence was insufficient to sustain such a charge.

I disagree with the majority’s determination that respondent should be removed. I believe the extent of his proven misconduct neither requires nor justifies a sanction greater than censure. Even if I were to agree with the extent of the misconduct found by the majority, I believe removal is unnecessary and unwarranted in view of respondent’s reformation of his prior practices and harsh in view of respondent’s virtually blemishless 24-year judicial career. [2]

FAILURE TO REQUIRE AFFIDAVITS

I agree with the majority that respondent’s awarding fees without supporting affidavits, in clear violation of SCPA §1108(2)(c) and general principles relating to court awards of legal fees, was such a fundamental legal error that it constitutes judicial misconduct. As Surrogate, he certainly should have been aware of this basic requirement. [3] While I do not accept respondent’s professed ignorance of such a basic statute as justification or mitigation for his failure to require the affidavits, I do not, however, find respondent’s testimony that he was not aware of the SCPA provision “incredible,” as does the referee, or “not credible,” as does the majority.

FAILURE TO CONSIDER STATUTORY FACTORS

I agree with the referee’s and majority’s factual determinations that respondent failed to consider the statutory criteria for compensation and thus failed to give individualized consideration to the fee requests. Respondent, not having received affidavits from Counsel, was unaware of at least the first listed factor in the statute, “the time and labor required.” [4] Further, his uniformly setting a rate of 8% of the gross value of the estate belies any contention that he gave each request “individualized consideration.” I do not, however, find that the failure to consider the statutory factors and the grant of a uniform fee, while seemingly in violation of SCPA §1108(2)(c), constitute judicial misconduct.

Respondent’s conduct in not evaluating the factors particular to each case and instead setting a uniform fee during the relevant period appears to have been the prevalent (but not unvarying) practice in the Surrogate’s Courts of New York City, at least in Manhattan. [5] The fee schedule in New York County, for instance, according to testimony by John Reddy, Counsel to the Public Administrator there, was “six percent standard, across the board” (with deviations when the beneficiaries were charitable institutions) (Tr. 1070, *see also* 1061-62, 1085-86). The purpose of such an “across the board” practice, as indicated in the 2002 Interim Report, was that in recognition that most estates administered by the Public Administrator were too modest to provide sufficient fees to retain counsel, the “more significant compensation in the more substantial estates” was necessary to induce counsel to accept the position of Counsel. [6]

Even if respondent's failure to consider the statutory criteria and his imposition of a uniform across the board percentage compensation rate violated the statute, I do not find that such conduct, which was consistent with a customary practice of other judges and established for a reasonable purpose, constituted judicial misconduct.

AWARDING ALLEGEDLY EXCESSIVE FEES

I disagree with the referee's finding, apparently accepted by the majority, that respondent awarded Counsel excessive fees. I disagree, first, because respondent was not charged in the Complaint with setting excessive fees and, second, because the evidence that respondent set excessive fees is insufficient to sustain such a finding.

The Complaint, as relevant here, charged that respondent "failed to avoid favoritism by approving compensation without ascertaining the fair value of services rendered." Since the factual underpinning of the Complaint was that respondent failed to require supporting affidavits from Counsel and set uniform fees without consideration of the statutory criteria, this charge clearly related to respondent's procedural failure to make a case-by-case determination of the proper value of Counsel's services, not to the substantive issue whether Counsel was paid an excessive fee. The Code of Judicial Conduct has a clear and direct injunction against awarding excessive fees: "A judge shall not approve compensation of appointees beyond the fair value of services rendered." Code of Judicial Conduct, Canon 3 (22 NYCRR §100.3[C][3]). There was no specific allegation in the Complaint that respondent violated that proscription. Nonetheless, the referee found misconduct under that provision. I believe that finding violated respondent's right to fair notice of the charges against him and due process.

In any case, in my view, the evidence is insufficient to justify a finding that respondent awarded excessive fees. The majority cites four factors to justify its "inescapable conclusion" that respondent's fee awards were excessive: that they were given without the required affidavits; that they were derived from a flat formula without individualized consideration of the statutory factors; that they exceeded the guidelines in the 1988 and 1994 agreements involving the prior Counsel to the Public Administrator and the then Attorney General; and that they exceeded the existing standard in other New York City counties.

First, while I agree that respondent failed to require the affidavits mandated by statute and that such a failure constituted misconduct, this failure provides no proof at all that the legal fees awarded to Mr. Rosenthal were excessive. There is no evidence that this failure was part of any scheme to conceal the extent of Counsel's fees. The amount of counsel fees was apparent from the accountings, which were available to the beneficiaries, the Attorney General and the public.

Second, while I agree that respondent's fees were awarded without case-by-case consideration of the statutory factors, even if such a practice constituted misconduct, it is no proof that the fees were excessive. Indeed, as discussed above, in the Surrogate's Court of New York County, used by the majority as a lodestar with respect to the appropriate amount of compensation, the judges also set fees according to a standard percentage.

Third, respondent's standard 8% award was little different in actuality from that given by the prior Surrogate under the 1988 and 1994 agreements – in which neither respondent nor Mr. Rosenthal was involved and to which respondent was not bound. The 1988 agreement was between the Attorney General and the then Counsel to the Public Administrator, the law firm of Hesterberg and Keller, and approved by Surrogate Bloom. The 1994 “agreement” consisted of a letter from the law firm to the Attorney General reiterating, with certain modifications, the provisions of the 1988 agreement. Both called for a maximum fee of 6% but with the right for Counsel to seek additional fees for special services. Additional fees of 2% were routinely sought, even in the absence of special circumstances. As the hearing testimony revealed, and as the majority found, under those agreements Surrogate Bloom generally (but not automatically) awarded fees of 8%. Thus, the prior “agreements,” apparently honored more in the breach than the observance, provide little proof that there was an accepted 6% standard. To the contrary, the practice under the “agreements” actually lends support to respondent's contention that 8% fees were customary in Kings County and therefore not excessive. [7]

Fourth, while respondent's fee awards of 8% did exceed the existing standards in the other counties of New York City [8], and in my view were certainly generous, I find this single factor insufficient to sustain a finding of awarding excessive fees and judicial misconduct. That one judge pays higher fees to counsel than others is scant proof that the fees are excessive. In 2002 and 2003, when the statutory hourly rates for the representation of indigents in the Criminal and Family Courts were \$40 for in-court work and \$25 for out-of-court, a small minority of judges awarded counsel fees of \$75 per hour. *See, Levenson v. Lippman*, 5 AD3d 86 (1st Dept. 2004). Surely, those judges cannot be considered to have set excessive fees. [9]

The 6% standard was never enacted by statute, court rule or appellate decision. In fact, no authority had ever contended that respondent's fees were excessive. Indeed, there is no indication in the record that the Attorney General, who was involved in the attempt to cap fees in 1988 and 1994 and who received notice of the accountings and amount of Counsel fees awarded by respondent in every case, ever lodged any objection.

The factors listed in SCPA §1108(2)(c) – the factors the majority finds respondent committed misconduct by not considering -- include the time and labor spent, the difficulty of the questions involved, the skill required to handle the problems, the benefit resulting to the estate from the services, the results obtained and the responsibility involved. [10] Presumably, if a Surrogate's determination of the appropriate fees must consider these factors, so should a Commission determination whether the fees are excessive. Yet, neither the majority nor the referee apparently considered any of these factors. They could not because the record provides no evidence about them. [11] The only real evidence of excessiveness is the lower fee schedule in the other Surrogate's Courts in New York City. That is too thin a reed to support a finding of judicial misconduct.

RESPONDENT'S LACK OF CANDOR

I agree with the referee and the majority that respondent's testimony was not convincing, occasionally erroneous, and sometimes inconsistent – although I do not find it incredible. The phrase “lack of candor” is often a euphemism for perjury, and I do not find respondent's

testimony to be perjurious or deliberately false. However, I do find that when respondent's testimony contained a mixed statement of fact and conclusion, such as his insistence that he considered the statutory factors for awarding fees in every case, it was sometimes at the least inaccurate.

I am mindful of the admonition of the Court of Appeals in *Matter of Kiley*, 74 NY2d 364, 370-71 (1989), that the Commission should hesitate to use lack of candor as an aggravating factor for fear that a judge will be reluctant to defend his conduct. This is not a case such as *Matter of Gelfand*, 70 NY2d 211 (1987), in which a judge gave patently false explanations to the Commission in the face of objective proof, nor is it a case like *Matter of Mason*, 100 NY2d 56 (2003) or *Kiley*, where the charges included lack of candor. Nonetheless, I believe that the Commission may in determining sanction give some consideration to the inaccuracy, whether deliberate or careless, of a judge's testimony and his demeanor and attitude during the proceeding, always bearing in mind that the judge has not been charged with misconduct in this regard and therefore that its weight should be limited. To the extent that *Kiley* limited the Commission's consideration in this area, this restriction has been eased somewhat by *Matter of Bauer*, 3 NY3d 158 (2004), where the Court of Appeals considered the judge's lack of contrition as an important factor in determining his fitness for office. *Id.* at 165; *see also, id.* at 173 (Smith, R.S., dissenting). In this connection, I found respondent's attitude disdainful and unrepentant. Rather than recognizing, in view of other fee awards in New York City, that he might have been somewhat generous to Mr. Rosenthal, respondent several times injected that he would have given an even higher fee award if he were able.

SANCTION

I believe, based on the misconduct I find, that removal is inappropriate. In reaching this conclusion, I have considered the extent of respondent's misconduct and the generosity of his fee awards and evaluated his testimony and attitude. I consider his largesse to Counsel not as an independent area of judicial misconduct, but as a factor to be considered in determining sanction. Although in the absence of a violation of a clear standard (as well as for lack of notice), I find no judicial misconduct with regard to excessive fees, I believe respondent's fee awards were certainly generous. I, therefore, believe the appropriate sanction is a censure. Had respondent violated a clear standard for compensation – like the 2002 Interim Guidelines – I would have no hesitancy in voting for his removal. However, had there been such clear guidelines in effect prior to 2002, I doubt that respondent would have violated them.

Even if I were to accept the majority's expansive findings of misconduct, beyond those found by the referee, I would vote for censure. The sanction of removal is reserved for "truly egregious circumstances." *Matter of Steinberg*, 51 NY2d 74, 83 (1980). It is not warranted "for conduct that amounts simply to poor judgment or even extremely poor judgment." *Matter of Kiley, supra*, 74 NY2d at 370. It is "rarely warranted...[i]n cases involving [only] the appearance of impropriety." *Matter of Cohen*, 74 NY2d 272, 278 (1989). While the purpose of judicial disciplinary proceedings "is not punishment" (*Matter of Waltemade*, 37 NY2d [a],[III] [Ct. on the Judiciary 1979]), the effect of removal on a judge is little different: loss of livelihood, career, reputation and respect. Accordingly, the sanction should not be imposed except in extremely serious cases.

This is a case in which, even under the majority’s factual findings, respondent exhibited “poor judgment or even extremely poor judgment” (*Kiley*). He made a serious legal error in not requiring affidavits in support of his request for legal fees. [12] He failed to consider the statutory factors and set a standard fee based on percentages for compensation, for which practice the majority finds misconduct even though respondent’s practice was largely consistent with the prevailing practice in New York City. He failed to change a 30-year practice in Kings County of paying the Counsel to the Public Administrator a fee equal to 8% of the gross estate. As the referee found, “[t]he credible evidence leads to the conclusion that respondent mistakenly and impermissibly thought he was entitled to apply what he understood to be an automatic customary 8% rule in Kings County for awarding legal fees in Public Administrator cases.”

The majority fails to accept respondent’s defense that the amount of his fee awards was the same as those of the previous Kings County Surrogates. Instead, it condemns respondent largely because his fee awards were not the same as the other New York City Surrogates. Even if the majority does not credit the longstanding Brooklyn practice as a defense, it should at the least consider it a mitigating factor.

Respondent has been a judge for 24 years, and has, with one extremely minor exception over 20 years ago, served without any disciplinary stain. He received no personal benefit from his misconduct here. He has demonstrated that he can, although perhaps unenthusiastically, mend his ways. Once he learned that the *Daily News* was about to report that he had ignored the affidavit requirement, he ordered that all future fee requests be accompanied by affidavits and that Counsel file *nunc pro tunc* affidavits justifying the fees Counsel had received. Once the Interim Guidelines [13] reducing the fee schedule for counsels to the Public Administrator were approved, respondent has followed them. Notwithstanding his lack of contrition, I believe that in the future respondent will act properly and competently. This is not a situation where the judge’s “failure to recognize and admit wrongdoing strongly suggests that if he is allowed to continue on the bench, we may expect more of the same” (*Matter of Bauer, supra*, 3 NY3d at 165).

Further, precedent, ordinarily not critical in Commission cases, which generally are largely dependent on the particular facts, supports the conclusion that censure is the appropriate sanction. In *Matter of Ray*, 2000 Annual Report 145 (Comm. on Judicial Conduct), a case with parallels to this one and arguably more serious, a Family Court judge appointed two attorneys with whom he had a political relationship to a disproportionate number of assignments and certified without adequate examination their grossly inflated fee vouchers so that they were able to overbill thousands of dollars. The judge was censured by the Commission. In this case, there is no claim that respondent approved false vouchers or affidavits.

To be sure, a system in which a judge appoints a friend to a public legal position, solely determines the friend’s compensation, and the compensation is hundreds of thousands of dollars per year [14] – several times the salary, for instance, of the Chief Judge of the Court of Appeals – is anachronistic and cries out for review, if not reform. That, however, does not mean that we must remove a judge who has served for 24 years (*see, Matter of Skinner*, 91 NY2d 142, 144 [1997]).

I believe the appropriate sanction is censure.

* * * * *

OPINION BY MR. FELDER, CONCURRING AS TO MISCONDUCT AND DISSENTING AS TO SANCTION

I agree with each of the majority opinion's conclusions and determinations of fact. I do, however, disagree on the appropriate sanction. This is not to suggest that the conduct of respondent was not seriously improper.

Respondent said that when he became a Surrogate he "skimmed through" the SCPA – the very statute that he was required to administer, interpret and enforce. If a lawyer acted similarly, did not do necessary research, or have a necessary understanding of the statutes which were the subject matter of a proceeding in which he was before a Court, sanctions would be available against the lawyer (22 NYCRR §130-1.1).

A Surrogate has an even greater responsibility, and for respondent to state that he assumed this office having only "skimmed through" the statute is appalling. Mr. Rosenthal, who was appointed as counsel for the Public Administrator by the Surrogate, similarly had little experience in the field, having only 5% of his practice in Surrogate's Court litigation. Apparently, as far as the counsel to the Public Administrator in Kings County is concerned, being acquainted with the law is less important than being acquainted with the Surrogate.

It is quite clear that basically it was the Clerk, and, in some instances, the counsel for the Public Administrator himself, who ran the Surrogate's Court – at least as far as counsel to the Public Administrator's fees were concerned. Supporting affidavits in request for fees were required by law (SCPA §1108[2][c]). Instead, respondent awarded fees based on the "Post-It" method. The file was handed to him, and the Clerk (and, at times, Mr. Rosenthal's office) wrote the amount to be awarded on a Post-It note placed on the file. The amount awarded exceeded by 2% the proper percentage, that being 6%.

It should not pass unnoticed that the foregoing method of fixing fees must have been known to lawyers who practice in that Court, and to various employees of that Court. It is a sad commentary on events that respondent only learned of his obligation from the *New York Daily News*. The *Daily News* revealed respondent's practices, and it was only *after* this that respondent attempted to rectify things by requiring *nunc pro tunc* affidavits. I find this attempt at remedy, at best, disingenuous. Whether affidavits were prepared on the original fee application (which they were not), or *nunc pro tunc*, I believe they were never read or analyzed by the Surrogate. The fact is, the requiring of *nunc pro tunc* affidavits for cosmetic purposes, in my opinion, made matters worse. They were never intended to be read, and represent a cavalier attempt by the Surrogate to meet his lawful obligations while, at the same time, not to meet those obligations. Lest there be any question that these were harmless errors in which there was no victim, there was a victim in each of these cases since the monies, in effect, came out of beneficiaries' pockets. As the majority opinion pointed out, this additional 2%, over time, added up to \$2 million. In the larger picture, Mr. Rosenthal, as counsel to the Public Administrator, from January 1997 to May 2002 received approximately \$9 million.

I found it disappointing that when respondent was asked at the oral argument whether he would, after all that has occurred, end his professional relationship with Mr. Rosenthal, he indicated that he would not. Loyalty to friends is admirable. Loyalty to friends taking precedent over a judge's legal obligations is deplorable.

I agree with Judge Shea that, at least as far as many of his answers given, respondent was not truthful. I find a skein of deception and untruthfulness running through respondent's entire testimony. It is not without interest that Judge Shea notes:

Further bearing on the extent to which respondent's testimony is to be believed were the unfounded representations made by respondent to his attorney which prompted the offering of a stipulation by respondent's attorney on the last day of the hearing with regard to the testimony of Hon. A. Gail Prudenti. (Referee's report, p. 11*fn.*)

I have sought, to the best of my ability, not to be influenced by respondent's – and even his lawyer's – arrogance, including the tone and tenor at the oral argument, which at times were confrontational.

I reject the suggestion that this is a case of selective prosecution. It is the uniqueness of respondent's judicial position, and his actions, that sets this apart from the conduct of other Surrogates. The corollary of this sort of reasoning is that respondent basically inherited a corrupt system. Even if true, this is not a valid excuse for what occurred here, nor for any type of misconduct.

What respondent did, and caused to happen, is an embarrassment to lawyers, litigants and fellow jurists (who, considering training and responsibility, are among the lowest paid and most overworked civil servants in the State). The residents of Kings County – both living and dead – deserve better in their Surrogates.

Having said all of the above, I find myself voting for censure. It is a censure that trembles on the brink of a finding for removal of respondent. While an argument could be made that under existing precedent, removal is the appropriate remedy, I believe a similar argument could be made for censure. I vote for censure in part because respondent has been a judge for 24 years and will, whether by public censure or removal, be subject to public disgrace. Should he continue to perform his duties in the manner in which he has in the past, I would have no hesitation in voting for removal.

It should not be left unsaid that the Honorable Felice K. Shea, the Referee herein, in a difficult situation, acted admirably, with great legal acumen, insight and skill, and should be commended.

Dated: February 10, 2005

.....

[1] We note that following the adoption of the Interim Guidelines in October 2002, setting fees at a maximum of 6%, Mr. Rosenthal has continued to serve as Counsel.

[2] In 1984 respondent received a confidential Letter of Dismissal and Caution because of his failure to obtain an accounting of money he contributed to the Kings County Democratic Party for his own political campaign.

[3] Although I am troubled by the amorphous and expansive scope of the prohibition on the “appearance” of impropriety, as opposed to actual impropriety, I concur with the majority’s determination to the extent it finds an appearance of favoritism. Respondent’s failure to require affidavits mandated by statute from a friend and political appointee, and his awarding a higher fee than other Surrogates, even if, as I believe, not motivated by friendship, does give an appearance of favoritism. I also do not believe that respondent’s fee awards would have been any different if he had required, and had received, the supporting affidavits. I do not find actual favoritism.

[4] The time spent, a standard basis for legal billing, is not viewed as the definitive criterion in Surrogate’s Court billing. According to the Interim Report of the Administrative Board for the Public Administrator (“Interim Report”), “in some instances, time might be the least important factor to be considered.”

[5] Except with respect to New York County, the record as to the practices of the other Surrogates in New York City is limited and not totally clear, other than a stipulation between respondent and the Commission that 6% was the maximum fee given in New York City by the other Surrogates.

[6] Since in the ordinary course, legal fees based on time spent on a smaller estate would be a higher percentage of the value of the estate than fees based on time on a larger estate, the flat fee practice has a Robin Hood effect of distributing more funds to beneficiaries of smaller estates at the expense of beneficiaries of larger estates.

[7] The referee apparently accepted that the 8% rule had been the general practice in Kings County Surrogate’s Court for 30 years.

[8] See fn. 4 herein.

[9] In the *Levenson* situation, the administrative judge determined that the \$75 hourly fees were excessive under the statutory scheme and reinstated the \$40/\$25 scale set by the Legislature. See, *Levenson v. Lippman*, *supra* (holding administrative judge’s determination was beyond her authority). At the other extreme, in the State tobacco litigation case, an arbitration panel awarded legal fees equivalent to \$13,000 per hour. See, *State v. Philip Morris*, 308 AD2d 57 (1st Dept 2003) (holding courts lack authority to overturn arbitration panel award). It is difficult to find excessiveness here when an arbitration panel awards \$13,000 per hour fees and an appellate court determines that it cannot upset such an award. While the record does not reveal what Mr. Rosenthal’s fees were if calculated by hour, they were no doubt a very small fraction of \$13,000.

[10] DR 2-106(B) [22 NYCRR §1200.11(B)], the Disciplinary Rules for attorneys, sets forth criteria to be considered in determining whether a fee is excessive. The time and labor involved, difficulty of the questions, skill required and result obtained are among them.

[11] Neither counsel for the Commission nor respondent presented such evidence, I assume, because they did not believe actual excessiveness had been charged.

[12] This statutory requirement in SCPA §1108(2)(c) was enacted in 1993, four years before this misconduct began. Thus, it was not by any means longstanding law. That, of course, does not mean that respondent should not have been aware of it.

[13] The Interim Report and Guidelines reduced the fee schedule to a maximum fee of 6%, for estates up to \$750,000, tapering down to 1.5% for estates over \$5 million.

[14] Mr. Rosenthal testified that during the period in question his net compensation as Counsel ranged from approximately \$300,000 in 1998 to nearly \$700,000 in 2001 (Tr. 666).

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **GLENN T. FIORE**, a Justice of the North Hudson Town Court, Essex County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn J. Blake, Of Counsel) for the Commission
John T. Wilkins for Respondent

The respondent, Glenn T. Fiore, a justice of the North Hudson Town Court, Essex County, was served with a Formal Written Complaint dated April 25, 2005, containing four charges. A verified amended answer was filed dated June 14, 2005.

By motion dated May 24, 2005, the administrator of the Commission moved for summary determination as to Charge I of the Formal Written Complaint, pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR §7000.6[c]). Respondent opposed the motion by affirmations dated June 14, 2005, and the administrator filed a reply memorandum dated June 16, 2005. By Decision and Order dated June 24, 2005, the Commission granted the administrator's motion and determined that Charge I was sustained and that respondent's misconduct was established; Charges II through IV were held in abeyance. The Commission scheduled oral argument on the issue of sanctions for August 11, 2005.

By letter dated July 13, 2005, respondent's attorney advised the Commission that he did not know whether he would appear for oral argument but it was his understanding that respondent intended to appear. By letter dated July 14, 2005, Commission counsel advised the Commission that she intended to appear for oral argument but would waive argument if neither respondent nor his counsel appeared. Commission counsel filed a brief recommending the sanction of removal; respondent filed an affidavit dated July 18, 2005, asking the Commission to impose "a letter of caution or censure"; Commission counsel filed an affirmation in reply dated July 26, 2005. By letter dated August 9, 2005, Commission counsel advised the Commission that respondent had filed a letter of resignation with the Town Board dated August 8, 2005.

On August 11, 2005, neither respondent nor his counsel appeared for oral argument, which was deemed waived. The Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent was a justice of the North Hudson Town Court, Essex County, from 1996 until his resignation by letter dated August 8, 2005, effective August 11, 2005. He was the only justice of that court.

2. On March 10, 2005, respondent signed an employment contract with Kellogg, Root & Brown, a subsidiary of Halliburton Corporation (hereinafter "Kellogg"), declaring his intention to be employed in Iraq for one year.

3. On March 22, 2005, respondent departed the United States for Iraq to engage in private employment. Prior to his departure, respondent did not give the Town any notice that he would be leaving the United States for employment in Iraq.

4. Since his departure for Iraq in March 2005, respondent failed to hold court and otherwise perform his judicial duties.

5. Respondent returned from Iraq on July 14, 2005. By affidavit dated July 18, 2005, respondent stated that he was in Essex County, that he had resigned his employment with Kellogg and had "no plan or expectation" of returning to Kellogg's employment, and that he was "ready, willing and able" to resume his judicial duties. Respondent also stated in the affidavit that during his absence his salary checks as town justice had been held by his wife and had not been cashed, and that he would reimburse the town for any monies paid to him while he was in Iraq.

6. By affidavit dated July 26, 2005, Robert Dobie, Supervisor of the Town of North Hudson, stated that, as of that date, respondent has not been present in court and has not resumed his judicial duties.

7. Because of respondent's unavailability and failure to perform his duties as a judge, the Town of North Hudson arranged for Schroon Town Justice Jean R. Strothenke to hear matters pending in the North Hudson Town Court. During respondent's absence, the Town of North Hudson paid for the services of both Judge Strothenke and her court clerk, in addition to paying respondent's salary.

8. By letter to the Town Board dated August 8, 2005, respondent stated that he was resigning as town justice, effective August 11, 2005, and planned to return to Iraq.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(A) and 100.4(A)(3) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established. Charges II through IV are held in abeyance.

The Commission has a constitutional mandate to discipline a judge for “cause,” including “persistent failure to perform his duties” (NY Const. Art. 6 §22a). The ethical rules further require that the judicial duties of a judge take precedence over all the judge’s other activities (Section 100.3[A] of the Rules Governing Judicial Conduct).

Having left the United States in March pursuant to an employment contract while declaring his intention to be employed in Iraq for a year, respondent effectively abandoned his judicial position. The contract signed by respondent established that he would be residing overseas for a majority of the year. As such, having committed himself to full-time employment in a foreign country, respondent was clearly in no position to perform the duties of his office and was in violation of the ethical rules. Indeed, because of respondent’s continued absence, his town, where he served as the sole judge, was constrained to secure the services of a judge from a neighboring town, at additional expense, while continuing to pay respondent’s judicial salary.

Respondent’s flagrant, voluntary abandonment of his judicial position in order to pursue other employment requires the sanction of removal. Respondent’s return from Iraq after an absence of four months -- a return that appears to be only temporary -- does not vitiate our determination that he should be removed. His sworn statements on July 18 that he was “ready, willing and able” to resume his judicial duties and had “no plan or expectation” of returning to employment in Iraq stand in stark contrast to his resignation three weeks later and announcement that he intends to return to Iraq.

Respondent's apparent plan was to fulfill his judicial duties by having his clerk (his son) cover for him and to render judicial decisions when he returned for vacations. It would appear that his motive was to draw two salaries, one as a judge and the other as a corporate employee in Iraq. In explaining his conduct, respondent has not indicated that he consulted with court administration, received permission to be absent for so long, or sought an advisory opinion as to his proposed absence. His conduct is inexcusable, and in no way justified by his professed patriotism or support for the war effort.

The sanction of removal bars a judge from holding judicial office in the future (NY Const Art 6 §22[h]). This determination is rendered pursuant to Judiciary Law Section 47 in view of respondent’s resignation from the bench.

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Luciano was not present.

Dated: August 17, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JAMES P. GILPATRIC**, a Judge of the Kingston City Court, Ulster County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Alan J. Pope, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
James E. Long for the Respondent

The respondent, James P. Gilpatric, a judge of the Kingston City Court, Ulster County, was served with a Formal Written Complaint dated June 21, 2005, containing two charges.

On November 1, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be censured and waiving further submissions and oral argument.

On November 10, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Kingston City Court since January 1, 1994. He is an attorney.
2. Respondent is an alcoholic who sought assistance for this disease in June 1994 and had been alcohol-free from that time until September 1, 2004.
3. In the late-evening/early-morning period of August 31-September 1, 2004, respondent had a relapse of this disease and drank alcoholic beverages. He also took the over-the-counter medication Benadryl.

As to Charge I of the Formal Written Complaint:

4. On the morning of September 1, 2004, while still under the influence of alcoholic beverages, respondent appeared in the Ulster County Family Court as an attorney representing a party. The appearance was in connection with a routine scheduling calendar and not an evidentiary or other substantive proceeding. The matter was adjourned.

As to Charge II of the Formal Written Complaint:

5. On September 1, 2004, while still under the influence of alcohol, respondent took the bench in Kingston City Court but was unable to continue to preside. He was relieved of his judicial duties.

6. From September 2 to September 15, 2004, respondent performed judicial duties and did not consume any alcoholic beverages.

7. On September 16, 2004, respondent entered a residential treatment program at the Tully Hill Alcohol Rehabilitation Center in Tully Hill, New York. He successfully completed the program in 21 days. Upon discharge from Tully Hill, he enrolled in the Pius XII Chemical Dependency Program in Newburgh, New York, on an out-patient basis. He continues to participate in the Pius XII program and in Alcoholics Anonymous.

8. On October 7, 2004, respondent resumed his judicial duties and has performed without impairment or incident.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.4(A)(2) and 100.4(A)(3) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent’s misconduct is established.

Respondent has acknowledged that, while under the influence of alcohol, he appeared in court as an attorney and, later that same day, took the bench but was unable to continue to preside because of his impaired condition. Litigants and the public can have little faith in the decisions and judgment of a judge who appears in court while under the influence of alcohol. *See, Matter of Aldrich v State Comm. on Judicial Conduct*, 58 NY2d 279 (1983).

It is apparent from this record that respondent is an alcoholic who frankly recognizes his condition and has engaged in stringent efforts, over more than a decade, to fight the disease from which he suffers. We recognize that alcoholism is an insidious disease from which judges are not exempt and we acknowledge respondent’s rehabilitative efforts. However, the public is entitled to a judge who does not come to court while under the influence of alcohol, and litigants should not have to wonder whether a judge has fallen off the wagon on a particular court date. There is also the humiliating institutional spectacle of local lawyers and court personnel knowing that a judge has an alcohol problem that he or she cannot control.

As the Court of Appeals has often stated, judges “are held to higher standards of conduct than members of the public at large and [even] relatively slight improprieties subject the judiciary as a whole to public criticism and rebuke.” *Matter of Aldrich, supra*, 58 NY2d at 283; *see also Matter of Kuehnel*, 49 NY2d 465, 469 (1980); *Matter of Mazzei*, 81 NY2d 568, 571-72 (1993). Respondent’s conduct was a clear departure from the high standards expected of a judge.

In determining an appropriate disposition in such cases in the past, the Commission has considered mitigating and/or aggravating circumstances, including the totality of the judge's conduct and the judge's rehabilitative efforts. *See, e.g., Matter of Aldrich, supra* (judge was intoxicated while performing judicial duties and, while intoxicated, used vulgar, racial and sexist language and threateningly displayed a knife) (removal); *Matter of Wangler*, 1985 Annual Report 241 (judge was intoxicated and belligerent in court and at a meeting with court auditors and failed to promptly deposit and remit court funds) (removal); *Matter of Purple*, 1998 Annual Report 149 (judge presided in court while under the influence of alcohol on a single occasion, and had a subsequent DWI conviction) (censure); *Matter of Giles*, 1998 Annual Report 127 (judge twice presided over off-hours arraignments while under the influence of alcohol) (censure); *Matter of Bradigan*, 1996 Annual Report 71 (judge twice presided while under the influence of alcohol, conducting a bench trial and an arraignment, and engaged in unrelated misconduct in two small claims cases) (censure). Here, respondent took the bench while under the influence of alcohol but was unable to continue to preside. In addition, the record is uncontradicted that in the past 14 months respondent has performed his judicial duties without impairment or incident, while regularly attending Alcoholics Anonymous meetings, participating in AA programs, and continuing to undergo group and individual counseling.

In view of the circumstances in this case, we accept the recommendation of both Commission counsel and respondent that censure is appropriate. Further, staff is hereby authorized to observe respondent's public court sessions periodically in the future. The Commission will consider authorization of a new investigation and additional charges upon any observation that suggests that respondent is presiding while under the influence of alcohol. *See, Matter of Bradigan, supra; Matter of Giles, supra.*

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

Mr. Goldman, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez and Judge Ruderman concur.

Judge Klonick and Mr. Pope dissent and vote to reject the Agreed Statement on the basis that the proposed disposition is too harsh.

Judge Peters did not participate.

Mr. Coffey and Judge Luciano were not present.

Dated: December 14, 2005

DISSENTING OPINION BY MR. POPE, IN WHICH JUDGE KLONICK JOINS

I am deeply troubled by the Decision of the majority of the Commission to censure Judge Gilpatric because he suffers from an illness. I believe the only proper way in which to analyze this case is with a recognition that respondent's isolated actions were as a result of a recognized illness, namely alcoholism, and not as a result of any knowing or intentional misconduct on the

part of the judge. I would vote to issue a confidential letter of caution based on the circumstances of this particular case.

The legislature of this state has defined alcoholism as “a chronic illness in which the ingestion of alcohol usually results in the further compulsive ingestion of alcohol beyond the control of the sick person to a degree which impairs normal functioning” (Mental Hygiene Law §1.03, subd. 13). The legislature defines a “recovered alcoholic” as “a person with a history of alcoholism whose course of conduct over a sufficient period of time reasonably justifies a determination that the person’s capacity to function normally within his social and economic environment is not, and is not likely to be, destroyed or impaired by alcohol” (*Id.*, subd. 15). The Court of Appeals has also recognized that “alcoholism is an illness which must be treated as a public health problem” (*Matter of Quinn*, 54 NY2d 386, 394 [1981]).

It is clear from this record that respondent is a recovering alcoholic who had an isolated relapse after more than ten years of continuous sobriety. Respondent’s relapse lasted for part of a single day, during which, while under the influence of alcohol, he appeared in court as an attorney in connection with a scheduling calendar and later, as a judge, took the bench but was unable to preside. Thereafter, respondent took prompt action to fight his disease. He entered a residential treatment facility, enrolled thereafter in an out-patient program, and continues to attend AA meetings and to be involved in its programs. He has abstained from the consumption of alcohol since the date of his relapse. It appears that respondent is deeply committed to continuing his efforts to fight his illness while assisting others who are struggling with the disease.

In contrast to other cases involving judges who have been disciplined for presiding while under the influence of alcohol, this case involves a single isolated episode without any exacerbating factors. *Compare, Matter of Purple*, 1998 Annual Report 149 (judge presided while under the influence of alcohol and engaged in an angry confrontation with the sheriff; two weeks later, he drove while under the influence of alcohol, was involved in an accident and was later convicted of Driving While Intoxicated); *Matter of Giles*, 1998 Annual Report 127 (judge presided on two occasions over off-hours arraignments while under the influence of alcohol, and also engaged in misconduct in two small claims cases); *Matter of Bradigan*, 1996 Annual Report 71 (judge presided on two occasions while under the influence of alcohol, including a bench trial in a drunk-driving case); *Matter of Wangler*, 1985 Annual Report 241 (judge appeared in court in an intoxicated condition and was sent home by his co-judge; on another occasion, he was intoxicated at a meeting with representatives of the State Comptroller’s office; the judge also had significant depositing and reporting deficiencies); *Matter of Aldrich*, 58 NY2d 279 (1983) (judge presided on two occasions while under the influence of alcohol, used profane, menacing language and made inappropriate racial references, and threatened a security guard with a knife).

Under the circumstances, including respondent’s record of honorable, competent service as a judge and a member of the bar, I do not believe that respondent’s isolated relapse in any way warrants the sanction of public censure. The respondent has an illness, which he successfully controlled for more than ten years. I do not believe a judge, or anyone else for that matter, should be publicly sanctioned because of a one-time isolated failure to control an illness. Under present day medical, social and legal knowledge of this disease, a public sanction is simply

unacceptable. This is especially so since respondent apparently did not conduct any substantive proceedings while under the influence of alcohol and there was no apparent harm to any litigant or client; nor did he engage in any exacerbating acts of misconduct. In addition, respondent's frank acknowledgment of his illness and his past and present record of commitment to fighting this disease should be taken into consideration in determining an appropriate sanction.

Accordingly, I respectfully vote to reject the Agreed Statement of Facts and would issue respondent a confidential letter of caution.

Dated: December 14, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **THOMAS R. GLOVER**, a Justice of the Saranac Lake Village Court and the Harrietstown Town Court, Franklin County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
John J. Muldowney for the Respondent

The respondent, Thomas R. Glover, a justice of the Saranac Lake Village Court and the Harrietstown Town Court, Franklin County, was served with a Formal Written Complaint dated June 28, 2005, containing one charge.

On September 19, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be censured and waiving further submissions and oral argument.

On September 30, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Saranac Lake Village Court since March 1991 and a justice of the Harrietstown Town Court since January 2003. He is not an attorney.
2. In or about the fall of 2003, Dan Marrone distributed flyers to his neighbors, notifying them that his band would be rehearsing during the evenings from 7:00 to 9:00 PM in a shed on his property, which he had soundproofed. Mr. Marrone's letter requested that the neighbors first contact him with regard to any complaints before notifying police.
3. Thereafter, Mark Taylor and Susan Etri made a series of complaints to the New York State Police regarding noise associated with Mr. Marrone's band rehearsals. The State Police investigated but declined to lodge any charges against Mr. Marrone.
4. In or about October and November 2003, respondent met *ex parte* at court with Mark Taylor and Susan Etri and received at least two letters from them, complaining about Mr.

Marrone's band rehearsals. Ms. Etri also furnished respondent with copies of the State Police incident reports relative to her complaints, and hotel bills she claimed to have incurred in order to avoid the noise from Mr. Marrone's band rehearsals.

5. In or about November 2003, respondent met *ex parte* at court with Mr. Marrone and his mother, Rhonda Marrone, who inquired whether Mr. Marrone was violating any laws with regard to the band rehearsals. Respondent did not indicate that Mr. Marrone was violating the law.

6. In or about November 2003, respondent received additional complaints by telephone from Ms. Etri concerning Mr. Marrone's band rehearsals. Respondent thereafter issued to Mr. Marrone a letter dated December 1, 2003, on Town Court stationery, a copy of which is annexed as Exhibit 1 to the Agreed Statement of Facts, stating that it was "an order of this court" that "from this day forward" Mr. Marrone "shall not continue to practice" with his musical band "outside in any area (*i.e.* shed, shack, barn or building) within your property" except "within the confines of your home with windows and doors closed." Respondent further stated in the letter that if Mr. Marrone were to violate the provisions of the letter, he would be held in contempt of court and that the New York State Police were allowed to arrest him for contempt of the order. Respondent sent copies of his letter to the State Police, the District Attorney's office, his co-judge and Mr. Marrone's neighbors, among others. Respondent sent the letter based upon his prior *ex parte* communications with neighbors of Dan Marrone and others, and notwithstanding that no court or other legal proceedings concerning Mr. Marrone had been commenced or were otherwise before respondent.

7. After receipt of respondent's letter, Mr. Marrone and his parents complained to the District Attorney's office, which brought the impropriety of respondent's letter to his attention. Thereafter, respondent orally instructed the State Police not to enforce his December 1, 2003 letter, but respondent did not put anything in writing to that effect.

8. On or about March 1, 2004, on the complaint of Mark Taylor and Susan Etri, an accusatory instrument was filed by the State Police charging Dan Marrone with Aggravated Harassment for playing his bass guitar loudly on that date. The defendant accompanied the arresting officer to the police station, where he was issued an appearance ticket to appear in the Harriestown Town Court. Respondent properly disqualified himself as a consequence of his prior improper *ex parte* communications. The charge was summarily dismissed by respondent's co-judge, Michael Kilroy, on the recommendation of the District Attorney.

9. Respondent was attempting to mediate a troublesome situation among neighbors. He now recognizes that he should not have engaged in the *ex parte* communications described above in an attempt to mediate the dispute and that he should not have issued the December 1, 2003 letter. Once the impropriety of his letter was brought to his attention, respondent should have acted promptly to rescind it in writing, rather than simply advising the police orally that his letter should not be enforced.

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) and 100.3(B)(6) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6,

Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

It is the proper role of a judge to preside in court proceedings, not to act as a mediator, investigator, prosecutor or ombudsman. Respondent's activities in an effort to resolve a neighborhood dispute overstepped the boundaries of his judicial authority and compromised his impartiality.

In the absence of any civil or criminal proceeding, and based upon *ex parte* complaints from Mr. Marrone's neighbors, respondent sent a letter on court stationery ordering Dan Marrone to stop band rehearsals on his property or face contempt charges. Respondent, who had previously met *ex parte* with both sides to the dispute, sent the letter not only to Mr. Marrone, but to the State Police, the District Attorney's office, the Town Board, respondent's co-judge, and Mr. Marrone's neighbors. In issuing the "order," respondent acted without jurisdiction and prejudged the matter by determining that Mr. Marrone's band rehearsals would subject him to criminal charges. Such conduct compromised respondent's impartiality and conveyed the appearance that he was acting as a law enforcement officer, not as a judge. *See Matter of Barnes*, 2004 Annual Report 81 (Comm. on Judicial Conduct) (judge issued an order involving disputed property although no case was pending); *Matter of Maclaughlin*, 2002 Annual Report 117 (Comm. on Judicial Conduct) (judge sent a threatening letter to a landowner about code violations on her property, although no charges had been filed against her); *Matter of Colf*, 1987 Annual Report 71 (Comm. on Judicial Conduct) (judge sent a letter threatening to hold an individual in contempt, based on *ex parte* information, although no civil or criminal action had been commenced).

Respondent's conduct undermined the independence and impartiality of the judiciary (Rules Governing Judicial Conduct, §§100.1 and 100.2[A]). Indeed, as a consequence of his improper *ex parte* communications in connection with the dispute, respondent was later obliged to disqualify himself when the matter came before his court.

As a judge for more than a decade, respondent should have realized that he lacked jurisdiction to issue an *ex parte*, threatening letter. The fact that he orally instructed the police not to enforce the letter mitigates but does not excuse his conduct. Every judge is required to maintain professional competence in the law and to refrain from lending the prestige of office to advance private interests (Rules, §§100.3[B][1] and 100.2[C]).

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Pope was not present.

Dated: October 11, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **WILLIAM J. GORI**, a Justice of the Duane Town Court, Franklin County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the Commission
Riebel Law Firm (by David L. Riebel) for Respondent

The respondent, William J. Gori, a justice of the Duane Town Court, Franklin County, was served with a Formal Written Complaint dated December 13, 2004, containing one charge.

On January 20, 2005, 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, recommending that respondent be admonished and waiving further submissions and oral argument.

On February 7, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Duane Town Court, Franklin County, since January 1, 1998. He is not an attorney.
2. On or about April 1, 2004, Anna George appeared in Duane Town Court before respondent in the matter *People v. Anna George*, a Vehicle and Traffic Law matter. Ms. George's driver's license had been suspended because she had allegedly failed to attend a previously scheduled court appearance for a Speeding ticket.
3. Ms. George's sister, Lucille K. Millett, had driven her to the courthouse and was waiting in the parking lot when Ms. George entered the courtroom. Ms. Millett was neither scheduled nor required to appear in court. There were no pending or impending charges against her or proceedings involving her.

4. Respondent called Ms. George to the bench and asked her if she was accompanied to court by a licensed driver. Ms. George responded that her sister, Ms. Millett, had driven her to court.

5. Respondent informed Ms. George that he wished to speak with Ms. Millett and directed Ms. George to ask Ms. Millett to come inside so he could confirm that Ms. George was accompanied by a licensed driver. Ms. George left the courtroom, walked outside to the parking lot and relayed respondent's request to Ms. Millett.

6. Ms. George returned to the courtroom with Ms. Millett. Respondent asked Ms. Millett to produce her driver's license, which she did. Respondent asked if the license was valid, to which she replied, "Yes." Respondent then asked Ms. Millett if he could verify the validity of the license and said he was required by law to do so because some people come to court without legal licenses. Respondent did so notwithstanding that there was no pending or impending case or matter concerning Ms. Millett and that respondent had no jurisdiction over her. Ms. Millett agreed and respondent called the New York State Police to check Ms. Millett's license, which was valid. Respondent returned the license to Ms. Millett.

7. Respondent did not ask any other spectator to produce his or her license for verification during that session of court, although he has on previous occasions done so when persons with suspended licenses appeared before him.

8. Respondent acknowledges that he had no basis in law or other reasonable basis to summon Ms. Millett to the bench, take her driver's license and check its validity with the New York State Police. Respondent promises not to engage in such conduct in the future.

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 should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

It was improper for respondent to summon Ms. Millett to his court, to ask for her driver's license and to check its validity with the police. Respondent had no authority over Ms. Millett, who had transported her sister to court and had been waiting in the parking lot. Any time a judge makes a "request," it is likely to be interpreted as mandatory, and respondent had no legitimate reason to investigate the license of an individual who was not the subject of any pending or impending matter or otherwise within the court's jurisdiction. Respondent's actions conveyed the impression that he was acting in a law enforcement or quasi-prosecutorial role. His conduct was contrary to the ethical rules requiring a judge to be faithful to the law and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Rules Governing Judicial Conduct, Sections 100.2[A] and 100.3[B][1]).

We note that respondent, who has served as a judge for seven years, was admonished in 2001 for mishandling a small claims case. *Matter of Gori*, 2002 Annual Report 101 (Comm. on Judicial Conduct).

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Dated: February 10, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DUANE A. HART**, a Justice of the Supreme Court, Queens County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Vickie Ma, Of Counsel) for the Commission
Donald R. Schechter for Respondent

The respondent, Duane A. Hart, a justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated May 10, 2004, containing two charges. Respondent filed an answer dated May 30, 2004.

By Order dated June 28, 2004, the Commission designated Hon. John A. Monteleone as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 12, 2004, and February 22 and April 4, 2005, in New York City. The referee filed his report with the Commission dated June 6, 2005.

The parties submitted papers with respect to the referee's report. Counsel to the Commission recommended that Charge I be dismissed, that Charge II be sustained, and that respondent be admonished; respondent recommended that both charges be dismissed. On August 11, 2005, 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 Supreme Court, Queens County since January 2002; prior to that, he served as a judge of the Civil Court of the City of New York for two years.

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. *Modica v. Modica*, a civil matter concerning an ownership interest in a building, was assigned to respondent on April 26, 2002. In the next year, respondent presided over three non-jury trials in the matter, all of which resulted in mistrials. On April 16, 2003, the plaintiff's attorneys, Max Goldweber and Leland Greene, moved for respondent's recusal on the grounds that he had prejudged the case, and asked for a stay of the action in the Appellate Division. Prior to that, the plaintiff's attorneys complained to the administrative judge that respondent had delayed the trial. Respondent held the recusal motion in abeyance pending the trial and directed the parties to be present for trial on April 21, 2003, at 9:30 AM.

4. On April 21, 2003, respondent took the bench at 11:30 AM, and the trial commenced. After about an hour, respondent declared a recess and stated that he was adjourning the case until the next day because he had to fix his tire. The plaintiff, John Modica, requested a one-day adjournment so that he could attend his son's soccer game the next day. Respondent denied the request.

5. A short time later, after court was adjourned, Mr. Modica approached respondent in the courthouse parking lot, hoping to persuade respondent to grant the adjournment he had requested. After Mr. Modica stated, "Excuse me, Your Honor--," respondent called to the court officer on duty, GERALYN MARTUCCI, and told her to arrest Mr. Modica.

6. Officer Martucci called her supervisor, Lieutenant Lawrence Sullivan. Respondent told the officers that Mr. Modica was a litigant who had approached respondent's car. Lieutenant Sullivan asked respondent how he wanted the matter to be handled. At respondent's request, Mr. Modica was released with a warning not to approach the judge at any time. Mr. Modica was never arrested or restrained with handcuffs.

7. The next morning, April 22, 2003, after Mr. Modica advised his attorneys of the parking lot incident, Mr. Greene asked to make a record of the incident. Respondent stated that if Mr. Greene placed the matter on the record, he would hold Mr. Modica in contempt. After conferring with his client, Mr. Greene stated that he had to make a record of the incident to protect himself and his client, and respondent reiterated that if Mr. Greene made a record of the incident, he would hold the plaintiff in contempt.

8. On the record, Mr. Greene stated that Mr. Modica had only intended to ask respondent to reconsider his request for an adjournment so that he could attend his son's soccer game. Respondent held Mr. Modica in contempt and imposed a 30-day jail sentence, stating that Mr. Modica had "tried to intimidate the Court." Respondent said that the sentence was suspended pending the outcome of the trial and stated:

I find that his act in accosting me in the parking lot contumacious conduct, if there ever was contumacious conduct. He was not supposed to do it. Let the record show I tried to let it go with a warning, but you and your associate decided to put it on the record, and I told you if you wanted to keep the matter going, fine. I will hold him in contempt and therefore I did.

9. As the plaintiff's attorney, Mr. Greene had a right to make a record of his client's version of the parking lot incident, and respondent used the threat of contempt to intimidate the attorney from making that record.

10. Respondent held Mr. Modica in contempt out of pique because the attorney insisted on making a record of his client's version of the incident, contrary to respondent's wishes.

11. Before holding Mr. Modica in contempt, respondent did not give him a warning or an opportunity to make a statement in his defense or in extenuation of his conduct, as required by the Rules of the Appellate Division, Second Department.

12. Later that day, respondent dismissed both the plaintiff's action and the counterclaim, and he vacated his contempt finding. Since respondent did not commit Mr. Modica, respondent did not prepare a written order in support of his contempt ruling.

13. On appeal, the Appellate Division, Second Department affirmed respondent's decision, holding that there was no basis for recusal and no proof of bias.

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)(3) of the Rules Governing Judicial Conduct; Sections 700.5(a), 700.5(e), 701.2(a), 701.2(c) and 701.4 of the Rules of the Appellate Division, Second Department (22 NYCRR §700 *et seq.*) ("Second Department Rules"); and Section 755 of the Judiciary Law, and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge II is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established. Charge I is not sustained and is therefore dismissed.

The enormous power of summary contempt may be exercised "only in exceptional and necessitous circumstances" where the offending conduct "disrupts or threatens to disrupt" the proceedings or "tends seriously to destroy or undermine the dignity and authority of the court" (22 NYCRR §701.2[a]). Such exercise also requires strict compliance with mandated safeguards, including giving the accused a warning and opportunity to desist from the contumacious conduct and a reasonable opportunity to make a statement in his defense (22 NYCRR §§701.2[c], 701.4). Respondent did not comply with these well-established safeguards on April 22, 2003, when he held a litigant in summary contempt because his attorney insisted on making a record of an out-of court encounter between respondent and the litigant.

On the previous day, the first day of the non-jury trial, respondent adjourned for the day at 1:00 PM, stating that he had to fix a tire, while denying the request of the plaintiff, John Modica, for a one-day adjournment. Mr. Modica, a single parent of a 12-year-old son, had asked for the adjournment so that he could attend his son's soccer tournament the next day. (At the hearing, respondent candidly stated that he would have granted the request if Mr. Modica's attorneys had not earlier complained about respondent to the administrative judge.) Shortly after the case was recessed, Mr. Modica politely approached respondent in the courthouse parking lot

with the intent of asking him to reconsider his denial of the requested adjournment. At respondent's request, Mr. Modica was briefly detained by court officers, then released with a warning.

The next morning, when Mr. Modica's attorney, Leland Greene, indicated that he wanted to place the parking lot incident on the record, respondent explicitly warned that if he did so, respondent would hold Mr. Modica in contempt. The attorney had an absolute right to assert his client's interests by placing his version of the incident on the record, and it was improper for respondent to use the threat of contempt as a weapon to try to prevent him from doing so. There was certainly no lawful basis for summary contempt: the litigant's conduct in the parking lot, even if improper, was not "disruptive" of the proceedings or a significant threat to the court's dignity and authority. As the referee stated, even using the word contempt to intimidate a lawyer "is wrong since it has a chilling and fearful effect." Respondent's heavy-handed effort to dictate what the attorney placed on the record was highly injudicious.

When the attorney insisted on making a record of the incident, in defiance of respondent's express warning, respondent carried out his threat and announced that he was holding Mr. Modica in contempt, thus punishing the litigant for his attorney's lawful, appropriate advocacy. Without giving Mr. Modica an opportunity to make a statement in his defense or in extenuation of his conduct, as required by the Second Department Rules, respondent held the litigant in contempt and imposed a 30-day jail sentence. Respondent's intemperate, ill-considered actions were a totally inappropriate response to Mr. Greene's lawful advocacy and constituted an abuse of the summary contempt power, warranting public discipline. *See Matter of Mills*, 2005 Annual Report 185 (Comm on Judicial Conduct); *Matter of Teresi*, 2002 Annual Report 163 (Comm on Judicial Conduct); *Matter of Recant*, 2002 Annual Report 139 (Comm on Judicial Conduct); *see also*, *Matter of Lawrence* (decision issued today).

It seems apparent that in the context of a particularly contentious proceeding (in which there had been three mistrials, a complaint by Mr. Modica's attorneys about respondent to the administrative judge and a motion for respondent's recusal on the grounds of bias), respondent overreacted to the attorney's zealous, appropriate effort to defend his client's interests. Despite respondent's insistence at the oral argument that he simply wanted Mr. Modica to apologize for the parking lot incident, it is clear that respondent never told the litigant on the record, directly or through his attorney, that a simple apology would have sufficed to avoid a holding of contempt. Incredibly, when respondent was asked at the oral argument why he had failed to convey that message to Mr. Modica, respondent asserted that he could not properly do so since Mr. Modica was represented by counsel.

We find respondent's misconduct particularly troubling notwithstanding that later that same day, at the conclusion of the trial, he corrected his injudicious decision by vacating the contempt finding. Several factors have persuaded us that a severe sanction is appropriate in this case.

First, respondent continues to insist that his actions were appropriate and, indeed, asserts that in similar circumstances he would do the same thing again.^[1] Such intransigence suggests that respondent still fails to recognize that the awesome contempt power should be exercised

only with appropriate restraint and within the carefully mandated safeguards. A judge's "fail[ure] to recognize the inappropriateness of his actions or attitudes" is a significant aggravating factor on the issue of sanctions. *See, Matter of Aldrich*, 58 NY2d 279, 283 (1983).

Second, we note with concern respondent's conflicting testimony as to certain matters (for example, the various reasons he gave for leaving early on April 21 and his varying testimony as to whether Mr. Modica "tapped" him in the parking lot) as well as his tendency to accuse others of misdeeds in order to justify his own misbehavior. Respondent's claim that he tried to prevent the attorney from making a record because he knew the attorney wanted to make a "phony" record (Tr. 225-27, 264) is entirely unsupported.

In sum, we find that respondent's conduct constitutes a significant departure from the role of a judge, who is required to be the "exemplar of dignity and impartiality" and to exercise the considerable powers of judicial office within the bounds of the law (Section 100.2[A] of the Rules; Section 700.5[a] of the Second Department Rules). We trust that respondent will learn from this episode and that, in light of this decision, he will modify his behavior appropriately.

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

Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Peters and Judge Ruderman concur. Mr. Emery and Mr. Felder file concurring opinions.

Mr. Goldman, Mr. Coffey and Mr. Pope dissent only as to the sanction and vote that the appropriate disposition is admonition.

Judge Luciano was not present.

Dated: October 20, 2005

CONCURRING OPINION BY MR. FELDER

The Court of Appeals has indicated its approval of the proposition that legal error and misconduct are not mutually exclusive.¹²¹ We deal here with legal error and more. Conduct that is not legal error *or* misconduct can still be especially hurtful and wrong, just as wounding words can inflict pain and embarrassment and yet fail to be actionable as defamation. Such conduct, although beneath the radar screen of actionable misconduct, can nevertheless help in arriving at a determination as to whether or not misconduct has occurred in an otherwise ambiguous scenario. It can be the music that helps define the lyrics. Truth is often as elusive as it is fragile, so that it needs all the help that is available to a searcher. Moreover, respondent's unjustifiably-hostile attitude in this proceeding helps us determine some of the disputed facts.

The inferences that may fairly be drawn from the facts here are of assistance in examining this troubling record. The events that created the present complaint arose over two partial days of court appearances in the *Modica* case, which commenced on April 21, 2003.

Prior to that date, the attorney for the plaintiff, John Modica, had lodged a complaint with respondent's Administrative Judge. On April 21st, Mr. Modica asked respondent for a one-day adjournment of the next day's proceedings for a legitimate, even compelling reason: he was a single parent and his 12-year old son was scheduled to play in a soccer tournament. Respondent denied the request for a modest adjournment and, in testimony during the investigation, candidly linked his refusal to the attorney's prior complaint: "In fact, if they hadn't complaint [sic] to the Administrative Judge, I'd have let [Mr. Modica] see the soccer match. I didn't care. It was a non-jury trial. I got things to -- I had other things to do" (Comm. Ex. 3, p. 81).

After little more than an hour of testimony (although the parties had arrived as directed at 9:30 AM, respondent took the bench around 11:30 AM), respondent cancelled the remainder of the court day. At the proceeding, and in his testimony, respondent gave various reasons for his early departure. He told the attorneys it was because he had "car trouble" (Tr. 38, 103). At the hearing, he testified it was because he had to visit his father (Tr. 223). He then testified that he "may have" told the attorneys the reason was "to fix a tire" (Tr. 234), but if he did, that was accurate because he got his tire fixed *and* saw his father (Tr. 237). At any rate, according to the record (uncontradicted by respondent), he adjourned the trial around 1:00 PM.

After court adjourned, as respondent, whose car was near the entrance of the judges' parking lot, began to drive out of the lot, Mr. Modica recognized him and approached the car, presumably to discuss the adjournment. At this point, respondent called over the guard, Geralyn Martucci, and told her to arrest Mr. Modica ("Could you arrest this man?" [Tr. 169]). She in turn called her lieutenant, and when the lieutenant arrived, respondent withdrew his demand for Mr. Modica's arrest. Respondent denies telling anyone to arrest Mr. Modica; he maintains that he asked the guard to "secure" Mr. Modica and then told the lieutenant who arrived on the scene, "Don't arrest him. Just scare the blank out of him and let me go on my way" (Tr. 224). If respondent did not initially give the order for Mr. Modica's arrest, there seems to be little reason why he would tell the lieutenant not to "arrest him." Further, at the argument before the Commission, respondent said, "I know Geri [Martucci], I knew Geri's father" (Oral argument, p. 34), which only underscores that Officer Martucci would have little motivation to give testimony that would be unhelpful to respondent.

Towards the end of the Commission hearing, for the first time, respondent said, "[Mr. Modica] tapped me on the back" (Tr. 245). Then he stated, "He could've tapped me. I don't remember if he tapped me," but acknowledged that prior to the date of the hearing he did not think he had ever told anyone about being tapped on the back (Tr. 246-47). Later he said that Mr. Modica "may have tapped me on the shoulder to get my attention" or "may not have tapped me," and then indicated that Mr. Modica may or may not have asked him for an adjournment in the parking lot (Tr. 255, 256-57).

Into this maze of conflicting facts and uncertain testimony, two troubling elements are added to the mix.

First, at the argument before the Commission, respondent for the first time mentioned^[31] spending some hours dealing with the situation in chambers *prior to* court convening on April

22nd, and respondent insisted that he wanted to keep Mr. Modica's attorney from making a "phony record."

Respondent's new assertion that on April 22nd there were as much as two hours of conferences on the subject of contempt *prior to* his taking the bench is, to say the least, surprising. Such conferences were never previously mentioned by respondent, nor is there any indication on the record that they occurred. The unavoidable conclusion is that his description of a lengthy meeting in chambers, from which he deduced that the plaintiff's attorney wanted to make a "phony record," was a sheer invention by respondent to create a predicate event in order to explain the inexplicable: namely, holding the *litigant* in contempt because his *lawyer* had the temerity to insist on placing his client's position on the record.

The second troubling aspect is respondent's attitude and deportment both at the hearing and at the argument before the Commission. Respondent has said he believes he was unfairly treated by the Commission. While he is entitled to that view, his own words and demeanor, as depicted in this record, are revealing.

Typical of the atmosphere engendered by respondent at the Commission hearing was the following colloquy between Commission counsel and respondent:

Q. Is it true today?

A. That – sir, you're asking me a hypothetical – no, sir, you're not that good to ask me a hypothetical." (Tr. 239)

In the argument before the Commission, Commission counsel at least three times referred to respondent as "a bully." While this would not normally be in my lexicon to be used in describing a jurist -- any jurist -- respondent's own actions, the record of the hearing and even respondent's angry, confrontational deportment before the Commission breathe life into such an appellation:

Q. That's because you had nothing to do the next day?

A. Sir, but what does this have to do with contempt? (Tr. 241)

After this colloquy at the hearing, respondent was admonished by the Referee.

Respondent then testified:

A. I an– excuse me– they were inappropriate questions that called for a "Yes" or "No" answer. Ms. Ma got angry because I answered her questions that demanded a "Yes" or "No" answer, "Yes" or "No." Excuse me, and since you want to refer to the record, I would implore the Commission to go back and check Ms. Ma's reason that I'm down here because she didn't like the fact that I answered "Yes" or "No" questions, "Yes" or "No." (Tr. 248)

In this maelstrom of respondent's contradictions and confrontational behavior, there are detours leading to absolute illogic.

At the hearing, respondent was asked:

Q. Were they trying to set up an appeal based upon what their activities were, in your opinion?

He responded:

A. I have no idea, but based on Mr. Goldweber's reputation, I could only believe he had something in his mind. (Tr. 220-21)

For a judge to believe an attorney had something in his mind based on what he believed to be his reputation is beyond comment.

At the Commission argument, respondent also offered the novel, if not illogical, assertion that he never held Mr. Modica in contempt at all since after holding Mr. Modica in contempt, he vacated the contempt:

MR. GOLDMAN: So, you think because you vacated essentially it was proper. Had you held him in contempt and not vacated, would you have acted improperly, procedurally?

THE RESPONDENT: ..But, again, as a matter of law because I vacated, I didn't hold him in contempt. That's the problem. I mean, I'm charged with holding somebody in contempt when I vacated the contempt. (Oral argument, pp. 45-46)

Instead of punishing the *litigant* for something the *lawyer* said, an attempt could have been made to give the litigant a chance to address respondent's pervasive theme: "Is he sorry for what happened the prior day in the parking lot?" Respondent has indicated that if Mr. Modica had merely said he was "sorry" for what occurred, he would not have held him in contempt, yet when asked to explain why he never said that to the litigant, his response was merely that it would have been wrong to speak to a litigant who was represented by counsel:

MS. DIPIRRO: Why didn't you go right to the defendant, Mr. Modica, and say –

JUDGE KLONICK: – Right.

MS. DIPIRRO: – just tell me you're sorry? It could have been over.

THE RESPONDENT: You know, I had a discussion like that with one of my colleagues. He was represented by counsel. Last time I checked, once he was represented by counsel – was supposed to go through the counsel.

MS. DIPIRRO: Well, it could have made it so much easier if you just said, "Are you sorry?"

THE RESPONDENT: But, ma'am, he was represented by counsel." (Oral argument, p. 56)

However, it was pointed out to him that his reasoning was inconsistent:

MR. FELDER: But didn't you also say to him that you're going to have 30 days at the expense of the city of New York?

THE RESPONDENT: Yes, if he did anything else. (Oral argument, p. 56)

It is clear that respondent never told the litigant on the record, directly or through his attorney, that a simple apology would have sufficed to avoid a holding of contempt.

Of particular significance is the fact that when respondent was specifically asked:

MR. FELDER: And if the same events happen again today, you would do the same thing today?

his response was:

THE RESPONDENT: Absolutely. (Oral argument, p. 49)

At the center of what occurred was that respondent initially punished a litigant by denying him a reasonable adjournment simply because the litigant's attorney had made a complaint about respondent. While a request for an adjournment is within a judge's discretion, here the denial was retaliatory and all the more unreasonable in the face of respondent's own decision to cut short the day for personal reasons. Then, respondent reacted to a trivial incident *outside* the courtroom, in the parking lot, by blowing the incident all out of proportion the next day. He held the *litigant* in contempt because his *lawyer* merely tried to do what it was his obligation as a lawyer to do: make a record and present his client's position. Any disruption in the courtroom caused by the *prior* day's incident in the parking lot was because of respondent's own actions.

Section 755 of the Judiciary Law provides as to contempt that "Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily." The Second Department Rule Section 701.2 reads as follows:

- (a) The power of the court to punish summarily any contempt committed in its immediate view and presence shall be exercised only in exceptional and necessitous circumstances, as follows: (1) where the offending conduct disrupts or threatens to disrupt proceedings actually in progress; or (2) where the offending conduct destroys or undermines or tends seriously to destroy or undermine the dignity and authority of the court in a manner and to the extent that it appears unlikely that the court will be able to continue to conduct its normal business in an appropriate way, provided that in either case the court reasonably believes that a prompt summary adjudication of contempt may aid in maintaining or restoring and maintaining proper order and decorum.
- (b) Wherever practical, punishment should be determined and imposed at the time of the adjudication of contempt. However, where the court deems it advisable the determination and imposition of punishment may be deferred

following a prompt summary adjudication of contempt which satisfies the necessity for immediate judicial corrective or disciplinary action.

(c) Before any summary adjudication of contempt the accused shall be given a reasonable opportunity to make a statement in his defense or in extenuation of his conduct.” (Emphasis added.)

Respondent’s misconduct cascaded. Initially, in retaliation for making a complaint to his superiors, respondent penalized the litigant. He then punished the litigant because his attorney sought to make a record and, indeed, he tried to dictate what the attorney should place on the record. Worse yet, the finding of contempt was itself patently without merit. Compounding this misconduct are respondent’s conflicting testimony and his complete lack of contrition, or even recognition of his misconduct, which are aggravating factors in considering an appropriate sanction. *See, Matter of Bauer*, 3 NY3d 158, 165 (2004); *Matter of Shilling*, 51 NY2d 397, 404 (1980).

For these reasons, I concur that censure is the appropriate remedy.

It should not go unnoticed that the referee, Judge Monteleone, performed his services admirably in a proceeding that was obviously – and unnecessarily – confrontational and nasty due to respondent’s pronounced hostility.

Dated: October 20, 2005

CONCURRING OPINION BY MR. EMERY

There can be no doubt that a judge must maintain control of, enforce decorum in, and require respect for his or her court. Among the tools to fulfill this responsibility is summary contempt; however, this power – to deprive a lawyer or litigant of liberty or impose a fine – is the “nuclear option” for judges faced with unruly behavior.

The Judiciary Law and the Rules of the Appellate Division, Second Judicial Department specifically delineate both the criteria and the procedure for imposing this extreme judicial sanction: they require, *inter alia*, that it be exercised “only in exceptional and necessitous circumstances” and that prior to such adjudication, the accused be given an opportunity to desist from the conduct and to make a statement explaining the conduct (22 NYCRR §§701.2[a],[c], 701.4; Jud Law §755).

Too often this Commission confronts abuse of the summary contempt power (*e.g.*, *Matter of Mills*, 2005 Annual Report 185; *Matter of Recant*, 2002 Annual Report 139; *Matter of Teresi*, 2002 Annual Report 163; *Matter of Sharpe*, 1984 Annual Report 134; the Commission has also cautioned judges for less serious abuses of this kind). Some judges repeatedly ignore both the basis and, even more frequently, the procedures on which any such finding and sanction may be legally premised. It is the essence of the statute, case law and rules that the potential contemnor must be warned and permitted to refrain from the behavior before the contempt sanction is imposed. Given the frequency of our public discipline for this unique abuse of judicial power, it

is a mystery to me how any judge in New York could ignore the well-established rules that are fashioned to restrict and even defuse imposition of summary punishment.

At a minimum, every judge ought to know when and how she/he may summarily put a person in jail. The rules are clear and not hard to follow. When they are followed, the rules can alleviate the need for the contempt sanction entirely, or permit the contempt to be purged before jail is imposed. If jail is ultimately required, at least the rules assure that due process is provided for the person deprived of liberty.

Respondent's actions in *Modica v. Modica* demonstrate a substantive and procedural lack of respect for the contempt statute (Jud Law §755), the Second Department rules (22 NYCRR §§701.2[a],[c], 701.4) and the case law (cases cited above). Substantively, respondent had no basis to hold the plaintiff in contempt: the plaintiff did nothing which "disrupt[ed] or threaten[ed] to disrupt the proceedings, or which "tend[ed] seriously to destroy or undermine the dignity and authority of the court" (22 NYCRR §701.2[a]). The behavior respondent found contemptuous was plaintiff's approach to the judge in the courthouse parking lot to request an adjournment to see his son play soccer. This out-of-court conduct the day before the contempt citation, no matter how threatened the judge may have felt, was simply not a substantive basis for imposition of summary contempt. *See, People v. Jeter*, 116 AD2d 558 (2d Dept. 1986). Moreover, respondent's unjustified anger at plaintiff's counsel for making a record of the parking lot incident plainly was the trigger for respondent to pervert the contempt sanction as a reprisal against plaintiff and his attorney.

Procedurally, respondent failed to abide by the most basic tenets for imposing summary contempt. He did not give the plaintiff an opportunity to explain his behavior; in fact, respondent punished him for his lawyer's attempt to do so. He gave no opportunity for the plaintiff to desist, which, of course, he could not for conduct that had occurred a day earlier outside of court. Finally, respondent's "warning" prior to the imposition of contempt was, in fact, a threat to improperly intimidate plaintiff's counsel from making a record. Under these circumstances respondent's procedural failures flowed inevitably from his myopic insistence on pursuing a course not legally available to him.

Perhaps even more troubling is respondent's combative approach to this entire incident as well as to the proceedings before this Commission. Respondent's misconduct in *Modica* seems to have been a response to the plaintiff's attorneys' complaints to the administrative judge during that litigation. Similarly, our majority decision today documents that, far from vigorously and appropriately defending himself, respondent has chosen to obfuscate, deny and provide retrofitted, *post hoc* rationalizations for misconduct he insists he would repeat. Ordinarily, this would be grounds for removal in a case as serious as this one. But because respondent vacated his ill-conceived contempt finding before the plaintiff suffered more than the court's improper opprobrium, I conclude censure is appropriate.

I do fear that, as respondent seems to predict, he will engage in this type of misconduct again. Because I hope my fears are unfounded, I concur.

Dated: October 20, 2005

^[1] When asked at the oral argument, “[I]f the same events happen again today, you would do the same thing today?” his response was: “Absolutely” (Oral argument, p. 49).

^[2] *Matter of Feinberg*, 5 NY3d 206, 215 (2005). Approving the observation in the referee’s report, the Court stated that legal error and judicial misconduct “are not necessarily mutually exclusive (*see Matter of Reeves*, 63 NY2d 105, 110 [1984]).”

^[3] Although accompanied by counsel at the argument before the Commission, respondent chose to argue and plead his own case.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **NILDA MORALES HOROWITZ**, a Judge of the Family Court, Westchester County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg, Of Counsel) for the Commission
Deborah A. Scalise for Respondent

The respondent, Nilda Morales Horowitz, a judge of the Family Court, Westchester County, was served with a Formal Written Complaint dated July 21, 2004, containing three charges. Respondent filed a verified answer dated August 13, 2004.

On November 30, 2004, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts, stipulating that the Commission make its determination based upon the agreed facts. The Commission approved the agreed statement on December 10, 2004.

Each side submitted memoranda as to sanction. On February 7, 2005, the Commission heard oral argument, at which respondent and her counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been a judge of the Family Court, Westchester County, since 2001. Respondent previously served as an administrative law judge and as a law guardian and hearing examiner in Family Court. Respondent is an attorney.

As to Charge I of the Formal Written Complaint:

2. Beth Martin is a personal friend of respondent and was a teacher of respondent's child.

3. Beth Martin had appeared as a litigant in a Family Court matter before Westchester Family Court Judge David Klein prior to May 30, 2003.

4. Within a few days of May 30, 2003, respondent spoke to Ms. Martin, who stated that she was considering the commencement of additional proceedings in the Family Court in the future and wished to have her case assigned to a judge other than Judge Klein. At the time, respondent informed Ms. Martin that she could not preside over her matter.

5. On May 30, 2003, respondent telephoned Judge Klein's court attorney, Kathryn Ritchie, Esq., who formerly served as respondent's court attorney, and requested her help in getting Judge Klein to recuse himself from Ms. Martin's matter, by leaving the following voice mail message for Ms. Ritchie:

It's Nilda. How you doin'? Give me a call on Monday. I need to ask a favor and see whether or not this can be done. Basically, I'll tell you briefly so you have an idea. There was a matter, there have been matters before your judge dealing with Beth Martin. She's a personal friend of mine. She's my kids' teacher for a couple of years and she's beside herself, something happened recently with her husband and she said she's had issues with Judge Klein and she's written letters against him. So, I told her to file her petitions in White Plains. [Supervising Family Court] Judge Cooney said that unless Judge Klein recuses himself we wouldn't be able to hear her case here, not me obviously but somebody else. So, I'm reaching out to you to get suggestions, as to how we could get him to do that. I don't know if he would, for whatever reason. But apparently they have not had a good rapport and she definitely has major issues she needs to modify with regard to her divorce decree and her husband. So if you want to get back to me I'll give you a little more information and you could give me your ideas. Call me back Monday.

6. Ms. Martin did not subsequently commence additional proceedings in Westchester County Family Court or have any additional conversations with respondent concerning the proceedings.

7. Respondent now recognizes that her conduct in paragraph 5 above was improper.

As to Charge II of the Formal Written Complaint:

8. Respondent is a close friend of Jeff Higdon and Barbara Antmann, a married couple, and has socialized often with them over the past several years.

9. Respondent knew that Mr. Higdon and Ms. Antmann were involved in a custody dispute in the New Jersey courts concerning a child who was living with them, but who was not their biological or adopted child. Respondent frequently came into contact with the child when visiting at the Higdon/Antmann home. Respondent advised Mr. Higdon and Ms. Antmann that she could not preside over their matter should a proceeding be commenced in Westchester County Family Court because of the personal nature of their relationship.

10. On June 5, 2003, Mr. Higdon called respondent at her court and advised her that the matter had been dismissed in New Jersey and that he and his wife were considering

commencing a proceeding in respondent's court against the child's biological parents, Motke and Shoshona Barnes.

11. On June 5, 2003 and June 6, 2003, Family Court Supervising Judge Joan O. Cooney was assigned to preside over emergency applications and *ex parte* proceedings.

12. On June 5, 2003, without identifying them by name, respondent advised Judge Cooney that her friends, meaning Mr. Higdon and Ms. Antmann, would be coming to court seeking an order of protection. Judge Cooney advised respondent that the matter must proceed in the normal manner.

13. On June 6, 2003, immediately prior to Judge Cooney's presiding over the matter commenced by Mr. Higdon and Ms. Antmann, respondent advised Judge Cooney that the petitioners were respondent's friends. Judge Cooney reiterated that the matter must proceed in its normal course.

14. Judge Cooney presided over the matter on June 6, 2003, issued an *ex parte* order of protection in favor of Mr. Higdon and Ms. Antmann and against Mr. and Mrs. Barnes, and granted Mr. Higdon and Ms. Antmann temporary custody of the child. Judge Cooney then assigned the matter to Family Court Judge Sandra B. Edlitz.

15. Prior to the first appearance of Mr. Higdon and Ms. Antmann before Judge Edlitz, respondent spoke to Senior Court Clerk Edward Edmead, the court clerk assigned to Judge Edlitz's part, and told Mr. Edmead that the petitioners, Mr. Higdon and Ms. Antmann, were respondent's friends and were really nice people. Respondent also asked Mr. Edmead to look out for them.

16. In June 2003, in a courthouse hallway, respondent encountered Judge Edlitz's court attorney, Susan Pollet, and told Ms. Pollet that the petitioners in the *Higdon* matter were respondent's friends.

17. Subsequently, during the summer of 2003, respondent came into Ms. Pollet's office in the courthouse and stated that she knew Mr. Higdon and Ms. Antmann in the matter from Scarsdale (where respondent, Mr. Higdon and Ms. Antmann reside) and was friendly with them. Respondent also stated that Mr. Higdon and Ms. Antmann were good people and good parents. Ms. Pollet would testify that this was the first time since respondent had become a judge that she had come into Ms. Pollet's office. Respondent would testify that she had previously been in Ms. Pollet's office on several occasions.

18. In August 2003, respondent entered Judge Edlitz's chambers and had a conversation with Judge Edlitz. Judge Edlitz would testify that, initially during the conversation, respondent told Judge Edlitz that the petitioners, Mr. Higdon and Ms. Antmann, were her friends and that they were very nice people and that respondent and Judge Edlitz then discussed several unrelated matters. Respondent would testify that, during the course of a conversation concerning several matters, she told Judge Edlitz that the petitioners, Mr. Higdon and Ms. Antmann, were her friends and that they were very nice people.

19. On August 18, 2003, Judge Edlitz recused herself from the matter commenced by Mr. Higdon and Ms. Antmann because of respondent's unauthorized *ex parte* communications on behalf of the petitioners, Mr. Higdon and Ms. Antmann. Judge Edlitz did not state a reason for the recusal on the record. The matter was then transferred to Rockland County, and was later transferred again to New York County.

20. In September 2003, Judge Cooney told respondent that the matter commenced by Mr. Higdon and Ms. Antmann was transferred out of Westchester County because of respondent's intervention. Respondent replied that Judge Cooney was "being ridiculous" and that "everybody does it."

21. Respondent now recognizes that her conduct in paragraphs 12, 13 and 15-18 above was improper.

As to Charge III of the Formal Written Complaint:

22. On December 4, 2003, respondent testified before the Commission concerning a complaint alleging that respondent had sought special consideration on behalf of Beth Martin. At the time, the Commission had not received a complaint concerning respondent's conduct in connection with the matter commenced by Mr. Higdon and Ms. Antmann.

23. On December 4, 2003, respondent testified concerning her voice mail message of May 30, 2003, to Kathryn Ritchie, Esq., concerning Beth Martin.

24. Respondent was asked if there were any other pending or impending matters, involving litigants whom she knew, as to which she had communicated with another judge or court attorney. Respondent testified as follows:

Q: Have you ever attempted to communicate with any other judge concerning a pending matter or an impending matter on behalf of an individual?

A: On behalf? No. Conversations about cases that we know, sure, but not on -
- no.

Q: Did you ever have a conversation with a judge about - - another judge about a pending matter or an impending matter in which you knew a litigant?

A: In which I knew a litigant?

Q: Yes.

A: Maybe.

Q: Could you explain?

A: I mean, at one point or another, all of us have people in front of us that we know, so - - and we discuss these matters all the time. "Oh, did you see

so-and-so, he was here,” and, you know, “that one’s attorney is, you know, filing for orders of protection.” And so those conversations are - -

Q. Other than just referring to a case, that “X” was here, did you have any other conversations?

A. No, no.

Q. Of that nature?

A. No.

Q. Did you ever have a conversation with another court attorney, not your own court attorney, but another court attorney, concerning a pending or impending matter in which you knew one of the litigants?

A. Probably the same type of conversation we’ve had with the judge.

Q. Just informational, “did you see who was here?”

A. Yes, right, you know.

Q. Anything other than that?

A. No, no.

25. Respondent now recognizes that her testimony was not accurate and that, in response to the questions posed to her in paragraph 24 above, she should have advised the Commission about the *Higdon* matter.

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)(6) and 100.4(A)(1) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent’s misconduct is established.

It is improper for a judge to intervene in official matters when he or she is known as a judge, even in the absence of an explicit request for special consideration. *Matter of Edwards v. Comm. on Judicial Conduct*, 67 NY2d 153, 155 (1986) (non-lawyer town justice was censured for identifying himself as a judge while inquiring about procedures in his son’s traffic case). Such conduct constitutes an improper assertion of judicial influence, which has long been condemned as favoritism and “is wrong, and always has been wrong.” *Matter of Byrne*, 47 NY2d (b), (c) (Court on the Judiciary 1979); Rules Governing Judicial Conduct, §100.2(C).

In a 1977 report about the assertion of influence in traffic cases, the Commission stated that such conduct results in “two systems of justice, one for the average citizen and another for

people with influence” (“Ticket-Fixing: Interim Report,” June 20, 1977, p. 16). A judge who asserts the influence of judicial office by speaking favorably about a litigant to the presiding judge does a grave injustice to the judicial system since such conduct implies that, as a result of such private communications, a litigant with the right “connections” might receive special treatment. Respondent’s conduct diminishes respect for the judiciary because it strikes at the heart of the justice system which is based on equal justice and the impartiality of the judiciary.

Here, respondent interceded on behalf of friends in two cases that were pending or impending before other judges in Family Court. In the first matter, respondent believed a proceeding was about to be filed, and she left a message for the judge’s court attorney (respondent’s former court attorney), seeking the attorney’s assistance in conspiring how to persuade the judge to recuse himself. In her message, respondent described her personal relationship with the prospective litigant, told the court attorney that her friend did not have “a good rapport” with the judge, and solicited the court attorney’s “ideas” as to “how we could get [the judge] to do that [*i.e.*, disqualify himself].” This approach was especially harmful since it tried to entice an attorney who worked for another judge to manipulate the system, rather than allow the case to proceed in the normal course. It is immaterial that no new proceeding was ever initiated. It is especially troubling that respondent indicated to the Commission that if she had a closer relationship to the presiding judge, she would have gone to him directly with the request (Oral argument, p. 69). This indicates that respondent lacks an essential understanding of why her conduct was improper.

Five days later, respondent engaged in another improper *ex parte* communication about a pending matter. Respondent advised her supervising judge that respondent’s friends would be seeking an order of protection. The judge informed respondent that the matter must proceed in the normal course. Undeterred by this response, the next day respondent reminded the judge, who was about to preside over respondent’s friends’ petition, that the litigants were her friends. Once again, the judge told respondent that the matter must proceed in its normal course. The judge issued an order of protection in favor of respondent’s friends, granted temporary custody of the child to respondent’s friends, and assigned the case to another judge.

Despite having twice been warned that the case had to proceed in the normal course, respondent then told the senior court clerk that the petitioners were respondent’s friends and “were really nice people,” and asked the clerk to “look out for” her friends. Respondent also told the court attorney of the judge assigned to the case that the petitioners were respondent’s friends and, a few weeks later, again told the court attorney that the petitioners were her friends and were “good people” and “good parents.” Finally, respondent repeated that message—that the petitioners were her friends and were “very nice people”—to the presiding judge while visiting the judge in chambers. Because of that highly improper *ex parte* communication, the judge recused herself from the case, which was transferred to another county.

Later, when respondent’s supervising judge commented that because of respondent’s intervention the case had been transferred out of the county, respondent replied, “That’s ridiculous” and said, “Everybody does it.” Respondent has explained that her comment, “That’s ridiculous” meant that there were other reasons why the case had been transferred, and that “Everybody does it” meant only that judges often speak about their cases to other judges.

Obviously, there is a significant difference between casual discussion of pending cases and communications that convey, implicitly or explicitly, a request for special treatment. Regardless of what respondent claims she meant, her comments reflect a lack of sensitivity to judicial ethics.

Arguably, respondent's conduct to advance her friends' interests was far more harmful than seeking special consideration in traffic cases or telling a prosecutor or even a judge favorable background material about a defendant in a criminal case in regard to a determination of sentence (*see Matter of Kiley*, 74 NY2d 364 [1989]). In Family Court cases, there often are opposing parties whose competing interests impact the lives of children. When a judge seeks to privately impart favorable information about a litigant to the judge presiding over a matter, the entire system of justice in Family Court is subverted.

Respondent was charged with lack of candor during the investigation when, testifying about the earlier incident, she was asked whether she had engaged in similar *ex parte* communications about any other pending matters. Respondent testified under oath that she had not done so, which clearly was inaccurate since the events covered by Charge II had occurred only a few months earlier. Respondent conceded in the Agreed Statement of Facts that she should have disclosed the prior events and that her responses were "not accurate."

In determining the appropriate sanction, we find precedent in the decisions of the Commission and the Court of Appeals in which judges have been disciplined for the improper assertion of influence. The Court of Appeals has stated that "[t]icket-fixing is misconduct of such gravity as to warrant removal," even for a single transgression. *Matter of Reedy v. Comm. on Judicial Conduct*, 64 NY2d 299, 302 (1985); *Matter of Edwards v. Comm. on Judicial Conduct*, *supra* ("as a general rule, intervention in a proceeding in another court should result in removal" [67 NY2d at 155]). The Court has also observed that mitigating factors should be considered in deciding whether a sanction less severe than removal would be appropriate. *Matter of Edwards*, *supra*. In numerous cases, both the Court and the Commission have admonished or censured judges for such conduct. *See, e.g., Matter of Lonschein*, 50 NY2d 569 (1980); *Matter of Calabretta*, 1985 Annual Report 112 (Comm. on Judicial Conduct); *Matter of Cipolla*, 2003 Annual Report 84 (Comm. on Judicial Conduct); *Matter of Martin*, 2002 Annual Report 121 (Comm. on Judicial Conduct), *revised*, 6/6/02; *Matter of LoRusso*, 1988 Annual Report 195 (Comm. on Judicial Conduct); and, recently, *Matter of Bowers*, 2005 Annual Report ___ (Nov. 12, 2004), <http://www.scjc.state.ny.us/Determinations/B/bowers.htm> (town justice was censured, upon a joint recommendation of Commission Counsel and the judge, for sending a letter requesting special consideration for a defendant in a traffic case, untruthfully identifying the defendant as his relative).

In *Matter of Kiley*, *supra*, the Court rejected a Commission determination that a full-time judge be removed for seeking special consideration from a prosecutor in one case and from a prosecutor and the judge presiding in another case. Holding that the judge had "lent and appeared to lend the prestige of his office to advance the respective defendant's private interests," the Court noted that, as to one case, the judge was motivated by sympathy for the defendant's family and sought to help his friends through an emotional trauma (74 NY2d at 368, 370). As to both cases in which he interceded on behalf of defendants, the judge "was not motivated by personal gain, and totally absent from his conduct was any element of venality,

selfish or dishonorable purpose”; there were “no aggravating factors and thus a sufficient basis for removal is lacking” (*Id.* at 370).

The decision in *Kiley* is especially instructive here since the facts are somewhat similar. In this case, however, respondent ignored warnings by her supervising judge, had improper conversations with court personnel as well as two judges presiding over her friends’ case, and tried to enlist a judge’s court attorney to achieve the result that respondent’s friend wanted: the judge’s recusal. Although the misconduct here is more serious than in *Kiley*, one mitigating factor in that case is applicable here: respondent’s motivation in advancing her friends’ cause was sympathy for her friends and a strong belief in them as parents.

The only other mitigating factor in this case is the stipulation by respondent, her attorney and Commission counsel that respondent now understands that her conduct was improper.

Left to choose between censure and removal, we decide not to remove respondent from office. We emphasize that the misconduct here is extremely serious and cannot be tolerated. Every judge is obliged to learn and abide by the ethical rules. If parties in court proceedings are to have faith in the decisions of judges, they must have assurance that *ex parte* communications of the kind respondent initiated will be condemned by strong measures.

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

Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur. Mr. Goldman dissents only as to sanction and votes that the appropriate disposition is removal.

Dated: March 25, 2005

DISSENTING OPINION BY MR. GOLDMAN

I respectfully dissent from the determination of censure, and vote to remove respondent. I believe her persistent misconduct in interfering in cases before other judges, her evasive testimony during the investigation by Commission staff and her failure to recognize the gravity of her misconduct demonstrate her lack of fitness to serve as a judge.

Respondent abused her position as a judge in two separate matters before other judges in her own court by making statements that could only have been meant, and understood, as seeking preferential treatment for her friends. Obviously, such beneficial treatment, if it had been given, would have been to the detriment of the litigants on the other side of the lawsuit.

In one instance, when a friend was unhappy with the judge previously assigned to her case, respondent by voicemail importuned the judge’s court attorney, who had been her own court attorney, to help her find a way to get the judge to recuse himself so that her friend would have a more favorable judge.

In another case, she persistently sought favorable treatment for a couple involved in a

custody suit: twice to the supervising judge, to whom she mentioned that the litigants were her friends; once to a court clerk, to whom she said that the litigants were her friends and were nice people and to look out for them; twice to the assigned judge's court attorney, to whom she said that the litigants were her friends and good people and good parents; and once to the assigned judge herself, to whom she said the litigants were her friends and very nice people. When told by her supervising judge that the matter had to be transferred out of the county because of her intervention, she replied that the judge was being "ridiculous" and that "everybody does it."

Under the test enunciated by the Court of Appeals, that conduct alone might well warrant removal. In *Matter of Edwards v. Comm. on Judicial Conduct*, 67 NY2d 153, 155 (1986), where the judge intervened in another court concerning his son's traffic ticket, the Court wrote: "[A]s a general rule, intervention in a proceeding in another court should result in removal." Here, there is far more than the single instance of intervention, and here, of course, the matters were not in "another" court but in the very court in which respondent sat. Thus, respondent's misconduct is more pernicious than that in *Edwards*. Requests for favorable treatment from a judge of the same court, or from a judge to a lower-ranking official in the same court, are more difficult to ignore and thus more likely to succeed. [1] On the other hand, the "general rule" has been honored more in the breach than in the observance and cases involving requests for favoritism have generally occasioned a sanction less than removal. See, e.g., *Matter of Kiley*, 74 NY2d 364 (1989); *Matter of Pennington*, 2004 Annual Report 139 (Comm. on Judicial Conduct).

Respondent's misconduct, however, is not limited to her two (or seven, depending how one counts) instances of intervention. Called to testify during the Commission staff's investigation of the first instance, involving the voicemail message, [2] respondent gave evasive, if not false, testimony in denying that she had ever, aside from that single incident, communicated with a fellow judge or court attorney on behalf of a litigant. I find unconvincing respondent's explanation, given during oral argument before the Commission, that she had forgotten about the second series of entreaties. Her testimony occurred only four to six months after she made six requests for favorable treatment and only three months after she was rebuked by her administrative judge for causing the assigned judge to recuse herself so that the case had to be sent to another county. These events were certainly memorable. This evasive (or perhaps deliberately false) testimony itself is grounds for severe sanction, possibly removal. See, e.g., *Matter of Collazo*, 91 NY2d 251, 255 (1998) ("deception is antithetical to the role of a Judge who is sworn to uphold the truth"). [3]

Lastly, in her appearance before the Commission (as well as in her remarks to her supervising judge when told of the transfer of the case), respondent demonstrated a lack of awareness of the extent and gravity of her wrongdoing. Although she stipulated to a finding of misconduct, she continually denied that she had intended to seek favorable treatment and intervene with the judicial process, maintaining that she spoke to court staff only to remind them that she could not hear the case. She viewed her overtures to court officials as improper only because they may have been misconstrued and appeared improper to others. While she admitted making "mistakes," she stated that she "can't control th[e] perception" of others. When asked if she thought that she did something wrong, she allowed only that she should not have called people or left messages "that...can...be interpreted in any way, shape or form ...as something that is asking for any special consideration" and that she "let the boundaries get kind of fuzzy."

I recognize that respondent's conduct was not motivated by personal gain, but out of concern for friends. I realize that the sanction of removal is reserved for "truly egregious circumstances." *Matter of Steinberg*, 51 NY2d 74, 83 (1980). I believe respondent's combined misconduct, considered with her inability to comprehend the severity of that misconduct, meets that standard. Her "failure to recognize and admit wrongdoing strongly suggests that, if [s]he is allowed to continue on the bench, we may expect more of the same." *Matter of Bauer*, 3 NY3d 158, 165 (2004).

I vote for removal.

Dated: March 25, 2005

[1] To their credit, those who were approached by respondent gave no favorable treatment to her friends.

[2] At the time Commission staff was unaware of respondent's requests for favorable treatment in the other matter.

[3] Indeed, if such a serious matter had been in fact so soon forgotten, even after a Commission investigation into similar interference, it would indicate that respondent did not view her misconduct very seriously.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RICHARD D. HUTTNER**, a Justice of the Supreme Court, Kings County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg and Vickie Ma, Of Counsel) for the Commission
Jerome Karp for Respondent

The respondent, Richard D. Huttner, a justice of the Supreme Court, Kings County, was served with a Formal Written Complaint dated March 3, 2005, containing one charge. Respondent filed a verified answer dated March 10, 2005.

On April 13, 2005, the administrator of the Commission, respondent's attorney 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, recommending that respondent be censured and waiving further submissions and oral argument.

On April 21, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Supreme Court since January 1985. Prior to that, he served as a judge of the Family Court of the City of New York from 1979 through 1984. Insofar as respondent is 70 years of age, he is presently serving a term of office that expires on December 31, 2005. Insofar as respondent is not 76 years of age, he is eligible to apply for certification for an additional two-year term, to commence January 1, 2006.

2. Respondent has had a close social relationship with Ravi Batra, Esq. since the mid-1990s. They have been to each other's homes, and respondent has attended various of Mr. Batra's family events, including a wedding anniversary celebration and a memorial service. They have socialized together with their spouses, and have had drinks, lunch and dinner together on numerous occasions.

3. Between 1996 and 1999, respondent appointed Mr. Batra as a fiduciary in 11 matters. In one such matter in 1998, respondent appointed Mr. Batra as receiver to the Cypress Hills Cemetery and subsequently appointed him as counsel to receiver.

4. Respondent socialized with Mr. Batra while the Cypress Hills matter was pending before him and continued to do so after Mr. Batra stepped down as receiver on May 10, 2000. For example, respondent and Mr. Batra and their wives met socially for drinks and dinner at a restaurant in respondent's Manhattan apartment building on May 11, 2000.

5. In June 2000, Mr. Batra appeared before respondent as counsel for two of the three defendants in *Baisden et al. v. Pacific House Residence for Adults Housing Development Fund Corporation et al.* ("*Baisden*"). The Office of the Attorney General represented the third defendant, the Commissioner of the New York State Department of Health.

6. Respondent continued to socialize with Mr. Batra while *Baisden* was pending before him.

7. Respondent did not disclose his social relationship with Mr. Batra to the other attorneys in the *Baisden* matter, on or off the record. Nor did respondent disclose to the attorneys that he had awarded fiduciary appointments to Mr. Batra.

8. The attorneys made several appearances before respondent in the *Baisden* matter. Respondent presided over a three-hour hearing and signed a stipulation between the parties as "so ordered."

9. Respondent stipulates and agrees that he will not seek or accept recertification to serve as a justice of the Supreme Court beyond the end of his current term on December 31, 2005.

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(E) and 100.3(F) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

A judge's disqualification is required in any matter where the judge's impartiality might reasonably be questioned (Section 100.3[E][1] of the Rules Governing Judicial Conduct ["Rules"]). Respondent violated that standard by presiding over a case notwithstanding that he had a close social relationship with the defendants' attorney, Ravi Batra. *See, Matter of Robert*, 1997 Annual Report 127, *accepted*, 89 NY2d 745 (1997); *Matter of DiBlasi*, 2002 Annual Report 87 (Comm. on Judicial Conduct); *Matter of Lebedeff*, 2006 Annual Report ____ (Comm. on Judicial Conduct) (<http://www.scjc.state.ny.us/Determinations/L/lebedeff.htm>). Their social relationship included meals together, family celebrations, and visits to each others' homes. At the very least, respondent should have disclosed the relationship so that the parties and their attorneys could have had an opportunity to consider whether to seek his disqualification (*see* Section 100.3[F] of the Rules).

While the *Baisden* case was pending before him, respondent continued to socialize with Mr. Batra. Even if they did not discuss the merits of Mr. Batra's case during their out-of-court meetings, an appearance of impropriety would be inevitable. Despite several court appearances in *Baisden*, respondent never disclosed his social relationship with Mr. Batra to the other attorneys in the matter; nor did he disclose that, in the four years prior to the *Baisden* case, he had awarded eleven fiduciary appointments to Mr. Batra. Those appointments compounded the appearance that he could not be impartial when Mr. Batra appeared before him.

In mitigation, it appears that respondent's actual role in the *Baisden* case, which was concluded by stipulation, was relatively small.

We are mindful that in December 2001 respondent was censured for lending the prestige of judicial office to advance private interests by his "highly visible" participation in litigation involving his residential cooperative board. *Matter of Huttner*, 2002 Annual Report 113 (Comm. on Judicial Conduct). Although respondent's misconduct in this matter predates the Commission's proceedings as to the earlier matter, the record establishes that respondent lacks sensitivity to the special ethical obligations of judges and indicates the need for a severe sanction.

In accepting the stipulated disposition and imposing a sanction less than removal, we are constrained by the fact that, at the age of 70, respondent will retire at the end of this year, having agreed not to seek re-certification for an additional term. Absent such an agreed disposition, in which respondent has acknowledged his misconduct, it is unlikely that a disciplinary proceeding resulting in any public sanction could have been completed prior to respondent's departure from the bench. In view of the foregoing, we reluctantly accept that this result is appropriate. *See, Matter of Dye*, 2004 Annual Report 94 (Comm. on Judicial Conduct).

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

Mr. Goldman, Mr. Coffey, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. Di Pirro and Judge Luciano were not present.

Dated: July 5, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MATTHEW F. KENNEDY**, a Justice of the Cocksackie Village Court, Greene County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Dennis B. Schlenker for Respondent

DECISION AND ORDER

The matter having come before the Commission on March 10, 2005 ; and the Commission having before it the Formal Written Complaint dated February 1, 2005, and the Stipulation dated March 10, 2005; and respondent having resigned from judicial office on March 7, 2005, and having affirmed that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if approved by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued and the case closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: March 15, 2005

STIPULATION

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter "Commission"), the Honorable Matthew F. Kennedy, the respondent in this proceeding, and his attorney Dennis B. Schlenker .

1. This Stipulation is presented to the Commission in connection with a formal proceeding pending against respondent.

2. Respondent has been a Justice of the Coxsackie Village Court, Greene County, since 1998. He is not an attorney

3. On February 2, 2005, respondent was served by the Commission with a Formal Written Complaint, alleging *inter alia* that he released two defendants, charged with felonies, on recognizance without notice to the district attorney concerning bail, as required by law; that he refused to conduct arraignments in four cases when contacted by the police after they had arrested the defendants on respondent's warrants, and instructed the police to release the defendants instead; that he pressured a state trooper to accord special consideration to a Speeding defendant who had done business with the employer of respondent's wife; and that he authorized his court staff to collect and disburse monetary judgments on behalf of certain civil litigants in cases before him.

4. Respondent submits this Stipulation and his resignation in lieu of an Answer to the Formal Written Complaint.

5. Respondent tenders his resignation, dated March 2, 2005, effective March 7, 2005, and affirms that he will neither seek nor accept judicial office at any time in the future. A copy of respondent's letter of resignation is attached.

6. Pursuant to law, the Commission has 120 days from the date of a judge's resignation to complete the proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.

7. All parties to this Stipulation respectfully request that the Commission close the pending matter based upon this Stipulation.

8. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if accepted by the Commission.

s/ Matthew F. Kennedy
Respondent

s/ Dennis B. Schlenker, Esq.
Attorney for Respondent

s/ Robert H. Tembeckjian
Administrator & Counsel to the Commission
Cathleen S. Cenci, Of Counsel)

March 10, 2005

RESIGNATION LETTER

March 2, 2005

Mayor Henry Rausch
Village of Cossackie
119 Mansion Street
Cossackie, NY 12051

Dear Mayor Rausch:

After serious consideration I am tendering my resignation as Cossackie Village Justice effective Monday, March 7, 2005.

It has been a pleasure serving the people of Cossackie.

Very truly yours,

s/ Matthew F. Kennedy

cc: Cossackie Village Board
Office of Court Administration

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DANIEL L. LA CLAIR**, a Justice of the Clinton Town Court, Clinton County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Harris Beach PLLC (by Thomas W. Plimpton) for Respondent

The respondent, Daniel L. LaClair, a justice of the Clinton Town Court, Clinton County, was served with a Formal Written Complaint dated March 8, 2005, containing two charges.

On June 6, 2005, the administrator of the Commission, respondent's attorney 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, recommending that respondent be censured and waiving further submissions and oral argument.

On June 23, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Clinton Town Court since 1990. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about January 30, 1997, respondent's wife, Bonnie Sue LaClair, was charged with Speeding at 50 miles per hour in a 30 mile-per-hour zone. The summons was returnable in the Chateaugay Town Court, Franklin County.

3. Between January 30, 1997, and February 17, 1997, respondent telephoned Chateaugay Town Justice John Clark, identified himself as a judge and said his wife had received a Speeding ticket in Judge Clark's court. Judge Clark, who is now deceased, told respondent that he would see what he could do.

4. On or about February 17, 1997, when respondent's wife appeared in court, Judge Clark granted her an adjournment in contemplation of dismissal of the Speeding charge.

As to Charge II of the Formal Written Complaint:

5. On or about March 16, 2003, Daniel Lamb, a long-time acquaintance of respondent, was charged with Speeding at 50 miles per hour in a 30 mile-per-hour zone. The summons was returnable in the Chateaugay Town Court.

6. Between March 16, 2003, and March 31, 2003, respondent telephoned Chateaugay Town Justice Marie Cook, who knew respondent to be a judge. Respondent told Judge Cook that Mr. Lamb was a nice, elderly gentleman and that respondent would appreciate anything Judge Cook could do to “help” Mr. Lamb with respect to the Speeding ticket.

7. On or about March 31, 2003, based upon her conversation with respondent, Judge Cook reduced the charge against Mr. Lamb to a non-moving violation. Judge Cook recorded in her docket that the charge had been “reduced in the interest of Justice Danny LaClair.”

Supplemental finding:

8. In response to the Commission’s inquiries during the investigation of the allegations in Charge II above, respondent disclosed the conduct set forth under Charge I, which was otherwise unknown to the Commission. Respondent was cooperative throughout the Commission’s proceedings. Other than the matters herein, respondent has an unblemished disciplinary record in his 15 years 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) and 100.2(C) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent’s misconduct is established.

It is improper for a judge to ask another judge to grant special consideration to a defendant, or even to make an implicit request for special treatment by contacting the presiding judge and identifying the defendant as a friend or relative. By engaging in such conduct in two cases, respondent violated the Rules enumerated above and engaged in ticket-fixing, which is a form of favoritism that has long been condemned. In *Matter of Byrne*, 47 NY2d (b), (c) (1979), the Court on the Judiciary declared that “a judicial officer who accords or requests special treatment or favoritism to a defendant in his court or another judge’s court, is guilty of *malum in se* misconduct constituting cause for discipline.” Ticket-fixing was equated with favoritism, which the Court stated “is wrong, and has always been wrong” (*Id.* at [b]).

In the 1970s and 1980s, the Commission uncovered a widespread pattern of ticket-fixing throughout the state and disciplined over 140 judges for the practice. With the benefit of a significant body of case law, every judge in the state should be well aware that such conduct is prohibited.

As the Commission stated in a 1977 report about the assertion of influence in traffic cases, ticket-fixing results in “two systems of justice, one for the average citizen and another for

people with influence.” The report stated: “While most people charged with traffic offenses accept the consequences, including the full penalties of the law ... some are treated more favorably simply because they are able to make the right ‘connections’” (“Ticket-Fixing: The Assertion of Influence in Traffic Cases,” Interim Report, June 20, 1977, p. 16). Such conduct subverts the entire system of justice, which is based on the impartiality and independence of the judiciary, and undermines respect for the judiciary as a whole.

Here, respondent contacted the judge who was handling respondent’s wife’s traffic case, identified himself as a judge and identified the defendant as his spouse. As the Court of Appeals has held, such conduct is improper even in the absence of an explicit request for favorable treatment. *See, Matter of Edwards v. Comm. on Judicial Conduct*, 67 NY2d 153, 155 (1986). Following respondent’s call, the presiding judge granted respondent’s spouse an adjournment in contemplation of dismissal. In a second matter, respondent requested special consideration on behalf of a long-time acquaintance by contacting the judge handling the man’s traffic case. In a telephone call to the presiding judge, respondent told the judge (who knew respondent to be a judge) that the defendant was “a nice, elderly gentleman” and that respondent would appreciate anything the judge could do to “help” the defendant. As a result of respondent’s communication, the charge against the defendant was reduced.

The Court of Appeals has stated that even a single incident of ticket-fixing “is misconduct of such gravity as to warrant removal” (*Matter of Reedy v. Comm. on Judicial Conduct*, 64 NY2d 299, 302 [1985]), although mitigating factors may warrant a reduced sanction (*see, e.g., Matter of Edwards, supra; Matter of Cipolla*, 2003 Annual Report 84 [Comm. on Judicial Conduct] [judge was censured, in part, for intervening in his friend’s traffic case]; *see also, Matter of Bowers*, 2005 Annual Report 125 [Comm. on Judicial Conduct] [judge was censured, upon a joint recommendation, for sending a letter requesting special consideration for a defendant in a traffic case, untruthfully identifying the defendant as his relative]).

We note in mitigation that respondent has been forthright and cooperative in this proceeding and, indeed, informed the Commission of his misconduct as to the earlier incident, which had occurred eight years earlier and involved another judge who is now deceased. But for respondent’s disclosure of the 1997 incident during the Commission’s investigation, that incident probably would not have come to the Commission’s attention.

While we conclude that censure is appropriate in this case, this decision, based upon stipulated facts and a joint recommendation by counsel to the Commission and the judge as to sanction, should not be interpreted to suggest that we will never impose the sanction of removal for such transgressions. We continue to regard ticket-fixing as extremely serious misconduct and underscore that such conduct will be condemned with strong measures.

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Judge Klonick, Mr. Pope and Judge Ruderman concur.

Mr. Emery, Mr. Felder, Ms. Hernandez and Judge Luciano dissent and vote to reject the Agreed Statement of Facts on the basis that the disposition is too lenient and that respondent should be removed. Mr. Emery files a dissenting opinion in which Mr. Felder, Ms. Hernandez and Judge Luciano join insofar as it concludes that respondent's conduct warrants removal.

Judge Peters was not present.

Dated: August 31, 2005

DISSENTING OPINION BY MR. EMERY, IN WHICH MR. FELDER, MS. HERNANDEZ AND JUDGE LUCIANO JOIN IN PART

The *Cook* and *LaClair* cases pose the issue of what is the proper sanction for judges who decide cases, not based upon the law and the facts, but for their personal benefit or for the benefit of their friends. I consider this category of judicial misconduct to be the most serious of any that comes before the Commission. The question these cases raise is whether a sanction less than removal is supportable for judges who abuse their power by making decisions that are devoid of legal analysis, contrary to the facts as presented, and designed knowingly and solely to further their own personal interests.

The Court of Appeals has defined the purpose of disciplinary proceedings as “not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents” (*Matter of Reeves*, 63 NY2d 105, 111 [1984], citing *Matter of Waltemade*, 37 NY2d [a], [III]). In essence, our duties are protective rather than punitive. Our goal is to preserve the integrity and perception of judicial integrity within the justice system for litigants, victims, the state and other participants in the process by upholding the Rules on Judicial Conduct. In doing so, we must be fair to the judges who are charged and sanctioned. We must realistically evaluate the individual circumstances of each violation. Regularly, judges assert that their misconduct is mitigated by a myriad of factors such as provocation by litigants or lawyers (*Matter of Mills*, 2005 Annual Report 185 [Comm. on Judicial Conduct]; *Matter of Bauer*, 3 NY3d 158 [2004]); personal, medical, family or psychological circumstances (*Matter of Horowitz*, 2006 Annual Report ___ [Comm. on Judicial Conduct]; *Matter of Washington*, 100 NY2d 873 [2003]); good faith mistakes of law (*Matter of Bauer, supra*; *Matter of Feinberg*, __ NY3d __, No. 125 [June 29, 2005]); an absence of personal, financial or other economic benefit (*Matter of DiStefano*; 2005 Annual Report 145 [Comm. on Judicial Conduct]; *Matter of Feinberg, supra*); and speedy and spontaneous acknowledgment of the violation and sincere apology to those affected (*Matter of Allman*, 2006 Annual Report ___ [Comm. on Judicial Conduct]; *Matter of DiStefano, supra*).

But excuses and exceptions cannot be allowed to eviscerate the fundamental rule animating the Commission's work: that judging must be fair, unbiased, untainted, and driven by the law and the facts, and that the personal desires and interests of individual judges can have no role whatsoever in decision-making. How to uphold this rule in the face of competing interests and individual circumstances, and how to determine the appropriate sanction based upon a legally supportable neutral principle, is a constant struggle for the members of the Commission. The *Cook* and *LaClair* cases present what I believe is an opportunity to clarify how the Commission should make sanction decisions in a critical category of the cases.

In *LaClair*, Judge LaClair concedes that he telephoned Judge Cook and asked her to “help” a friend, Eric Lamb, who had received a Speeding ticket. In *Cook*, it is undisputed that Judge Cook received a phone call from Judge LaClair seeking special consideration for Mr. Lamb and that, as a result of the call, Judge Cook reduced Lamb’s Speeding charge to a parking violation. Remarkably, Judge Cook noted on the court docket that the charge had been “reduced in the interest of Justice Danny LaClair.”

Both justices also admit to other violations. Judge Cook concedes that *ex parte* she dismissed charges and amended a protective order as well as reduced or dismissed charges in 40 cases. In mitigation, she notes she is not an attorney, is new to the bench, and claims that the court schedule required her to deal *ex parte* with defendants. She also says she has reformed her practices to include the District Attorney.

Judge LaClair admits that he also asked a now-deceased town justice to fix a Speeding ticket for LaClair's wife with the result that the charge was adjourned in contemplation of dismissal. In mitigation, Judge LaClair asserts that he has been cooperative with the Commission and that he spontaneously confessed.

I dissent from the Commission’s determination of censure in these cases for one simple reason: removal is the only sanction available to the Commission that is commensurate with the corrosive effect of judicial decisions perverted by a judge's personal interest. This is a category of misconduct that strikes at the heart of our justice system. Decisions based on the personal interests of the judges, rather than the law and the facts, corrupt the system in two different and equally corrosive respects: they deny justice -- the simple but profound idea that acts contrary to law have consequences, no matter who the wrongdoer may be -- in the individual case at issue; and they infect the public with outrage and a depressing sense of despair when it becomes known that justice is not, in fact, blind in these cases. But, in contrast to judges whose misconduct is personal -- misbehavior off the bench that does not involve distortions of the justice system itself -- judges who pervert decision-making and abuse their power or discretion in their official capacity for their personal gain breed a special form of public cynicism and anger. I find it difficult, if not impossible, to excuse this category of judicial misconduct. And I simply cannot accept the proposition that misconduct of this sort is victimless. In fact, its victims are all of us, and the justice system itself.

With respect specifically to ticket-fixing, this Commission 28 years ago condemned this practice and demonstrated how the system of justice was “subverted” by such conduct (*Ticket Fixing: The Assertion of Influence in Traffic Cases*, Interim Report 1977 at p. 17). In that report the Commission stated: “The fixing of traffic tickets creates an illicit atmosphere within the courts which could easily carry over to other cases” (p. 19). The Commission discovered hundreds of judges who had engaged in ticket-fixing, either by seeking favors of other judges or by granting favors at the request of persons with influence. The practice was so routine that it was not unusual for Commission investigators to find letters requesting special consideration in the court files, clipped to copies of the tickets or dockets. By releasing its Interim Report and by imposing public discipline in over 140 cases, the Commission placed every judge in the State on notice that ticket-fixing would not be tolerated, and by the early 1980s, ticket-fixing had all but ended in this State.

Thereafter, incidents of ticket-fixing were treated with particular severity, since judges now had the benefit of a significant body of case law concerning the impropriety of ticket-fixing. In 1985 the Court of Appeals upheld the Commission's determination of removal of a judge who had interceded on two Speeding tickets issued to his son and his son's friend, stating that "ticket-fixing is misconduct of such gravity as to warrant removal, even if this matter were petitioner's only transgression" (the judge had previously been disciplined for similar misconduct) (*Matter of Reedy*, 64 NY2d 299, 302 [1985]). In a later case, the Court reiterated that "as a general rule, intervention in a proceeding in another court should result in removal," although, citing mitigating factors, the Court censured a town justice who had inquired about procedures in connection with his son's case but had not made an overt request for special treatment. *Matter of Edwards*, 67 NY2d 153, 155 (1986). Surely, the message from those cases must be that ticket-fixing will no longer be tolerated in this State and that a judge who engages in such conduct faces removal.

The respondents here had the lesson of recent history. They may be contrite when caught, but no amount of contrition can override such inexcusable conduct. *See, Matter of Bauer, supra*, 3 NY3d at 165. Neither the administration of justice nor the people of the state of New York can afford the message that ticket-fixing will result in a mere public censure. Only removal from office will demonstrate the Commission's view of how harmful this conduct is to the administration of justice.

We are fortunate that, despite occasional misconduct of this type, we still have a judicial system that is the envy of the world and trusted and respected by most of those who participate in it and, more importantly, society at large. But cynicism and alienation are lurking dangers that will be the inevitable consequence of any tolerance for judicial misconduct of this sort. Judges who have every opportunity, and a fundamental obligation, to obey the rules should not escape removal when they intentionally pervert justice for their own benefit.

I believe that focusing the Commission's ultimate sanction on those who fall into this narrow category properly fulfills the Court of Appeals' mission for us ("to safeguard the Bench from unfit incumbents"). This is not a punitive role for the Commission. We are entrusted with attempting to preserve the honor and integrity of the judicial function and to thereby engender public trust and respect. If we abdicate this responsibility by allowing judges who use the system for personal gain to remain in office, we will have failed in our own legal obligation to uphold the principles embodied in the misconduct Rules. Worse, we will fail, in the larger sense, to protect the system of justice.

Cook and *LaClair* are poster-cases for application of these principles. *Cook* knowingly and intentionally distorted her judicial decision to curry favor with her fellow justice. *LaClair* twice knowingly and intentionally used his position as a judge to have another judge render a decision that *LaClair* wanted. All of this occurred in flat contravention of the law and of the facts of the cases which these judges have sworn to decide fairly. This is not tolerable -- no matter how apologetic, cooperative or unsophisticated these respondents claim to be. Had either of these judges accepted a bribe -- no matter how small -- from a third party, they would face imprisonment. That they have corrupted the judicial process for the approbation of their friends, without money changing hands, warrants no less than our most severe sanction.

For me, proven misconduct of this sort that invidiously distorts judicial decision-making presumptively warrants removal. Were the sanction of suspension available, I might also consider it in certain compelling cases. However, a sanction of less than removal under the current array of available sanctions, which leaves a judge in office who has knowingly abdicated his/her official decision-making for personal gain, is simply inconsistent with a justice system rooted in procedural and substantive fairness, and with the Commission's duty to protect the system and the public that relies upon it.

Therefore, I respectfully dissent and vote to reject the Agreed Statement in both cases on the basis that the proposed disposition of censure is insufficient.

Dated: August 31, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RICHARD S. LAWRENCE**, a Judge of the Family Court, Nassau County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Vickie Ma, Of Counsel) for the Commission
Robert J. Miletsky for Respondent

The respondent, Richard S. Lawrence, a judge of the Family Court, Nassau County, was served with a Formal Written Complaint dated May 5, 2004, containing one charge. Respondent filed a verified answer dated June 14, 2004.

On March 2, 2005, 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 and provide an opportunity for briefs and argument on the issue of sanctions or, in the alternative, that based upon the agreed facts the Commission issue a letter of caution. On March 10, 2005, the Commission approved the Agreed Statement of Facts and scheduled briefs and argument.

The parties submitted briefs on the issue of sanctions. Counsel to the Commission recommended that respondent be admonished, and respondent's counsel recommended a sanction no greater than a letter of caution. On June 23, 2005, 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 Family Court judge, Nassau County since August 1997.
2. The original complaint against respondent was filed with the Commission by Mark Schulman.
3. On November 14, 2002, respondent presided over various petitions that had been filed by litigants Eva Schulman and Mark Schulman against each other for a family offense in which Ms. Schulman accused Mr. Schulman of domestic violence against her, and child custody/visitation matters arising out of an order of a different Family Court judge awarding joint custody to Mr. and Ms. Schulman of their two children.

4. Mr. Schulman appeared with his attorney, David Teeter. Also present were Ms. Schulman and her attorney, Robert Delcol; the law guardian, Jeffrey Halbreich; and the courtroom clerk, Janis Wong. The court reporter was Eric Fuchsman. Two court officers, Kellee A. Ross and Candace Seibt, were present throughout the proceedings.

5. Mr. and Ms. Schulman had appeared before respondent on prior occasions. Respondent noted on the record that there was a significant amount of ill will and acrimony between Mr. and Ms. Schulman evidenced in the prior proceedings before respondent and apparent at the hearing (at issue herein) before respondent on November 14, 2002. To respondent, Mr. Schulman seemed highly agitated at the beginning of and throughout the hearing, although respondent did not so state on the record.

6. On November 13, 2002 (one day prior to the hearing at issue before respondent), Mr. Schulman was found in civil contempt by Supreme Court Justice Robert Ross as a result of Mr. Schulman's failure to comply with a previous order of the Supreme Court and his failure to pay child support, maintenance, mortgage and other related expenses that he was previously ordered to pay. Mr. Schulman was sentenced to 120 days in jail for non-payment of support and related amounts due, which term of incarceration was to commence immediately. Mr. Schulman and his attorney, David Teeter, were aware of this contempt holding and order of incarceration at the time that they appeared before respondent, the next day, on November 14, 2002. Neither Mr. Schulman nor his attorney advised respondent, at any time during the hearing, that Mr. Schulman had been held in contempt by Justice Ross one day earlier and that Mr. Schulman had been ordered incarcerated by Justice Ross. On November 14, 2002, respondent was not otherwise aware of the contempt and/or incarceration order.

7. During the proceeding on several occasions, Mr. Schulman sighed, *i.e.* exhaled audibly in a long, deep breath, while others were addressing the Court. (One witness characterized it as "harrumphing.") Mr. Schulman was also fidgeting and on several occasions turned around, with his back toward respondent, apparently to reach for his personal belongings on a chair behind him. Respondent believed Mr. Schulman's conduct to be disrespectful and disruptive, and on one occasion respondent gazed at him silently but intently. Court Officers Ross and Seibt warned Mr. Schulman about his conduct several times.

8. The court reporter, Eric Fuchsman, did not record or describe in the minutes of the hearing any of the conduct of Mr. Schulman or the court officers throughout the hearing. It is Mr. Fuchsman's practice not to take down, in the minutes, conduct by any of the parties, individuals or court officers present during a hearing.

9. While Mr. Delcol was addressing the court, Mr. Schulman sighed again and shook his head. At the time, respondent believed that Mr. Schulman's cumulative behavior was disrespectful and disruptive. Respondent therefore declared Mr. Schulman in summary contempt and imposed a five-day jail sentence.

10. Respondent acknowledges that the transcript addresses the contempt determination in the following manner:

Mr. Delcol: ...That we resisted --

Respondent: Mr. Schulman, you make another sound you are going – hold Mark Schulman in summary contempt. He’s sentenced to five days at the Nassau County Correctional Center.

Mr. Schulman: I didn’t say a word.

Respondent: Quiet. Ten days.

Mr. Teeter: Your Honor, with all due respect --

Respondent: Twelve days. Twelve days in the Nassau County Correctional Center. Matter is on for hearing. Everything else is adjourned to the hearing date, December 4, 2:15 p.m. Twelve days. Take him out right now.

Mr. Schulman: Please, your Honor.

Mr. Teeter: With all due respect --

Court Officer: Step out.

11. It is court reporter Eric Fuchsman’s practice (a) only to take down the words of a judge when the judge and another individual are speaking at the same time and (b) not to make an indication in the transcript that the individual was talking at the same time as the judge. In the transcript excerpt above, respondent was cut off by Mr. Schulman at the point where respondent said, “Mr. Schulman, you make another sound you are going --”. Respondent was starting to give Mr. Schulman the required warnings relative to summary contempt at this point, but was interrupted by Mr. Schulman.

12. Respondent acknowledges that he did not specifically warn Mr. Schulman that his conduct could result in a summary contempt holding. Respondent also acknowledges that he did not provide to Mr. Schulman or his attorney an opportunity to make a statement in his defense or in extenuation of his conduct.

13. After the colloquy noted above, Mr. Schulman was handcuffed and taken into custody. Mr. Schulman was detained and spent the evening at the Nassau County Medical Center. On November 15, 2002, pursuant to Mr. Teeter’s petition for a writ of habeas corpus, Supreme Court Justice Victor Ort granted a stay of respondent’s contempt ruling upon Mr. Schulman’s posting of \$5,000 bail. Mr. Schulman was released at that time and ultimately did not serve any additional time as a result of the contempt determination by respondent. At the hearing on the writ, Justice Ort stated, *inter alia*, that “it could be argued” Mr. Schulman appeared before him with “unclean hands” but that it was not clear whether Mr. Schulman should still be incarcerated based on Justice Ross’ order of November 13, 2002.

14. Respondent now acknowledges that, prior to holding Mr. Schulman in contempt, he should have given Mr. Schulman a clear warning that his conduct could result in a holding of contempt, and he should have given Mr. Schulman or his attorney a reasonable opportunity to make a statement in his defense or in extenuation of his conduct. Respondent very much regrets not having done so.

15. While respondent believed at the time that Mr. Schulman’s ongoing conduct was disrespectful and disruptive, respondent states that if confronted by the same or similar conduct

today, respondent would not hold the individual in summary contempt and would consider other alternatives including directing that a short break be taken, or adjourning the matter to the next available and appropriate call of the calendar.

16. Respondent increased the time of Mr. Schulman's contempt term from five days to 10 days when Mr. Schulman started to speak, and then again to 12 days when Mr. Schulman started to speak again. Although the transcript excerpt in paragraph 10 above accurately shows Mr. Teeter saying "Your honor, with all due respect --", it does not show that Mr. Schulman was also starting to speak again, simultaneous to Mr. Teeter. Respondent recognizes that, notwithstanding his conclusion at the time that Mr. Schulman was acting disrespectfully toward the court, it was inappropriate for him to increase the contempt term without a separate warning and opportunity for Mr. Schulman or his lawyer to be heard. If confronted by the same or similar conduct today, respondent would not order an increase in incarceration time, without specifically providing to the individual and his counsel the required warnings and the opportunity to explain the conduct.

17. Respondent appreciates that the power to hold a person in summary contempt should be invoked with restraint. Respondent commits himself to exercise such restraint and to observe scrupulously the applicable statutory and Appellate Division mandates should he ever have occasion to exercise the summary contempt power in the future.

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)(3) of the Rules Governing Judicial Conduct in that he failed to exercise properly the summary contempt power as required by Section 755 of the Judiciary Law and Sections 701.2(a), 701.2(c) and 701.4 of the Rules of the Appellate Division, Second Department (22 NYCRR §§701.2[a], [c], 701.4) ("Second Department Rules"); and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. 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.

The exercise of the enormous power of summary contempt requires strict compliance with mandated safeguards, including giving the accused an appropriate warning and an opportunity to desist from the supposedly contumacious conduct (Jud Law §755; 22 NYCRR §§701.2[a], [c], 701.4); *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]; *Loeber v. Teresi*, 256 AD2d 747 [3d Dept 1998]). Respondent did not comply with these well-established procedural safeguards on November 14, 2002, when he held Mark Schulman in summary contempt.

Respondent's adjudication of contempt, which resulted in the litigant's incarceration and detention, was unnecessarily hasty and without procedural justification. Since respondent believed that Mr. Schulman's conduct (fidgeting, sighing, turning his back to the court) was disruptive and disrespectful, it was his obligation to warn Mr. Schulman that his conduct could result in a summary contempt holding resulting in his incarceration and to give Mr. Schulman an opportunity to desist from the conduct. It is no excuse that respondent did not provide the required warning simply because Mr. Schulman interrupted him. Clearly, notwithstanding the

interruption, respondent was not precluded from completing the warning and did, in fact, continue to speak.

Respondent's failure to adhere to mandated contempt procedures -- which he clearly knew about but disregarded -- constitutes misconduct warranting public discipline. *See Matter of Mills*, 2005 Annual Report 185 (Comm on Judicial Conduct); *Matter of Teresi*, 2002 Annual Report 163 (Comm on Judicial Conduct); *Matter of Recant*, 2002 Annual Report 139 (Comm on Judicial Conduct); *see also, Matter of Hart* (decision issued today).

Regardless of whether Mr. Schulman's conduct provided sufficient basis for the initial contempt holding (*i.e.*, the "exceptional and necessitous circumstances" required by the Second Department Rules), it was clearly improper for respondent to repeatedly raise the sentence when Mr. Schulman and his lawyer attempted to object to respondent's peremptory ruling. Under these circumstances the escalation of the sentence -- from five days to ten days to twelve days -- was a gross abuse of discretion and a substantial overreaction to their efforts to protest his ruling.

We note that respondent commits himself in the future to observe scrupulously the statutory and Appellate Division mandates in exercising the summary contempt power.

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

Mr. Coffey, Ms. DiPirro, Mr. Emery, Judge Klonick, Judge Luciano and Judge Ruderman concur as to the disposition. Mr. Emery files a concurring opinion.

Mr. Goldman, Ms. Hernandez and Mr. Pope dissent as to the sanction and vote that the appropriate disposition is a letter of caution.

Mr. Felder did not participate.

Judge Peters was not present.

Dated: October 20, 2005

CONCURRING OPINION BY MR. EMERY

There can be no doubt that a judge must maintain control of, enforce decorum in, and require respect for his or her court. Among the tools to fulfill this responsibility is summary contempt; however, this power -- to deprive a lawyer or litigant of liberty or impose a fine -- is the "nuclear option" for judges faced with unruly behavior.

The Judiciary Law and the Rules of the Appellate Division, Second Judicial Department specifically delineate both the criteria and the procedure for imposing this extreme judicial sanction: they require, *inter alia*, that it be exercised "only in exceptional and necessitous circumstances" and that prior to such adjudication, the accused be given an opportunity to desist

from the conduct and to make a statement explaining the conduct (22 NYCRR §§701.2[a],[c], 701.4; Jud. Law §755).

Too often this Commission confronts abuse of the summary contempt power (*e.g.*, *Matter of Mills*, 2005 Annual Report 185; *Matter of Recant*, 2002 Annual Report 139; *Matter of Teresi*, 2002 Annual Report 163; *Matter of Sharpe*, 1984 Annual Report 134; the Commission has also cautioned judges for less serious abuses of this kind). Some judges repeatedly ignore both the basis and, even more frequently, the procedures on which any such finding and sanction may be legally premised. It is the essence of the statute, case law and rules that the potential contemnor must be warned and permitted to refrain from the behavior before the contempt sanction is imposed. Given the frequency of our public discipline for this unique abuse of judicial power, it is a mystery to me how any judge in New York could ignore the well-established rules that are fashioned to restrict and even defuse imposition of summary punishment.

At a minimum, every judge ought to know when and how she/he may summarily put a person in jail. The rules are clear and not hard to follow. When they are followed, the rules can alleviate the need for the contempt sanction entirely, or permit the contempt to be purged before jail is imposed. If jail is ultimately required, at least the rules assure that due process is provided for the person deprived of liberty.

Respondent admits that he ignored the statute, the case law, and the Second Department rules and impetuously imposed escalating sentences of contempt on an unruly litigant. Most significantly, respondent gave no warning and twice increased the sentence when the litigant and his lawyer attempted to explain their conduct, as was their right. To the extent that the court transcript does not fully record the behavior of the litigant, it was respondent's obligation to show why he increased the jail term from five days to 10 days for no discernible reason, and from 10 days to 12 days when the litigant's lawyer said, "Your Honor, with all due respect -- ." On its face, it appears that the lawyer's reasonable effort to protect his client's rights in the face of a summary adjudication led to an increased term of detention. The absence of any explanation on the record for the increased jail term -- an absence for which respondent is accountable -- hinders us from drawing any other conclusion.

To his credit, respondent now acknowledges that were he to face this situation again, he would resort to options other than contempt. Had respondent followed the rules on November 14, 2002, it is likely he would not ultimately have imposed a contempt finding.

Speculation aside, this is a profound, persistent, and troubling pattern of judicial misconduct. Given the clarity of the law and its violation in this case, I would impose public censure, but am constrained to vote for admonition since the Judiciary Law (§41[6]) requires a concurrence of six members for Commission action.

Dated: October 20, 2005

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

I respectfully dissent from the Commission's sanction of admonition.

I agree with the majority that respondent acted injudiciously and excessively and, in his failure to give appropriate warnings and an opportunity to desist, erroneously. I agree further that the vast power given to judges to hold one in summary contempt and deprive him or her of liberty requires strict compliance with the law and serious restraint.

Nonetheless, based on the Agreed Statement of Facts, it appears that respondent's legal errors, made in a highly charged and disruptive proceeding, were procedural rather than substantive. I find that these errors were not so blatant that they demonstrate lack of competence in the law and thus constitute misconduct. I believe that under all the circumstances the appropriate disposition should be a private letter of caution.

The essential facts in this case, as stipulated by the parties, are as follows:

During a court proceeding relating to a family offense and custody and visitation matters, Mark Schulman, a litigant, performed certain actions -- audibly sighing, turning his back on the judge, and staring intently at him -- which respondent believed were deliberately disruptive of the proceedings and which caused the court officers to caution Mr. Schulman about his conduct. Then, while his wife's attorney was addressing the court, Mr. Schulman began to sigh audibly and shake his head. Respondent, believing that Mr. Schulman's cumulative behavior was disrespectful and disruptive, started to warn Mr. Schulman that if he uttered another word, he would be held in contempt. Before respondent had finished the warning, Mr. Schulman interrupted him; respondent then held Mr. Schulman in summary contempt and sentenced him to five days in jail. Mr. Schulman then protested that he did not say a word; respondent increased the sentence to ten days. When Mr. Schulman again started to speak, respondent increased the sentence to twelve days.^[1] Ultimately, Mr. Schulman, who had, unknown to respondent, been sentenced by another judge the previous day to 120 days in jail for non-support, did not serve any additional time as a result of the contempt finding.

Respondent now concedes that, if confronted by similar conduct today, he would not hold an individual in summary contempt. He further acknowledges that, prior to holding Mr. Schulman in contempt, he should have given him a clear warning that his conduct could result in his being held in contempt and he should have given Mr. Schulman or his attorney a reasonable opportunity to make a statement in defense or mitigation.

In view of respondent's acceptance of responsibility, the emotional atmosphere in which the events occurred, the nature of the legal error and the absence of actual loss of liberty, I do not believe a public sanction is warranted. I would issue respondent a private letter of caution.

Dated: October 20, 2005

[1] While the transcript fails to show Mr. Schulman's interruptions, according to the Agreed Statement Mr. Schulman did interrupt respondent both times before respondent increased the sentence (par. 16). In the Agreed Statement, the parties stipulated that the standard practice of the court reporter was to take down only the words of the judge when he and another individual were speaking simultaneously and not to indicate in the record that there was cross-talking (par. 11). Thus, the quoted transcript is incomplete in that it fails to show Mr. Schulman's interruptions.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DIANE A. LEBEDEFF**, a Judge of the Civil Court of the City of New York and an Acting Justice of the Supreme Court, New York County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Vickie Ma, Of Counsel) for the Commission
Gair, Gair, Conason, Steigman & Mackauf (by Ben B. Rubinowitz) for Respondent

The respondent, Diane A. Lebedeff, a judge of the Civil Court of the City of New York and an acting justice of the Supreme Court, New York County, was served with a Formal Written Complaint dated November 9, 2004, containing one charge.

On February 22, 2005, 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, recommending that respondent be censured and waiving further submissions and oral argument.

On March 10, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Civil Court of the City of New York, New York County since 1983 and an acting justice of the Supreme Court since 1988. Respondent is an attorney.
2. From on or about September 1994 to on or about May 2000, respondent presided over *Batra v. Office Furniture Service, Inc., et al.* ("*Batra v. Office Furniture*"), a civil matter that, at various times, involved ten different parties, and even more attorneys appearing at various times for each of these parties, including defendant Kaspar Wire Works. The plaintiffs, Ravi Batra and his wife, Ranju Batra, appeared by co-plaintiff Ravi Batra, an attorney licensed to practice law in New York. The plaintiffs sought \$80 million in damages as a result of Mr. Batra's alleged fall off a swivel chair in his law office.
3. Respondent has known Mr. Batra in both professional and social settings since the late 1980s. Respondent and Mr. Batra have been in attendance at bar association meetings and

have been to each other's homes, dined at restaurants together on various occasions, exchanged nominal gifts such as candy to each other's children, and had at least one joint family outing together. Respondent and Mr. Batra are friendly.

4. Respondent did not disclose her relationship with Mr. Batra to the defendants or defense attorneys in *Batra v. Office Furniture*.

5. Respondent and Mr. Batra socialized together during the period from 1994 to 2000 that *Batra v. Office Furniture* was pending before respondent. In that period, they had lunch together on at least two occasions, engaged in personal or social conversations with one another and met with one another in court to the exclusion of the other attorneys in the matter.

6. Approximately five times in the course of presiding over appearances in the matter, respondent excused the defense attorneys and stated that she was going to engage in "gossip" or other social conversation not related to the case, with Mr. Batra. On those occasions, she thereupon spoke with Mr. Batra privately in her robing room or chambers.

7. Respondent awarded Mr. Batra several fiduciary appointments while *Batra v. Office Furniture* was pending, including a lucrative guardianship in *Matter of Sylvia Marco* in 1999, in which respondent approved on consent a total of \$84,000 in fees to Mr. Batra.

8. Respondent did not disclose her fiduciary appointments of Mr. Batra to the other defendants or defense attorneys in *Batra v. Office Furniture*.

9. On July 26, 1999, respondent struck the responsive pleadings of third-party defendant Kaspar Wire Works for failing by one day to meet a stipulated 45-day discovery deadline, which was stipulated by the attorneys, each attorney knowing that non-compliance would result in the striking of the responsive pleading.

10. By Order dated November 1, 1999, which was later expanded on the record on January 21, 2000, respondent granted Mr. Batra's motion for sanctions against defendant Office Furniture and referred the matter to a special referee to determine the amount of sanctions.

11. On August 10, 2000, the Appellate Division, First Department, reversed and reinstated Kaspar's pleadings, noting as follows:

Had the IAS Court [respondent] objectively reviewed the history of this case, it could not have concluded that Kaspar's slight and arguably justified delay was in any way comparable to the years of dilatory practice in obstructing discovery that took place preceding Kaspar's arrival on the scene.

12. Thereafter, *Batra v. Office Furniture* was transferred to another judge, and the case was concluded with Mr. Batra's acceptance of a settlement in the amount of \$225,000.

13. Respondent now appreciates that her impartiality could reasonably be questioned in *Batra v. Office Furniture* because of her friendship with Mr. Batra, and that she should at least have disclosed her relationship to Mr. Batra, on the record.

14. Respondent now appreciates that, having decided to preside over *Batra v. Office Furniture*, she should not have socialized with Mr. Batra while the case was pending.

15. Respondent now appreciates that, insofar as the award of a fiduciary appointment signifies a judge's confidence in the credibility and integrity of the appointee, awarding Mr. Batra fiduciary appointments at the same time that he was a litigant whose credibility she would have to evaluate in a personal injury case in which he was seeking monetary damages created a direct conflict.

16. Although respondent was publicly censured in November 2003 for conduct related to her award of fiduciary appointments to Alice Krause, her friend and tax accountant, the conduct therein overlapped the conduct herein, and respondent's conduct herein does not constitute a failure to abide by the November 2003 public censure.

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(E)(1) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. 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.

A judge's disqualification is required in any matter where the judge's impartiality might reasonably be questioned (Section 100.3[E][1] of the Rules Governing Judicial Conduct ["Rules"]). As respondent has stipulated, she violated that standard by presiding over a personal injury case in which the co-plaintiff was Ravi Batra, an attorney with whom she had a significant social and professional relationship. *See, Matter of Robert*, 1997 Annual Report 127, *accepted*, 89 NY2d 745 (1997); *Matter of DiBlasi*, 2002 Annual Report 87 (Comm. on Judicial Conduct).

For more than five years, respondent presided over and made numerous rulings in the *Batra* case, in which Mr. Batra and his wife were seeking \$80 million in damages. Respondent did not disclose her relationship with Mr. Batra, which included dinners together, visits to each others' homes, and at least one joint family outing, and she continued to socialize with Mr. Batra while his case was pending before her. During that time, not only did they lunch together and have private meetings and conversations in court, but on several occasions respondent specifically excused the other attorneys in the case so that she could "gossip" privately with Mr. Batra. Such conduct created an appearance of impropriety, in violation of well-established ethical standards (Rules, §100.2[A]) and demonstrates a glaring insensitivity by respondent to her duty to avoid even the appearance of impropriety. Under the circumstances, even if the judge had scrupulously avoided discussing the merits of Mr. Batra's case during their private conversations, the appearance of impropriety would be inevitable.

During this same period, respondent awarded fiduciary appointments to Mr. Batra, including an appointment to a lucrative guardianship resulting in a fee of \$84,000. The appointments compound the appearance that she could not be impartial in Mr. Batra's case. The award of a fiduciary appointment signifies a judge's confidence in the credibility and integrity of the appointee. In the litigation before her, respondent was necessarily required to evaluate Mr.

Batra's credibility, and she should have recognized her ethical obligation not to preside in the case.

In one ruling in the case, respondent granted Mr. Batra's motion for sanctions against one of Mr. Batra's adversaries. Another of respondent's rulings was overturned by the Appellate Division, in a decision suggesting that the ruling, on its face, showed a lack of "objectiv[ity]" by respondent. (Following that ruling, the case was transferred to another judge.) Because of her relationship with Mr. Batra, respondent's rulings in his favor raise a suspicion that she was influenced by personal considerations. *See, Matter of Simeone*, 2005 Annual Report ____ (Comm. on Judicial Conduct), <http://www.scjc.state.ny.us/Determinations/S/simeone.htm>. Such an appearance is inimical to public confidence in the integrity and impartiality of the judiciary, as respondent should have recognized. Her apparent failure to realize that her relationship with Mr. Batra would raise the question whether her rulings were based solely on the merits is shocking and suggests an unacceptable insensitivity to judicial ethics.

We note that respondent has previously been censured for creating an appearance of impropriety by failing to pay her accountant for tax preparation services over the same period that she was appointing the accountant as a fiduciary and approving the accountant's compensation. *Matter of Lebedeff*, 2004 Annual Report 128 (Comm. on Judicial Conduct). As in that case, we conclude here that respondent's "dereliction of her ethical responsibilities created an appearance of impropriety" and "jeopardizes the public's respect for the judiciary as a whole, which is essential to the administration of justice."

The misconduct set forth herein overlapped respondent's misconduct in the earlier matter and predated the Commission's proceedings concerning it. Had it postdated the earlier determination, we would have been constrained to consider whether respondent ignored the Commission's warnings concerning her ethical obligations and whether the sanction of removal was warranted. As set forth herein, respondent's misconduct amply justifies the sanction of censure. In view of respondent's disciplinary history, any future ethical transgressions may be met with a more severe sanction.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. DiPirro and Judge Luciano were not present.

Dated: March 18, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DONNA M. MILLS**, a Justice of the Supreme Court, Bronx County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg and Vickie Ma, Of Counsel) for the Commission
Paul T. Gentile for Respondent

The respondent, Donna M. Mills, a justice of the Supreme Court, Bronx County, was served with a Formal Written Complaint dated March 1, 2005, containing one charge.

On July 26, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be censured and waiving further submissions and oral argument.

On August 11, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Supreme Court since January 2000. Respondent previously served as a judge of the Civil Court of the City of New York from 1993 to 1999.
2. On the evening of July 22, 2002, respondent was arrested and charged with Driving While Intoxicated, Driving Under the Influence of Alcohol and Resisting Arrest.
3. On April 1, 2004, at the end of a jury trial held in Bronx County Criminal Court, respondent was acquitted of all charges.
4. Prior to the arrest, respondent and an acquaintance, Tracey Mendelsohn, had drinks and dinner at a restaurant and subsequently visited a tavern in the Bronx.
5. Respondent consumed numerous alcoholic beverages during the course of the evening.

6. Thereafter, at approximately 11:00 P.M., respondent got into her car, a Rolls Royce, which was parked in the parking lot of the Loehmann's department store in the Bronx, across the street from the 50th precinct, and attempted to exit the parking lot. In attempting a U-turn, respondent's vehicle became wedged between two parked cars. After police officers intervened, respondent was placed under arrest.

7. At the trial, police officers testified that respondent had a strong odor of alcohol, was unsteady on her feet and was incoherent. Later that evening, respondent refused to take a breathalyzer test. A videotape containing respondent's appearance and speech was introduced in evidence at the trial.

8. Respondent acknowledges that it was inappropriate for her to drive after consuming as much alcohol as she did that evening.

9. As Officer Jackson was escorting respondent to the police car, respondent flailed her arms. Later that evening, she accused the officers of arresting her because she was African-American, notwithstanding that the arresting officers were themselves persons of color. Respondent did not utter profanities, epithets or other words that would have been offensive *per se*. Respondent did not invoke her judicial office or assert the influence of her judicial office in order to avoid arrest or influence the officers from performing their duties.

10. Respondent acknowledges that her accusations were offensive to the police officers and inconsistent with her lifelong respect for police officers.

11. After her arrest, respondent entered and completed an alcohol treatment plan in order to restore her driver's license.

12. Respondent has fully cooperated with the Commission's investigation and has voluntarily provided confidential medical records regarding her physical and psychological treatment and recovery.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.4(A)(2) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above facts, and respondent's misconduct is established.

It is the responsibility of every judge to act at all times in a manner that promotes public confidence in the integrity of the judiciary and to avoid conduct that detracts from the dignity of judicial office (Sections 100.2[A] and 100.4[A][2] of the Rules Governing Judicial Conduct). Respondent violated these standards by engaging in conduct that resulted in her arrest for Driving While Intoxicated, Driving Under the Influence of Alcohol and Resisting Arrest. As respondent has frankly acknowledged, it was inappropriate for her to drive after consuming as much alcohol as she did that evening.

The Commission has publicly disciplined numerous judges who have been convicted of alcohol-related driving infractions. *See, e.g., Matter of Barr*, 1981 Annual Report 139 (Comm. on Judicial Conduct); *Matter of Siebert*, 1994 Annual Report 103 (Comm. on Judicial Conduct); *Matter of Henderson*, 1995 Annual Report 118 (Comm. on Judicial Conduct); *Matter of Pajak*, 2005 Annual Report 195 (Comm. on Judicial Conduct). In the wake of increased recognition of the dangers of driving while under the influence of alcohol and the toll it exacts on society, alcohol-related driving misbehavior must be regarded with particular severity -- even, as here, where respondent was not convicted of any offense.

Respondent has also acknowledged that, after her arrest, she accused the officers (who were themselves persons of color) of arresting her because she was African-American and that her accusations were offensive to the officers and otherwise inappropriate. *See, Matter of Richardson*, 1982 Annual Report 129 (Comm. on Judicial Conduct) (village justice, charged with Driving While Intoxicated, made derogatory comments to the officers who effected his arrest). Throughout the incident, respondent, “although off the bench remained cloaked figuratively, with [her] black robe of office devolving upon [her] standards of conduct more stringent than those acceptable to others” (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]). Respondent’s remarks to the police officers were inconsistent with the high standards of dignity and respect required of judges at all times, and her inappropriate behavior undermines public confidence in the judiciary as a whole. *Matter of Richardson, supra; Matter of Canary*, 2003 Annual Report 77 (Comm. on Judicial Conduct).

Respondent has acknowledged that her conduct was improper and has stipulated that the appropriate sanction is censure. This sanction reflects the seriousness of such misconduct and underscores that judges, who hold a high position of public trust, are held to the highest standards of conduct both on and off the bench (Section 100.2[A] of the Rules).

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Luciano was not present.

Dated: August 17, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JAMES R. PASTRICK**, a Justice of the Corning Town Court, Steuben County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Richard W. Rich, Jr. for Respondent

The respondent, James R. Pastrick, a justice of the Corning Town Court, Steuben County, was served with a Formal Written Complaint dated July 15, 2004, containing two charges. Respondent filed an answer dated August 10, 2004.

By Order dated September 15, 2004, the Commission designated David M. Garber, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 14, 2004, in Bath, New York, and the referee filed his report with the Commission dated April 20, 2005.

The parties submitted briefs with respect to the referee's report. On June 23, 2005, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Corning Town Court, Steuben County, and has served in that position since 1990. Respondent, a retired police officer, is not an attorney.

As to Charge I of the Formal Written Complaint:

2. Debora Kephart is employed by the Corning Food-Mart as a bookkeeper/office manager. In the summer of 2002, she performed general office management and human resource duties, which included accepting employment applications.

3. In about late July 2002, respondent met with Ms. Kephart in her office to discuss procedures in a bad check case involving Food-Mart that had been commenced in his court. Ms. Kephart knew that respondent was a justice of the Corning Town Court.

4. During this same visit, while conferring with Ms. Kephart on judicial business, respondent indicated to Ms. Kephart that his daughter Stephanie, then a high school senior, was seeking part-time employment and asked Ms. Kephart whether there were any positions available. Ms. Kephart said that Stephanie should submit an application, and respondent picked up an application for his daughter.

5. Subsequently, after respondent's daughter had filled out the employment application, respondent returned to Food-Mart and delivered the application to Ms. Kephart. Respondent again inquired whether Food-Mart was hiring people.

6. On or about August 26, 2002, Food-Mart hired respondent's daughter. Ms. Pastrick worked at the store for about 18 months.

As to Charge II of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B) and 100.2(C) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established. Charge II is not sustained and is therefore dismissed.

The ethical standards prohibit a judge from lending the prestige of judicial office to advance the private interests of the judge or others and to avoid even the appearance of impropriety (Sections 100.2 and 100.2[C] of the Rules Governing Judicial Conduct). Respondent violated these provisions by his admitted conduct when, while visiting the Food-Mart to discuss procedures in a bad check case involving the store, he asked a store employee whether there were any positions available, said that his daughter was looking for a job and picked up an application for her. Later, respondent personally delivered the completed application to the store.

While attempting to help his daughter find employment, respondent should have been especially careful to avoid any conduct that might convey that he was using his judicial status to further private interests. Instead, by raising the subject of his daughter's employment during a conversation with a store employee about court business, respondent appeared to be trading on his judicial office to benefit his daughter's interests. In that context, respondent's discussion of procedures in a bad check case involving the store could easily be perceived as an explicit reminder of his judicial power, intended to intimidate or influence the store's hiring decision.

Regardless of respondent's intent, he should have realized that his actions on his daughter's behalf, in which he mixed judicial and personal matters, could be construed as trading on the prestige of the judiciary to advance private interests, in violation of the ethical standards. As the Court of Appeals has stated, judges must recognize that "any actions taken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary" and "must

assiduously avoid those contacts which might create even the appearance of impropriety.” *Matter of Lonschein*, 50 NY2d 569, 572, 573 (1980). See also, *Matter of McKeon*, 1999 Annual Report 117 (Comm. on Judicial Conduct) (judge improperly used the prestige of judicial office to advance private interests by writing a letter on judicial stationery to the corporation counsel of the City of New York, a frequent litigant in his court, seeking to expedite the hiring of a former court employee with whom he had a personal relationship). While respondent’s judgment may have been clouded by a desire to help his daughter, that does not excuse his ethical transgressions.

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano, Mr. Pope and Judge Ruderman concur except as follows.

As to Charge II, Judge Klonick and Judge Ruderman dissent and vote to sustain the charge.

As to sanction, Judge Klonick dissents and votes that the appropriate disposition is censure.

Judge Peters was not present.

Dated: August 17, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **CHARLES A. PENNINGTON**, a Justice of the Alexandria Bay Village Court, Jefferson County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Capone Law Firm (by Andrew N. Capone) for Respondent

The respondent, Charles A. Pennington, a justice of the Alexandria Bay Village Court, Jefferson County, was served with a Formal Written Complaint dated December 13, 2004, containing two charges. Respondent filed a verified answer dated January 3, 2005.

By Order dated January 21, 2005, 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 May 11, 2005, in Syracuse. Respondent and his counsel did not appear at the hearing. The referee filed his report with the Commission dated July 21, 2005.

By letter dated August 18, 2005, respondent's counsel declined to appear for oral argument, which was waived. Commission counsel filed a brief with respect to the referee's report. On September 7, 2005, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent was a justice of the Alexandria Bay Village Court, Jefferson County, from 1982 until his resignation on May 9, 2005. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. Eric Bailey was charged with Disorderly Conduct on October 4, 2003, a violation of an Alexandria Bay village ordinance, for allegedly having punched Eugene Sikora in front of a local nightclub. The defendant pleaded not guilty, and trial was scheduled and held before respondent on November 19, 2003.

3. No record was made of the trial. The defendant at the trial proceeded without counsel.

4. As a witness for the prosecution, Eugene Sikora was asked, “Do you see the gentleman here in the courtroom today that struck you outside of... [the] night club?” Mr. Sikora replied, “Yes, it would be that colored man right there,” indicating the defendant.

5. The defendant, Eric Bailey, was African-American.

6. Mr. Bailey objected to the witness identifying him as a “colored man,” saying either that such testimony was “racial” or “racist.”

7. Respondent overruled Mr. Bailey’s objection, stating:

I don’t perceive that as racial. I could understand it if he would have called you a Negro or a nigger, that would be racial. For years we had no colored people here, with the influx of Fort Drum, now we do.

8. Respondent convicted Mr. Bailey and fined him \$200.

As to Charge II of the Formal Written Complaint:

9. During the afternoon of November 16, 2003, Ms. R., a 17-year old female, was arrested at the home of her mother on a charge of Harassment, Second Degree, for allegedly throwing a cup at her mother’s boyfriend.

10. Ms. R. was brought before respondent for arraignment that day at approximately 2:30 PM.

11. Ms. R. pleaded not guilty and was released on her own recognizance.

12. Respondent informed Ms. R. during the arraignment that she “can’t go home,” and told Ms. R. to call someone to “come get her.”

13. Respondent did not sign an Order of Protection prohibiting Ms. R. from returning to her mother’s home.

14. Ms. R., using a telephone near the judge’s desk, attempted without success to reach her grandmother.

15. After being informed by Ms. R. that she did not have a place to go at that time, respondent told Ms. R. and a police officer in the courtroom that respondent was going to take Ms. R. home with him and that Ms. R. could make some calls from his home, presumably to locate a place for her to stay.

16. Respondent did not ask the police to locate an appropriate place for Ms. R. to stay. There was a women's shelter and a County social services agency that could have been contacted.

17. Following the arraignment, respondent brought Ms. R. to his home.

18. While at respondent's home, Ms. R. telephoned her mother and asked her to bring some items. Shortly thereafter, Ms. R.'s mother came to respondent's home. When Ms. R.'s mother arrived, Ms. R., respondent and another man were present. Ms. R.'s mother asked her daughter to come home. Respondent said, "No," and Ms. R. said she was not going home. Ms. R. and her mother argued, and Ms. R.'s mother left.

19. Ms. R. arranged with the parents of a friend to stay at their home and left respondent's home after being there for about an hour.

20. There is no evidence that respondent made any improper advances to Ms. R. while she was at his home.

21. The Harassment charge against Ms. R. was adjourned in contemplation of dismissal. Respondent presided over the disposition.

Supplemental finding:

22. Respondent transmitted his letter of resignation to the Chief Administrative Judge of the Courts, who received respondent's letter on May 11, 2005.

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)(3) and 100.3(B)(4) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

As this Commission has stated: "Public confidence in the integrity and impartiality of the judiciary is indispensable to the fair and proper administration of justice. A judge's conduct must be and appear to be beyond reproach if respect for the court is to be maintained." *Matter of Friess*, 1982 Annual Report 109 (Comm. on Judicial Conduct).

Respondent's gratuitous comments about a defendant's race were manifestly inappropriate. In ruling on the defendant's objection to a witness' use of the word "colored," respondent made a speech about his own views on racially-charged language, in the course of which he unnecessarily and repeatedly used racial language that was inappropriate and far exceeded the witness' single, objectionable term. Regardless of whether respondent's remarks were knowingly racist or simply ill-considered, the use of such language by a judicial officer serves to undermine public confidence in the integrity and impartiality of the judiciary. See *Matter of Mulroy*, 94 NY2d 652 (2000); *Matter of Agresta*, 64 NY2d 327 (1985).

It was also improper for respondent to bring a young, female defendant to his home after an arraignment. *See Matter of Friess, supra*. Respondent exhibited extraordinarily poor judgment in bringing the young woman to his home, where she made telephone calls and remained for about an hour. Although there is no evidence that he made improper advances toward the woman, respondent's conduct compromised his impartiality and conveyed an appearance of impropriety.

Respondent's disciplinary history, including a prior censure and two letters of dismissal and caution, bolsters the conclusion that he lacks sensitivity to the special ethical obligations of judges (*see* Commission counsel's brief, Appendix 1-3; *Matter of Pennington*, 2004 Annual Report 139 [Comm. on Judicial Conduct]) (*Matter of Cerbone*, 2 NY3d 479 [2004]). Significantly, the two incidents in this case occurred only a few days after respondent's prior censure. The improprieties throughout respondent's disciplinary history include a variety of activities, indicating an apparent inability or unwillingness to recognize and avoid misconduct and demonstrating that he is unfit to serve as a judge.

"[T]he 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*, 63 NY2d 105, 111 (1984), quoting *Matter of Waltemade*, 37 NY2d (a), (III) (Ct on the Jud 1975). In light of respondent's resignation, the sanction of removal is necessary to ensure that he is ineligible for judicial office in the future (NY Const Art 6 §22[h]). Removal is warranted here by respondent's misconduct and his prior disciplinary history.

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

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Peters and Judge Ruderman concur.

Judge Luciano and Mr. Pope were not present.

Dated: September 7, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN J. PISATURO**, a Justice of the Gates Town Court, Monroe County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Alan J. Pope, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Honorable John J. Pisaturo, *pro se*

The respondent, John J. Pisaturo, a justice of the Gates Town Court, Monroe County, was served with a Formal Written Complaint dated November 1, 2004, containing one charge. Respondent filed an answer dated December 3, 2004.

On October 28, 2005, 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, recommending that respondent be censured and waiving further submissions and oral argument.

On November 10, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Gates Town Court, Monroe County since January 1984. Respondent is an attorney.
2. From in or around January 2001 to in or around August 2003, in 703 traffic cases adjudicated in his court, respondent imposed a total of \$93,527 in fines in excess of the maximum amounts authorized by the Vehicle and Traffic Law (“VTL”).
3. In 240 traffic cases between January 2001 and December 2001, respondent imposed \$39,492 in fines not authorized by law, as set forth in Schedule 1 annexed to the Agreed Statement of Facts. The excess fines imposed by respondent in these cases ranged from \$2 to \$320.
4. In 317 traffic cases between January 2002 and December 2002, respondent imposed \$39,585 in fines not authorized by law, as set forth in Schedule 2 annexed to the Agreed

Statement of Facts. The excess fines imposed by respondent in these cases ranged from \$10 to \$315.

5. In 146 traffic cases between January 2003 and August 2003, respondent imposed \$14,450 in fines not authorized by law, as set forth in Schedule 3 annexed to the Agreed Statement of Facts. The excess fines imposed by respondent in these cases ranged from \$15 to \$300.

6. The large majority of the 703 cases herein involved pleas of guilty to the “standard reduction” which was a violation of VTL 1110(a), *i.e.* failure to obey a traffic control device. In all of the 703 cases, the disposition involved a plea to a reduced charge. Respondent mistakenly imposed fines that were authorized as the maximum fine for the original charge, but were not authorized for the reduced charge. He now realizes that he was in error and that he had imposed fines in excess of the maximum allowed by law.

7. Since learning in August 2003 that the fines he had imposed in these 703 cases were not authorized by law, respondent has engaged in a complex and time consuming process in which he has placed into action a procedure for providing refunds to all 703 defendants as to those fine amounts that were in excess of the maximum allowed by law. All of the defendants have been either provided with refunds or sent notices about the process for obtaining refunds.

8. By letter dated June 29, 2005, the Commission requested additional information in connection with this matter, including (1) how long respondent had engaged in similar conduct; (2) the allocation of funds to the town and to the state for both the fines imposed and the maximum statutory fines; and (3) the extent to which respondent was aware of such allocation. Respondent and Commission Counsel have conducted extensive additional research of court and state records, the results of which are reflected in the following paragraphs.

9. Respondent acknowledges that he also engaged in the improper conduct of imposing fines in excess of the statutory maximum from January 1999 until August 2003. Respondent acknowledges that in addition to the 703 traffic cases specified in the Formal Written Complaint, which covers the period from January 2001 to August 2003, a review of his court records would identify approximately 230 additional traffic cases disposed of between January 1999 and December 2000, in which he imposed fines in excess of the maximum authorized by the Vehicle and Traffic Law. Respondent agrees that a review of his court records would indicate that the excess fines for those two years would total approximately \$77,000. Respondent agrees that the Commission should refer to the Department of Audit and Control the issue involving excess fines collected between January 1999 and December 2000 and that he will cooperate with the Department of Audit and Control in taking action to provide refunds to these additional defendants.

10. Respondent was not aware of the formula for distribution of funds between the State and the town and was not provided with such information between January 1999 and August 2003. It was not his practice to obtain the breakdown of fund distribution figures for each of his monthly submissions to the Bureau of Justice Court Funds (hereinafter “JCF”), and it was the responsibility of JCF to calculate the distribution of funds. Each year, as provided by

law, respondent gave the town a report of the total fines and fees he had reported. He did not advise the town of how the total funds were distributed.

11. Respondent believed that it was his responsibility to impose a fine appropriate to the offense and circumstances of a case, without regard to what percentage of that fine would ultimately accrue to the town, and that it was therefore not necessary for him to know the formula that would determine how such fines would be divided between the State and the town.

12. For the period from January 2001 to December 2003, respondent received \$1,232,595.50 in fines and fees. Of that money, \$682,358 was paid to the state, \$160,932 was paid to the County of Monroe, and \$389,305.50 was paid to the Town of Gates.

13. The division of fines and fees is established by various State laws and varies according to the charge of which the defendant has been convicted. In 218 of the 703 cases involving respondent's imposition of an unauthorized maximum fine between January 2001 and August 2003, the excess fines were retained by the State. In the other 485 cases, the excess fines were returned to the Town of Gates.

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 should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

It is the responsibility of every judge 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 hundreds of Vehicle and Traffic cases by routinely imposing fines based on the original charges, rather than the charges to which the defendants pled guilty. Such a practice is contrary to law and resulted in fines that exceeded the legal maximum by amounts ranging from \$2 to \$320. *See Matter of Christie*, 2002 Annual Report 83 (Comm. on Judicial Conduct).

Respondent's wrongful practice resulted in significant financial benefit to his town. The excess amounts he collected apparently totaled over \$30,000 *per year* over a five-year period, with about one-third of those amounts going to respondent's town. While there is no indication that respondent's intent was to benefit the town, his conduct creates an appearance of impropriety. Although he did not know the exact percentages of the total fines that would go the town, he was obviously aware that the amounts involved were considerable.

It is axiomatic that the sentence in every case should be based on the offense a defendant is convicted of, not the original charge. As an attorney and as a judge since 1984, respondent should be familiar with basic principles of law.

In mitigation, upon learning that his practice was not authorized by law, respondent has made considerable efforts to obtain refunds for defendants as to the excess amounts that were paid. Respondent's conduct since learning of his error suggests a sincere effort to comply with the law and to mitigate the effects of his wrongful practice.

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

Mr. Goldman, Mr. Pope, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Judge Luciano were not present.

Dated: November 18, 2005

Schedules 1, 2 and 3 are available on the Commission's website at:

<http://www.scjc.state.ny.us/Determinations/P/pisaturo.schedule1.pdf>
<http://www.scjc.state.ny.us/Determinations/P/pisaturo.schedule2.pdf>
<http://www.scjc.state.ny.us/Determinations/P/pisaturo.schedule3.pdf>

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **GERALD P. SHARLOW**, a Justice of the Massena Town Court, St. Lawrence County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Honorable Gerald P. Sharlow, *pro se*

The respondent, Gerald P. Sharlow, a justice of the Massena Town Court, St. Lawrence County, was served with a Formal Written Complaint dated November 3, 2004, containing one charge. The judge filed an answer dated November 17, 2004.

On February 23, 2005, 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, recommending that respondent be admonished and waiving further submissions and oral argument.

On March 10, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Massena Town Court since June 2002; his judicial salary is \$14,000. Respondent is not an attorney. He is retired from the Massena Police Department, where he was employed for 25 years and had reached the rank of sergeant. Respondent has attended and successfully completed all required training sessions for judges.

2. On or about February 10, 2004, respondent's son, Jordan P. Sharlow, then age 16, was charged in the Massena Village Court with Trespass, in violation of Section 140.05 of the Penal Law. The case was transferred to the Brasher Town Court after the Massena village justices disqualified themselves from the case, and Brasher Town Court Justice Jeremiah D. Mahoney scheduled the arraignment for March 16, 2004.

3. Prior to March 16, 2004, respondent wrote a letter to Judge Mahoney on Massena Town Court stationery, *inter alia* purporting to enter a plea of not guilty on behalf of his son and

asking whether Judge Mahoney still required his son's appearance on March 16, 2004.

4. As a result of receiving respondent's letter, Judge Mahoney adjourned the matter and disqualified himself from Jordan Sharlow's case, causing the case to be transferred to another judge. Respondent subsequently hired an attorney to represent his son and, on the consent of the district attorney's office, the charge against respondent's son was ultimately adjourned in contemplation of dismissal.

5. Respondent regrets his conduct. He recognizes that it was improper to use his court stationery to intercede with another judge on his son's behalf.

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) and 100.2(C) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By writing a letter on judicial stationery to the judge presiding in his son's case, 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. Section 100.2(C) of the Rules Governing Judicial Conduct; *Matter of Edwards v. State Comm. on Judicial Conduct*, 67 NY2d 153 (1986). *See also, Matter of Nesbitt*, 2003 Annual Report 152 (Comm. on Judicial Conduct) (judge sent a letter on judicial stationery challenging an administrative determination concerning the judge's son); *Matter of Pennington*, 2004 Annual Report 139 (Comm. on Judicial Conduct) (judge met with the district attorney to discuss his son's case).

In the letter, respondent acted as his son's advocate, noting that he had requested but not received a copy of the accusatory instrument, entering a not guilty plea on his son's behalf, and asking the presiding judge to advise him if his son had to appear on the date scheduled for arraignment. Section 170.10(1) of the Criminal Procedure Law requires a defendant's personal appearance in court for arraignment, and a plea of not guilty cannot be entered by mail.

Notwithstanding the absence of an explicit request for favorable treatment, such a communication conveys an implicit request for special consideration, which constitutes favoritism. *Matter of Edwards, supra*. Such conduct "is wrong, and always has been wrong" (*Matter of Byrne*, 47 NY2d [b] [Ct. on the Judiciary 1979]). Indeed, after receiving respondent's letter, the presiding judge felt constrained to disqualify himself from the case.

Although respondent's desire to assist his son is understandable, his "paternal instincts" do not justify a departure from the standards expected of the judiciary" (*Matter of Edwards, supra*, 67 NY2d at 155).

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

Mr. Goldman, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge

Ruderman concur.

Judge Ciardullo and Mr. Coffey dissent and vote to reject the Agreed Statement on the basis that the disposition is too harsh and that the appropriate disposition is a letter of caution.

Ms. DiPirro and Judge Luciano were not present.

Dated: March 22, 2005

DISSENTING OPINION BY JUDGE CIARDULLO, IN WHICH MR. COFFEY JOINS

I cannot join in the majority opinion, because I believe that the penalty is too harsh for the misconduct. Because this case involves a single instance, and for the reasons set forth below, I would issue the respondent a private letter of caution.

Respondent, a judge in the Massena Town Court and a parent of a 16 year old son, wrote a letter on his court stationery to the judge in the Massena Village Court. The letter states:

Dear Judge Mahoney,

Judge sorry to have to come [sic] you with this case pending against my son Jordan P. Sharlow case #04030004.9 PL 140.05 Trespass. At this time after conversation of this incident and lack of accusatory instrument and supporting statements I requested from the Massena Village Police Department my son pleads NOT GUILTY to the charge. If you still want my son to appear 3/16/2004 advise. Otherwise set for trial. I have heard nothing from the District attorneys office. Again sorry this has been sent to your Court.

Respectfully Yours,
Hon. Gerald P. Sharlow
Massena Town Justice

It was wrong for respondent to send this letter on court stationery, a fact that he admits. Using his title and judicial office in this manner plainly violated ethical rules and lent the prestige of his office to advance private interests (Section 100.2[C]).

Even if respondent had not used his court stationery or judicial title to communicate with the arraigning court, the circumstances here warrant a cautionary statement. The record shows that respondent retired from the Massena Police Department after 25 years, and the Village court was situated within the Town of Massena. Both Village justices recused themselves from hearing the case. Because respondent was apparently well known, it is likely that any communication from the respondent to the Village court would create the appearance that he was invoking the prestige of his judicial office.

I am not prepared to state, however, that a judge who is a parent of a minor child may never appear or communicate with a court that is presiding over charges involving that child. A judge does not lose his or her rights and responsibilities as a parent simply because he or she

holds judicial office. There are many situations where a minor legally lacks capacity to act and the parent must act for the child (for example, under Public Health Law §2504, a minor under the age of 18 legally cannot consent to medical treatment). Therefore, I do not condemn judges who appear in court, communicate with a prosecutor, or otherwise assist a child in trouble. In my view, an ethical problem arises only where the judge is known to be a judge and this knowledge is likely to result in favoritism. Those circumstances were present in this case. Respondent ultimately took the appropriate action to cure the impropriety by retaining an attorney to represent his son.

I disagree with the majority, however, that this case warrants a public sanction. I do not read respondent's letter as requesting any special consideration. Rather, the letter simply asks the court whether defendant must appear, and requests the court to enter a not guilty plea and set the matter down for trial. The statements in the letter are quite unremarkable and are common communications in justice court matters. For that reason, I view this case differently than other situations where judges have blatantly requested favorable treatment using court stationery. *See, Matter of Freeman*, 1992 Annual Report 44 (town justice was admonished for writing to another judge on court stationery in support of a customer of his private business, seeking to have customer's gun permit reinstated); *Matter of Martin*, 2002 Annual Report 121 (Supreme Court justice was admonished for writing two *ex parte* letters on judicial stationery in support of defendants awaiting sentencing); *Matter of Nesbitt*, 2003 Annual Report 152 (judge was admonished for sending a letter on judicial stationery to a school official challenging expulsion of his son from a college program, and requesting reinstatement of the son "pending hearing and determination of this matter by competent authority").

Therefore, I respectfully dissent.

Dated: March 22, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOSEPH THAXTON**, a Justice of the Spring Valley Village Court, Rockland County.

DECISION AND ORDER

BEFORE:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian and Alan W. Friedberg for the Commission
Akin Gump Strauss Hauer & Feld LLP (by Ariane D. Austin) for Respondent

The matter having come before the Commission on April 21, 2005 ; and the Commission having before it the Formal Written Complaint dated October 29, 2004, respondent's Verified Answer dated December 8, 2004, and the Stipulation dated April 6, 2005; and the Commission, by order dated December 9, 2004, having designated Robert L. Ellis, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and a hearing having been scheduled to commence on April 11, 2005; and respondent having resigned from judicial office by letter dated April 5, 2005, effective June 6, 2005, and having affirmed that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if accepted by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued and the case closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: April 22, 2005

STIPULATION

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOSEPH THAXTON**, a Justice of the Spring Valley Village Court, Rockland County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter "Commission"), the Honorable Joseph Thaxton, the respondent in this proceeding, and his attorney, Ariane D. Austin.

1. This Stipulation is presented to the Commission in connection with a formal proceeding pending against respondent.
2. Respondent has been a Justice of the Spring Valley Village Court, Rockland County, since 1988. He is not an attorney.
3. On October 29, 2004, respondent was served by the Commission with a Formal Written Complaint, containing seven charges of misconduct.
4. The Commission appointed Robert L. Ellis, Esq., as referee to report proposed findings of fact and conclusions of law in this matter. Mr. Ellis scheduled a hearing to commence on April 11, 2005.
5. Respondent tenders his resignation, dated April 5, 2005, effective June 6, 2005, and affirms that he will neither seek nor accept judicial office at any time in the future. A copy of respondent's letter of resignation is attached.
6. Pursuant to law, the Commission has 120 days from the date of a judge's resignation to complete the proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.
7. All parties to this Stipulation respectfully request that the Commission close the pending matter based upon this Stipulation.
8. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if accepted by the Commission.

Dated: April 6, 2005

s/ **Honorable Joseph Thaxton**, Respondent
s/ **Ariane D. Austin, Esq.**, Attorney for Respondent
s/ **Robert H. Tembeckjian, Esq.**, Administrator & Counsel to the Commission
(**Alan W. Friedberg**, Of Counsel)

LETTER OF RESIGNATION

April 5, 2005

Hon. George O. Darden
200 N. Main Street
Spring Valley, NY 10977

Dear Mayor Darden:

After serious consideration and advice of counsel, I am tendering my resignation as Spring Valley Village Justice, effective Monday June 6, 2005.

It has been a pleasure serving the people of the Village of Spring Valley in this capacity.

Very truly yours,

s/ Joseph D. Thaxton

cc: Office of Court Administration

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN M. VOETSCH**, a Justice of the Harrison Town Court, Westchester County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Melissa DiPalo, Of Counsel) for the Commission
Richard E. Grayson for Respondent

The respondent, John M. Voetsch, a justice of the Harrison Town Court, Westchester County, was served with a Formal Written Complaint dated February 1, 2005, containing three charges.

On May 27, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be censured and waiving further submissions and oral argument.

On June 23, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a part-time justice of the Harrison Town Court, Westchester County since January 1984. Respondent is an attorney and a licensed real estate broker.
2. Respondent has owned Corner Ridge Real Estate, a real estate agency in Harrison, New York, since 1986.

As to Charge I of the Formal Written Complaint:

3. On March 7, 2003, respondent presided over the sentencing of the defendant in *People v. Patrick Rukaj*. Patrick Rukaj, who was 16 years old, had previously pled guilty to Assault in the Third Degree in connection with the death of his classmate, Robert Viscome. The incident had been highly publicized in Westchester County.

4. Patrick Rukaj, his attorney Vincent Gelardi and Assistant District Attorney Russell Smith were present at the sentencing. ADA Smith recommended a sentence of three years

probation and a conditional discharge, with the condition that Patrick perform community service and participate in the TASC (“Treatment Alternatives for Safer Communities”) program.

5. Respondent sentenced Patrick Rukaj, as a youthful offender, to a one-year conditional discharge. The sentence required the defendant to perform 100 hours of community service and to attend alcohol prevention and anger management counseling through the TASC program. Respondent knew that, under the terms of the sentence, he retained jurisdiction over the defendant until March 6, 2004.

6. At the time respondent sentenced Patrick Rukaj, he was familiar with some of the Rukaj family’s history, including that Patrick Rukaj’s father, Gjelosh Rukaj, had been convicted of second-degree murder in 1998. Shortly after Gjelosh Rukaj’s conviction, his attorney contacted respondent about listing the Rukaj house for sale with respondent’s real estate agency. Respondent and his wife drove past the house, at 18 Sky Meadow Drive in Purchase, New York, but respondent was not asked at that time to market the property. Respondent did not preside over any matters involving Gjelosh Rukaj.

7. In late April 2003, Katerina Rukaj, the mother of Patrick Rukaj and wife of Gjelosh Rukaj, contacted respondent and asked him to list the house at 18 Sky Meadow Drive with Corner Ridge Real Estate. The Rukaj family faced a deadline of May 9, 2003, by which to pay back real estate taxes on the house. Katerina Rukaj contacted respondent about a month after respondent had sentenced Patrick Rukaj, and while he still retained jurisdiction over him.

8. On May 6, 2003, three days before the house was the subject of a tax lien foreclosure sale, Gjelosh Rukaj entered into an Exclusive Right to Sell Agreement with Corner Ridge Real Estate. The agreement authorized Corner Ridge Real Estate to offer the house for sale at a list price of \$2.5 million, and stated that Corner Ridge Real Estate was to be paid a commission of five percent (5%) of the selling price. If another real estate broker assisted in the sale of the house, that broker would receive two percent (2%) of the selling price.

9. The house was listed with the Westchester Multiple Listing Service on May 9, 2003, and respondent was identified as the “List Agent.” Respondent withdrew the listing ten days later, when he learned that creditors had filed an involuntary bankruptcy petition against Gjelosh Rukaj.

10. At the time he listed the Rukaj house, it did not occur to respondent that it would be improper for him to handle the sale of the Rukaj house, in view of the fact that the one-year term of Patrick Rukaj’s conditional discharge had not expired, that he retained jurisdiction over Patrick, and that Patrick would appear before him again if it were alleged that he did not comply with the conditions of his sentence.

11. On July 23, 2003, respondent asked his court clerk, Rosemary King, to request an opinion from the Advisory Committee on Judicial Ethics, concerning the propriety of respondent’s real estate agency representing the Rukaj family in the sale of their home several months after sentencing Patrick Rukaj. The court clerk telephoned Raymond S. Hack, Counsel to the Advisory Committee, but Mr. Hack offered no opinion. Among other things, the Advisory

Committee only renders opinions on prospective conduct and not on conduct that has already occurred.

12. In late July 2003, a series of newspaper articles appeared that were critical of respondent for representing the Rukaj family in the sale of their house only four months after sentencing Patrick Rukaj.

13. On August 8, 2003, the District Attorney of Westchester County filed a petition charging Patrick Rukaj with violating the terms of his conditional discharge. On August 11, 2003, respondent recused himself from presiding over the matter.

14. Respondent now recognizes that it was inappropriate to engage in a business dealing with Katrina and Gjelosh Rukaj when their son Patrick was still subject to respondent's court's jurisdiction and there was a possibility that Patrick might have again come before his court. Respondent also recognizes that by engaging in a business discussion one month after he sentenced Patrick Rukaj, and by entering into a formal business relationship with Patrick's parents two months after the sentencing, he cast doubt on the impartiality of his sentencing decision.

As to Charge II of the Formal Written Complaint:

15. Beginning on May 9, 2001, respondent presided over *Ben Paul Siino v. Jose Restrepo*, a holdover action brought by the plaintiff-landlord, to remove the defendant-tenant from the house at 4 Taylor Avenue, West Harrison, New York, which the plaintiff owned. Respondent has known the plaintiff Ben Paul Siino, Esq. for more than 25 years.

16. Court records reveal that Mr. Siino commenced the eviction action based on the defendant-tenant's alleged failure to pay rent for the months of April and May 2001. On May 18, 2001, the parties appeared before respondent, who reserved decision.

17. On May 29, 2001, respondent entered judgment in favor of the plaintiff-landlord, Mr. Siino, and issued a warrant evicting the defendant-tenant from the house for non-payment of rent. The warrant gave the defendant-tenant 72 hours to vacate the premises.

18. On or around June 5, 2001, the defendant-tenant attempted to stay the eviction by filing an Order to Show Cause, signed by an Appellate Term judge, which was noticed to be heard before respondent on June 26, 2001. When the defendant-tenant failed to appear on June 26, 2001, respondent denied the Order to Show Cause and entered a final judgment and a warrant of eviction.

19. Mr. Siino decided to sell 4 Taylor Avenue in January 2002. On February 2, 2002, Mr. Siino entered into a brokerage agreement with respondent, providing that Corner Ridge Real Estate would list 4 Taylor Avenue for sale.

20. On November 25, 2002, Corner Ridge Real Estate sold 4 Taylor Avenue for \$465,000. Corner Ridge Real Estate earned a two percent (2%) commission on the sale, or \$9,300.

As to Charge III of the Formal Written Complaint:

21. The charge is not sustained and is therefore dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.4(A)(1), 100.4(A)(3), 100.4(D)(1)(a) and 100.4(D)(1)(c) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings, and respondent's misconduct is established. Charge III is not sustained and is therefore dismissed.

Every part-time judge is required to maintain a strict separation between the judicial function and the judge's private business activities. Judges are specifically required to avoid extra-judicial activities that cast doubt on the judge's capacity to act impartially, that interfere with the proper performance of judicial duties, or that may be perceived to exploit the judicial position (Sections 100.4[A][1], 100.4[A][3] and 100.4[D][1][a] of the Rules Governing Judicial Conduct).

As a part-time judge with a private real estate business, respondent violated these standards by entering into an agreement to sell real property owned by the family of a youthful defendant whom he had recently sentenced to a conditional discharge in a highly publicized case. Such an agreement cast doubt on the impartiality of his sentencing decision – which was more lenient than the prosecutor had recommended – and created an appearance of impropriety, contrary to Section 100.2(A) of the Rules. Moreover, since the one-year term of the conditional discharge had not expired, respondent retained jurisdiction over the defendant, who would be required to appear before him again if he allegedly failed to comply with the terms of his sentence. In fact, when it was later alleged that the defendant had violated the terms of his conditional discharge, respondent was obliged to recuse himself from the matter because of his business activities. As an attorney and long-time judge, respondent should have recognized that such business dealings conflict with his judicial role and must be strictly avoided.

It was also improper for respondent to enter into a brokerage agreement to sell a house seven months after he had presided over a holdover proceeding involving the same property. Under the circumstances, respondent's business dealings involving property that had recently been the subject of a holdover proceeding in his court created an appearance of impropriety, contrary to the ethical rules. Having decided that he could preside impartially in the litigation despite knowing the plaintiff for over 25 years, respondent should have recognized the potential conflict a few months later when the successful litigant asked him to be the seller's broker for the sale of property. The litigation, in which respondent issued a prompt warrant of eviction, concerned the same property that respondent was now being asked to sell as a broker.

As a judge, respondent should be aware of the conflicts that might emerge between his official duties and his brokerage business. In this case, the conflicts were substantial. Accepting employment from an individual who had recently been a successful litigant in his court, and from the family of a defendant who recently received a lenient sentence, creates an appearance of a quid pro quo, *i.e.*, that respondent's employment as a broker was a reward for favorable action he

took as a judge. It is respondent's obligation to ensure that he does not convey even the appearance that his judgeship is used to advance his brokerage business.

A judge who was more sensitive to these serious ethical issues might have sought an opinion from the Advisory Committee on Judicial Ethics before agreeing to serve as broker in such circumstances. It is noteworthy that respondent asked his clerk to seek an advisory opinion only *after* respondent had already agreed to be the broker for the Rukaj property, around the time there was adverse publicity concerning his conduct.

In *Matter of Sims*, 61 NY2d 349 (1984), a judge was disciplined for executing releases at her home for defendants who then retained the judge's attorney-husband, creating an appearance of impropriety. Rejecting the argument that the appearance of impropriety standard was impermissibly vague and could not be used as a basis for discipline, the Court of Appeals stated that judges "may be held to this admittedly high standard of conduct...even when performing nonjudicial duties" and added: "When a judge acts in such a way that she appears to have used the prestige and authority of judicial office to enhance personal relationships, or for purely selfish reasons, or to bestow favors, that conduct is to be condemned whether or not the judge acted deliberately and overtly" (*Id.* at 358).

On the facts presented, respondent's conduct shows an unacceptable lack of sensitivity to his judicial duties and warrants censure.

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano, Mr. Pope and Judge Ruderman concur.

Judge Peters was not present.

Dated: August 17, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RONALD C. WRIGHT**, a Justice of the Olive Town Court, Ulster County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
David Lenefsky for the Respondent

The respondent, Ronald C. Wright, a justice of the Olive Town Court, Ulster County, was served with a Formal Written Complaint dated August 10, 2005, containing two charges.

On September 19, 2005, the administrator of the Commission, respondent's counsel 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, recommending that respondent be censured and waiving further submissions and oral argument.

On September 30, 2005, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Olive Town Court since January 1996. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On April 9, 2002, respondent signed a letter on court stationery, a copy of which annexed as Exhibit 1 to the Agreed Statement of Facts, which he sent to the Town of Olive Police, the New York State Police, the New York State Department of Environmental Conservation, the Ulster County Sheriff's Department and the New York City Department of Environmental Protection Police. Respondent stated in the letter that the Olive Town Court would no longer enforce the 35 mph speed zone along Route 28A and Reservoir Road, and that tickets written for speeds less than 55 miles per hour would be dismissed, as speed zones were "illegally posted."

3. Respondent's April 9th statement that the speed zones were illegally posted was based upon his own observation of the signs, and not upon any case or matter which had been judicially decided.

As to Charge II of the Formal Written Complaint:

4. On April 22, 1998, the defendant in *People v. Kenneth Barringer* appeared in the Olive Town Court in response to a Speeding charge (53 miles per hour in a 35 mile-per-hour zone). Respondent's co-judge, Vincent Barringer, disqualified himself because he is related to the defendant. Kenneth Barringer is Judge Barringer's nephew.

5. On May 13, 1998, Kenneth Barringer appeared before respondent, who dismissed the Speeding charge without giving reasonable notice to the arresting officer who was assigned to prosecute the case, as was required by Sections 170.45 and 210.45 of the Criminal Procedure Law. On May 13, 1998, respondent notified the arresting officer, after the disposition, that he had dismissed the charge.

6. Respondent failed to make a proper record of the reason for the dismissal of the *Barringer* matter, as was required by Section 170.40(2) of the Criminal Procedure Law. Respondent recorded in his docket "Dismissed-Not a good zone."

7. On May 13, 1998, respondent dismissed two other Speeding charges which had been issued by the same arresting officer as in the *Barringer* case, also on the basis of "not a good zone." Respondent made his determinations on May 13, 1998, that the speed zone in question was not "good" based upon his personal belief that the posted speed signs were improperly placed.

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)(4) and 100.3(B)(6) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

It was improper for respondent to announce, in a letter sent to law enforcement agencies and signed by respondent and his co-judge, that in future cases he will not enforce the speed limit on a particular road because the speed limit signs were illegally posted. Such a pronouncement, based upon his own observation of the signs and not upon any case or matter which had been judicially decided, is inconsistent with the role of a judge in our legal system, which is to apply the law in each case in an impartial manner, regardless of the judge's personal views (Rules Governing Judicial Conduct, §§100.2[A] and 100.3[B][1]). See *Matter of Tracy*, 2002 Annual Report 167 (Comm. on Judicial Conduct); see also, *Matter of Barringer* (determination issued today).

Respondent has acknowledged that his dismissal of Speeding charges in three cases several years earlier was based upon his "personal belief" that the posted speed signs were improperly placed. A judge's personal views cannot override the judge's obligation to enforce

the law faithfully and impartially. Significantly, in one of the cases, the defendant was a relative of respondent's co-judge, and respondent dismissed the charge without giving reasonable notice to the prosecutor as was required by the Criminal Procedure Law (§§170.45, 210.45). *See, e.g., Matter of More*, 1996 Annual Report 99 (Comm. on Judicial Conduct) (judge dismissed cases without notice to the prosecution). Respondent's handling of that case conveyed the appearance of favoritism and violated his obligation to be faithful to the law and to perform his judicial duties in an impartial manner (Rules Governing Judicial Conduct, §100.3[B][1]).

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

Mr. Goldman, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano and Judge Ruderman concur.

Judge Peters did not participate.

Mr. Pope was not present.

Dated: October 11, 2005

Statistical Analysis of Complaints



2006 Annual Report
New York State
Commission on Judicial Conduct

COMPLAINTS PENDING AS OF DECEMBER 31, 2004

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>		9	35	14	2	2	13	75
<i>DELAYS</i>		8	8	3	2	0	0	21
<i>CONFLICT OF INTEREST</i>		2	6	2	0	2	4	16
<i>BIAS</i>		1	11	2	0	1	1	16
<i>CORRUPTION</i>		7	3	1	1	5	1	18
<i>INTOXICATION</i>		0	0	0	0	0	2	2
<i>DISABILITY/QUALIFICATIONS</i>		0	0	0	0	0	0	0
<i>POLITICAL ACTIVITY</i>		5	5	3	0	0	0	13
<i>FINANCES/RECORDS/TRAINING</i>		3	9	0	1	1	0	14
<i>TICKET-FIXING</i>		1	0	0	1	0	1	3
<i>ASSERTION OF INFLUENCE</i>		2	3	2	1	0	5	13
<i>VIOLATION OF RIGHTS</i>		3	19	5	3	1	5	36
<i>MISCELLANEOUS</i>		1	2	0	0	0	0	3
TOTALS		42	101	32	11	12	32	230

*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 2005

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>	677							677
<i>NON-JUDGES</i>	281							281
<i>DEMEANOR</i>	112	60	32	4	0	0	1	281
<i>DELAYS</i>	38	11	4	0	0	0	0	53
<i>CONFLICT OF INTEREST</i>	26	9	7	1	0	0	1	44
<i>BIAS</i>	59	10	2	0	1	0	0	72
<i>CORRUPTION</i>	13	5	0	1	0	1	0	20
<i>INTOXICATION</i>	2	0	0	0	0	0	0	2
<i>DISABILITY/QUALIFICATIONS</i>	0	1	0	0	0	0	0	1
<i>POLITICAL ACTIVITY</i>	6	18	2	0	0	0	0	26
<i>FINANCES/RECORDS/TRAINING</i>	11	20	2	3	0	1	0	37
<i>TICKET-FIXING</i>	0	1	0	0	0	0	0	1
<i>ASSERTION OF INFLUENCE</i>	4	7	1	0	0	0	0	12
<i>VIOLATION OF RIGHTS</i>	56	37	7	2	4	0	0	106
<i>MISCELLANEOUS</i>	20	0	1	0	2	1	0	24
TOTALS	1305	179	58	11	7	3	2	1565

*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 2005: 1565 NEW & 230 PENDING FROM 2004

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>	677							677
<i>NON-JUDGES</i>	281							281
<i>DEMEANOR</i>	112	69	67	18	2	2	14	284
<i>DELAYS</i>	38	19	12	3	2	0	0	74
<i>CONFLICT OF INTEREST</i>	26	11	13	3	0	2	5	60
<i>BIAS</i>	59	11	13	2	1	1	1	88
<i>CORRUPTION</i>	13	12	3	2	1	6	1	38
<i>INTOXICATION</i>	2	0	0	0	0	0	2	4
<i>DISABILITY/QUALIFICATIONS</i>	0	1	0	0	0	0	0	1
<i>POLITICAL ACTIVITY</i>	6	23	7	3	0	0	0	39
<i>FINANCES/RECORDS/TRAINING</i>	11	23	11	3	1	2	0	51
<i>TICKET-FIXING</i>	0	2	0	0	1	0	1	4
<i>ASSERTION OF INFLUENCE</i>	4	9	4	2	1	0	5	25
<i>VIOLATION OF RIGHTS</i>	56	40	26	7	7	1	5	142
<i>MISCELLANEOUS</i>	20	1	3	0	2	1	0	27
TOTALS	1305	221	159	43	18	15	34	1795

*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>	13,046							13,046
<i>NON-JUDGES</i>	4073							4073
<i>DEMEANOR</i>	2842	69	1009	290	99	90	218	4617
<i>DELAYS</i>	1178	19	124	61	23	14	18	1437
<i>CONFLICT OF INTEREST</i>	566	11	404	139	45	22	115	1302
<i>BIAS</i>	1749	11	236	52	27	17	26	2118
<i>CORRUPTION</i>	381	12	98	11	35	19	31	587
<i>INTOXICATION</i>	50	0	33	7	9	3	24	126
<i>DISABILITY/QUALIFICATIONS</i>	53	1	31	2	16	10	6	119
<i>POLITICAL ACTIVITY</i>	270	23	233	157	11	19	36	749
<i>FINANCES/RECORDS/TRAINING</i>	234	23	247	158	114	83	92	951
<i>TICKET-FIXING</i>	23	2	73	157	40	61	163	519
<i>ASSERTION OF INFLUENCE</i>	157	9	119	61	12	7	54	419
<i>VIOLATION OF RIGHTS</i>	2370	40	356	161	73	33	68	3101
<i>MISCELLANEOUS</i>	720	1	233	80	28	40	57	1159
TOTALS	27,712	221	3196	1336	532	418	908	34,323

*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.