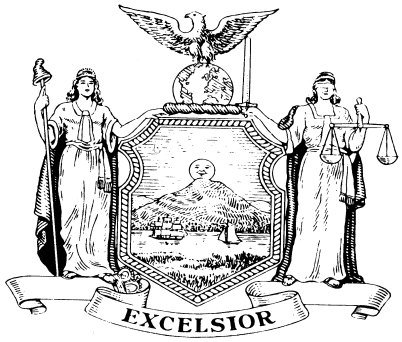
ANNUAL REPORT

2007

NEW YORK STATE



COMMISSION ON JUDICIAL CONDUCT

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

* * *

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March 1, 2007

To Governor Eliot Spitzer,
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, 2006.

Respectfully submitted,

Robert H. Tembeckjian, Administrator
On Behalf of the Commission

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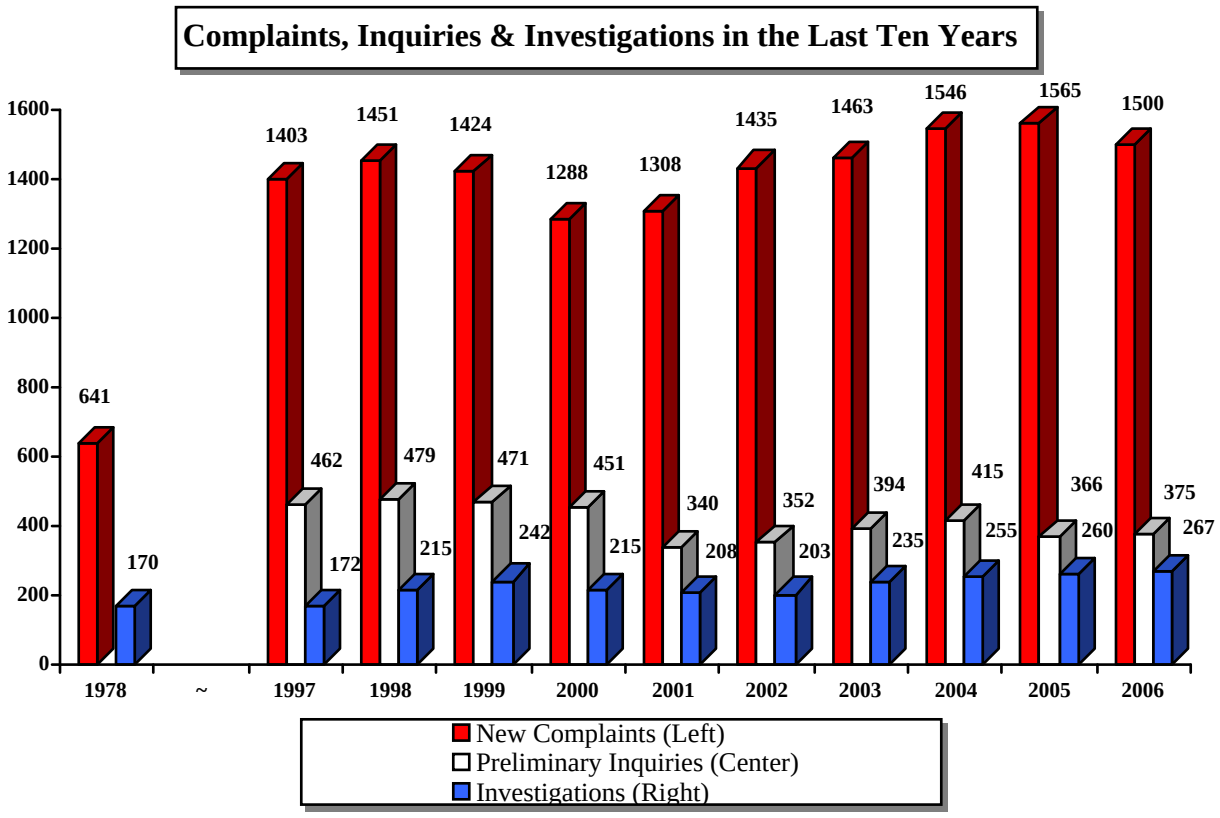
INTRODUCTION TO THE 2007 ANNUAL REPORT

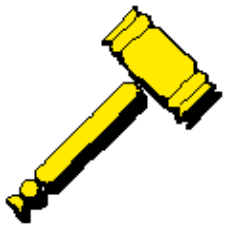
The New York State Commission on Judicial Conduct is the independent agency designated by the State Constitution to review complaints of misconduct against judges of the State Unified Court System, which includes approximately 3,400 judges and justices.

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 15 years has substantially increased compared to the first 18 years of the Commission's existence. Since 1992, the Commission has averaged 1440 new complaints per year, 400 preliminary inquiries and 200 investigations. Last year, 1500 new complaints were received and processed, and for the third year in a row, a record number were investigated (267). In each of the last 15 years, the number of incoming complaints has been more than double the 641 we received in 1978. Recently, for the first time in a generation, the Commission's budget was significantly increased.

This report covers Commission activity in the year 2006.





Action Taken in 2006

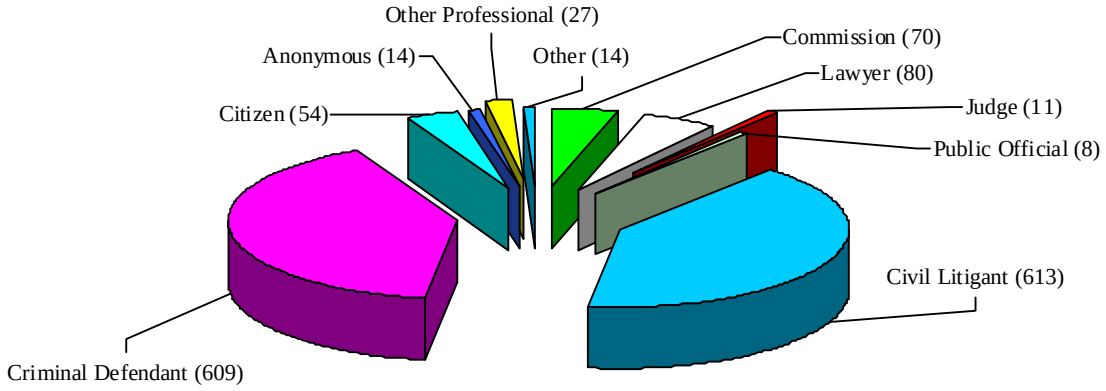
Following are summaries of the Commission's actions in 2006, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

Complaints Received

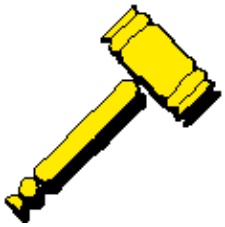
The Commission received 1500 new complaints in 2006. Preliminary inquiries were conducted in 375 of these, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts. In 267 matters, the Commission authorized full-fledged investigations – the most ever in one year. 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 2006 appears in the following chart.



Complaint Sources in 2006

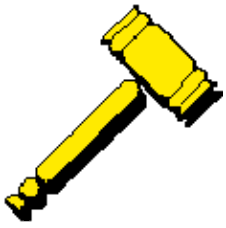


Preliminary Inquiries and Investigations

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 2006, staff conducted 375 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

During 2006, the Commission commenced 267 new investigations. In addition, there were 196 investigations pending from the previous year. The Commission disposed of the combined total of 463 investigations as follows:

- 106 complaints were dismissed outright.
- 58 complaints involving 48 different judges were dismissed with letters of dismissal and caution.
- 12 complaints involving 9 different judges were closed upon the judges' resignation.
- 7 complaints involving 7 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.
- 52 complaints involving 33 different judges resulted in formal charges being authorized.
- 228 investigations were pending as of December 31, 2006.



Formal Written Complaints

As of January 1, 2006, there were pending Formal Written Complaints in 25 matters, involving 15 different judges. In 2006, Formal Written Complaints were authorized in 52 additional matters, involving 33 different judges. Of the combined total of 77 matters involving 48 judges, the Commission acted as follows:

- 18 matters involving 9 different judges resulted in formal discipline (admonition, censure or removal from office).
- 2 matters involving 2 judges resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- 10 matters involving 5 judges were closed upon the judge's resignation, becoming public by stipulation.
- 47 matters involving 32 different judges were pending as of December 31, 2006.

Summary of All 2006 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

	Lawyers	*Non-Lawyers*	*Total*
Complaints Received	80	234	314
Complaints Investigated	28	106	134
Judges Cautioned After Investigation	10	20	30
Formal Written Complaints Authorized	3	20	23
Judges Cautioned After Formal Complaint	1	0	1
Judges Publicly Disciplined	0	5	5
Formal Complaints Dismissed or Closed	0	5	5

Note: Approximately 400 town and village justices are lawyers.

TABLE 2: CITY COURT JUDGES – 385, ALL LAWYERS

	Part-Time	*Full-Time*	*Total*
Complaints Received	49	146	195
Complaints Investigated	11	26	37
Judges Cautioned After Investigation	1	3	4
Formal Written Complaints Authorized	1	3	4
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	0	3	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	198
Complaints Investigated	13
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

* 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	160
Complaints Investigated	29
Judges Cautioned After Investigation	4
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

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

Complaints Received	14
Complaints Investigated	7
Judges Cautioned After Investigation	0
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	46
Complaints Investigated	5
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

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

Complaints Received	33
Complaints Investigated	6
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

* 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	246
Complaints Investigated	35
Judges Cautioned After Investigation	8
Formal Written Complaints Authorized	4
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
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	23
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 10: NON-JUDGES AND OTHERS NOT WITHIN THE COMMISSION'S JURISDICTION*

Complaints Received	266

* 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

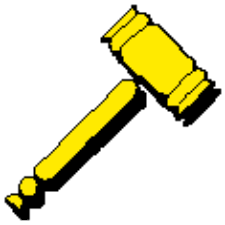
The Commission may not impose a public disciplinary sanction against a judge unless a Formal Written Complaint, containing detailed charges of misconduct, has been served upon the respondent-judge and the respondent has been afforded an opportunity for a formal hearing.

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 2006. The actual texts are appended to this Report.

Overview of 2006 Determinations

The Commission rendered 9 formal disciplinary determinations in 2006: 3 removals, 5 censures and 1 admonition. In addition, 5 matters were disposed of by stipulation made public by agreement of the parties. Ten of the 14 respondents were non-lawyer-trained judges, and 4 were lawyers. Ten of the respondents were part-time town or village justices, and 4 were judges of higher courts.



Determinations of Removal

The Commission completed three formal proceedings in 2006 that resulted in determinations of removal. The cases are summarized below, and the texts are appended.

Matter of John T. Greaney

The Commission determined on December 18, 2006, that John T. Greaney, a part-time Justice of the Berlin Town Court, Rensselaer County, should be removed for *inter alia* knowingly filing falsified nominating petitions with the local board of elections.

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

Matter of Kerry R. Lockwood

The Commission determined on November 7, 2006, that Kerry R. Lockwood, a part-time Justice of the Plainfield Town Court, Otsego County, should be removed for failing to report and remit court funds in a timely manner to the State Comptroller and for failing to cooperate with the Commission's inquiry into the matter.

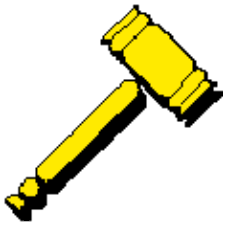
Judge Lockwood, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Thomas J. Spargo

The Commission determined on March 29, 2006, that Thomas J. Spargo, a Justice of the

Supreme Court, Albany County, should be removed for *inter alia* attempting to coerce attorneys who had pending cases before him to contribute to a legal defense trust created to defray the expenses associated with his federal lawsuit against the Commission.

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



Determinations of Censure

The Commission completed five formal proceedings in 2006 that resulted in public censure. The cases are summarized below, and the texts are appended.

Matter of William A. Carter

The Commission determined on September 25, 2006, that William A. Carter, a Judge of the Albany City Court, Albany County, should be censured for *inter alia* coming off the bench and challenging a defendant to a physical confrontation, which was prevented by a police officer's spiriting the defendant out of the courtroom. Judge Carter did not request review by the Court of Appeals.

Matter of David A. Clark

The Commission determined on March 27, 2006, that David A. Clark, a part-time Justice of the York Town Court, Livingston County, should be censured for using the prestige of judicial office on behalf of a friend who was engaged in a dispute with her former boyfriend. Judge Clark, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Peter M. Kulkin

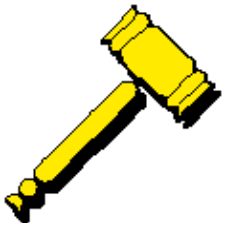
The Commission determined on March 23, 2006, that Peter M. Kulkin, a Judge of the Newburgh City Court, Orange County, should be censured for misrepresenting material facts about his opponent in the 2004 election for City Court Judge. Judge Kulkin did not request review by the Court of Appeals.

Matter of David M. Wiater

The Commission determined on June 29, 2006, that David M. Wiater, a part-time Justice of the Batavia Town Court, Genesee County, should be censured for making discourteous remarks on the phone and inappropriately threatening a motor vehicle defendant with jail. Judge Wiater, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Karen Uplinger

The Commission determined on March 15, 2006, that Karen Uplinger, a Judge of the Syracuse City Court, Onondaga County, should be censured for *inter alia* mocking and otherwise demeaning the victim of an assault in open court. Judge Uplinger did not request review by the Court of Appeals.

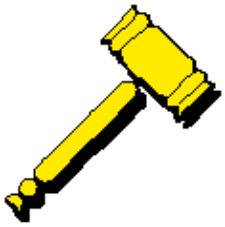


Determinations of Admonition

The Commission completed one proceeding in 2006 that resulted in a determination of public admonition. The case is summarized as follows, and the text is appended.

Matter of James E. Van Slyke

The Commission determined on December 18, 2006, that James E. Van Slyke, a part-time Justice of the New Hartford Town and Village Courts, Oneida County, should be admonished for holding a defense attorney in contempt without following the procedures mandated by law, when the attorney appropriately attempted to make a record of a material matter on behalf of his client. Judge Van Slyke, who is not a lawyer, did not request review by the Court of Appeals.



Other Public Dispositions

The Commission completed five other proceedings in 2006 that resulted in a public disposition. The cases are summarized below, and the texts are appended.

Matter of Earl R. Harris

Pursuant to a stipulation, the Commission discontinued a proceeding on May 1, 2006, involving Earl R. Harris, a non-lawyer part-time Justice of the Camden Town Court, Oneida County, after serving the judge with formal charges alleging *inter alia* that he failed to deposit and report the receipt of court funds in a timely manner.

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

Matter of George O. Hewlett

Pursuant to a stipulation, the Commission discontinued a proceeding on May 1, 2006, against George O. Hewlett, a non-lawyer part-time Justice of the Potsdam Town Court, St. Lawrence County, after serving the judge with formal charges alleging that *inter alia* he engaged in unauthorized *ex parte* communications, failed to accord litigants the right to be heard and presided over a matter involving a relative.

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 Roy H. Kristoffersen

Pursuant to a stipulation, the Commission discontinued a proceeding on February 14, 2006, involving Roy H. Kristoffersen, a non-lawyer part-time Justice of Saranac Lake Village Court, Franklin County, after serving the judge with formal charges alleging *inter alia* that he presided over civil cases involving his relatives and criminal cases involving his co-judge's son, to whom he granted favorable dispositions without notice to the prosecution.

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 Daniel L. LaClair

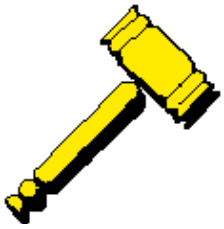
Pursuant to a stipulation, the Commission discontinued a proceeding on December 15, 2006, involving Daniel L. LaClair, a non-lawyer part-time Justice of the Clinton Town Court, Clinton County, after serving the judge with formal charges alleging *inter alia* that he intervened with police and another judge on behalf a relative who had been arrested.

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 I. LaLonde

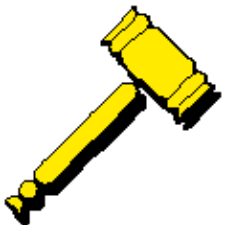
Pursuant to a stipulation, the Commission discontinued a proceeding on February 14, 2006, involving Joseph I. LaLonde, a non-lawyer part-time Justice of the Tupper Lake Town and Village Courts, Franklin County, after serving the judge with formal charges alleging *inter alia* that he made injudicious remarks to or about police officers and defendants and presided over certain arraignments while intoxicated.

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



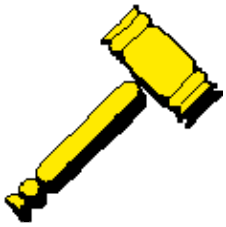
Dismissed or Closed Formal Written Complaints

The Commission disposed of 7 Formal Written Complaints in 2006 without rendering public discipline. Five complaints were closed upon the resignation of the respondent-judge, pursuant to a stipulation in which the judge waived confidentiality and agreed not to seek judicial office in the future. Two complaints were disposed of with a letter of caution, upon a finding by the Commission that judicial misconduct was established but that public discipline was not warranted.



Matters Closed Upon Resignation

Fourteen judges resigned in 2006 while complaints against them were pending at the Commission. Nine of them resigned while under investigation and five 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 2006, the Commission referred 25 matters to other agencies. Twenty-two 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. One matter was referred to an attorney grievance committee. Two matters were referred to a District Attorney.

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 2006, the Commission issued 48 Letters of Dismissal and Caution and two Letters of Caution. Thirty-one town or village justices were cautioned, including 11 who are lawyers. Nineteen 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. Seven judges were cautioned for engaging in unauthorized *ex parte* communications. For example, several judges initiated discussions on factual issues with a party's lawyer or witnesses without notice to the other side. One judge was cautioned for looking up information about a defendant on the Internet without notice to either side.

Political Activity. Two 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. Unexpended funds from one judicial campaign may not be used in a subsequent campaign, even by the same judge for the same 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 two cautioned judges committed isolated and relatively minor 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. Two judges were cautioned for presiding over cases in which it at least appeared that their relationships to one of the parties mandated recusal. A part-time non-lawyer justice was cautioned for holding a job in law enforcement that was incompatible with the impartial role of a judge, and he withdrew from the employment.

Inappropriate Demeanor. Eight judges were cautioned for discourteous, intemperate or otherwise offensive demeanor toward litigants, lawyers or others, in isolated circumstances that did not appear to be 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. Two judges were cautioned for setting bail in the form of "cash only," contrary to the requirements of law. Another was cautioned for rendering judgment in a small claims case without insuring that the defendant had been served with the claim.

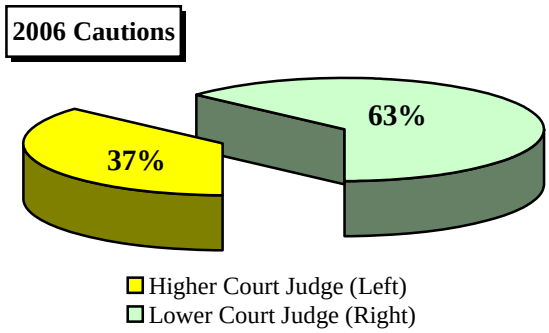
Charitable Fund Raising. Except as to bar associations, law schools and court employee organizations, the Rules prohibit a judge from being a speaker or guest of honor at an organization's fund raising event. One judge was cautioned for lending the prestige of judicial office to the fund raising activities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

Audit and Control. Eight 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 eventually accounted for, with no evidence of theft.

Delay. Five judges were cautioned for significant delays in scheduling or disposing of cases, despite prompting by the parties.

Miscellaneous. Five judges were cautioned for improperly conducting what should have been public court proceedings in non-public settings, either by excluding spectators from entering the courtroom or conducting arraignments in a home office, a police station or a parking lot.

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, a respondent-judge has 30 days to request review of a Commission determination by the Court of Appeals, or the determination becomes final. In 2006, the Court decided the following two Commission matters.

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 and the litigant the day before.

The Court of Appeals accepted the Commission's decision and censured the judge on May 4, 2006. 7 NY3d 1 (2006). The Court held that it was disciplinable misconduct for a judge to use the summary contempt power "retributively" rather than to restore order and decorum in the courtroom. *Id.* at 7. The Court noted that while the Commission had admonished rather than censured other judges who had acknowledged their wrongdoing, censure was appropriate here because *inter alia* Judge Hart continued to insist even before the Court that he had done nothing wrong. The Court noted that while a judge "need not adopt a posture of obeisance before the Commission or this Court," a judge "must recognize wrongdoing in order to forestall the inevitable, unfortunate conclusion that, absent a harsher sanction, more of the same will ensue." *Id.* at 11.

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 defendant on new charges unrelated to the matter which had brought the defendant to court that day.

The Court of Appeals accepted the determination and removed Judge Blackburne from office in an opinion dated June 13, 2006. 7 NY3d 213 (2006). The Court rejected Judge Blackburne's argument that precedent prohibited the removal of a judge for a "single act of bad judgment, unless the misconduct involved venality, breach of trust, moral turpitude or personal gain." *Id.* at 219. The Court noted it had "never implied that removal is limited to those categories of cases that have formerly come before [it]. Judicial misconduct cases are, by their very nature, sui generis." *Id.* at 220. Where, as here, the judge engages in egregious misconduct – "plac[ing] herself above the law she was sworn to administer" and putting the public at risk by helping a suspect evade arrest – removal from office is warranted. *Id.* at 221.

CHALLENGES TO THE COMMISSION'S PROCEDURES

In a proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) in December 2006 and decided in February 2007, a New York City Family Court judge sought to restrain the Commission from investigating various complaints of intemperance against her. The matter is summarized below.

Matter of Marian R. Shelton v. Commission on Judicial Conduct

New York City Family Court Judge Marian R. Shelton commenced a CPLR Article 78 proceeding against the Commission in December 2006, seeking to prohibit the Commission from taking her testimony and otherwise proceeding with investigation of eight complaints alleging in substantial part that she was disrespectful, discourteous, disparaging and otherwise rude and intemperate toward litigants, lawyers, judges court officers and others with whom she dealt in her official capacity.

Judge Shelton claimed *inter alia* that the Commission lacked jurisdiction to question her as to certain matters because it did not have specific complaints from the allegedly aggrieved individuals and because some categories of grievant (*e.g.,* court officers and fellow judges) were not specifically identified in the Rules Governing Judicial Conduct as people toward whom a judge is obliged to be courteous.

The Commission asserted in its defense that it was explicitly authorized by the Constitution to investigate complaints of habitual intemperance and that, under various court precedents, it did not need a new complaint to question the judge about matters reasonably related to the existing complaints, which were already the subject of duly authorized investigation.

The matter was assigned to Supreme Court Justice Joan A. Madden in New York County, who granted Judge Shelton's request to seal the record and proceedings, pending decision. After hearing oral argument and receiving written submissions on the merits, Judge Madden denied the petition and dismissed the proceeding. __ Misc3d __, 237 NYLJ 34 (Sup Ct NY Co February 8, 2007). Judge Madden also unsealed the record, except for the transcripts of Judge Shelton's previous testimony before the Commission; the parties had agreed previously to redact the names of Family Court litigants from all papers in the case.

Citing *Nicholson v. State Commission on Judicial Conduct*, 50 NY2d 597, 605-06 (1980), Judge Madden ruled that a writ of prohibition would not lie where, as here, the Commission was operating within its constitutional mandate and where the petitioner could not demonstrate a "clear legal right" to the relief sought. Citing *State Commission on Judicial Conduct v. Doe,* 61 NY2d 56 (1984), Judge Madden ruled that so long as the subject matter of the

Commission's questions to Judge Shelton is reasonably related to the complaints under investigation, it is permissible for the Commission to pursue them, even without signed individual complaints for each such reasonably related matter.

Judge Madden's decision states further that Judge Shelton's attempt to refute the merits of the various complaints against her is inapposite to the jurisdictional issue at the heart of the Article 78 petition. Moreover, the Madden decision cites *Going v. State Commission on Judicial Conduct*, 97 NY2d 121 (2001), noting that because the Commission gave Judge Shelton notice of the matters it intended to raise with her, the petition did not allege that she could not identify the matters or prepare for them.

On February 9, 2007, Judge Shelton filed a notice of appeal but has not perfected it to date. On March 6, 2007, her application for a stay of Judge Madden's decision, pending appeal, was denied by the Appellate Division, First Department, freeing the Commission to move forward with its inquiry.

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 S. 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 FROM OFFICE

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)[1]

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, 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 Governor and 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

[1] 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).

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 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. In one 2006 case (*Matter of Carter*), the Commission explicitly stated that it would have suspended rather than censure the judge if it had the authority to do so. As it has done previously, the Commission suggests that the Governor and 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. We commented on this subject extensively in last year's annual report and are compelled to do so again, in part because such practices continue to arise.

In the last two years, for example, the Commission became aware of several judges whose courtroom doors had posted signs excluding all but those whose cases were being heard. Last year, one Commission member appearing in court on a client's behalf found the courtroom door literally locked during regular business hours, with a crowd of lawyers and clients forced to wait in the hallway until their individual cases were called. Commission investigators sitting unobtrusively in the spectator section of some courtrooms have been confronted by court personnel who have asked their names, inquired as to their business and directed them to leave, claiming to do so pursuant to a policy of the judge. Litigants and lawyers have reported seeing signs on some courtroom doors announcing that children are not permitted inside, although no age limit is noted and/or distinction made between an unruly child who may disrupt proceedings versus a quiet child or even infant who may be asleep.

Typically, the Commission brings such circumstances to the attention of the Chief Administrative Judge, who asks various administrative judges to remind judges and courthouse personnel that most court proceedings, including Family Court matters, are required by law to be public. Such reminders usually produce the desired result, with no discipline imposed on the judge.

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.[2] 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.

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.[3]

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[2] *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.

[3] *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).

Unfortunately, these standards are still not uniformly observed throughout the state, despite reminders from the Office of Court Administration and the Commission.

Absent a controlling exception, all criminal and civil proceedings, including matrimonial and Family Court matters, 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. In another example, the full-time clerk of a full-time court failed to make certain public information available to the Commission by mail, then was not prepared when a Commission investigator came to court by appointment to review certain records, necessitating a second visit. While the Commission does not believe it should be necessary to subpoena 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.

Ironically, such dilatory conduct is often to the detriment of the judge involved. More often than not, court records resolve factual disputes in favor of the judge against whom a complaint has been made. Impeding the Commission's access to such records delays resolution of the pending complaint, keeping the judge under a cloud of suspicion longer than is necessary or appropriate.

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.

COERCING DEFENDANTS INTO PLEA BARGAINS

A judge is obliged by the Rules Governing Judicial Conduct to be and appear impartial, to comply with and be faithful to and professionally competent in the law, and to afford litigants and their lawyers the opportunity to be heard. Sections 100.2(A), 100.3(B)(1) and 100.3(B)(6).

In various cases, the Court of Appeals has held that legal error and judicial misconduct are not mutually exclusive. A judge may be disciplined for misconduct resulting from abuses of discretion or gross legal errors that, for example, deprive litigants of their fundamental rights, whether or not an appellate court has reviewed and ruled upon the merits of the judge's rulings in the case. *See Matter of Feinberg*, 5 NY3d 206 (2005); *Matter of Bauer*, 3 NY3d 158 (2004); *Matter of Reeves*, 63 NY2d 105 (1984).

The Commission has received a number of complaints in recent years alleging that some judges have coerced or attempted to coerce defendants into accepting plea bargains.

Judicial Intervention in The Plea Bargaining Process

New York state court judges are not prohibited from engaging in plea negotiations. *See People v. Seaberg*, 74 NY2d 1 (1989). The standard plea bargaining process contemplates agreement by the prosecutor and defense counsel on a resolution that is consistent with the interests of each, *e.g.* that the defendant will plead guilty to a particular charge or charges, often less than the most serious charge the defendant faces, and that in exchange the remaining charges will be dismissed or the punishment for all charges will be resolved contemporaneously and tempered. The parties typically also agree upon a recommended sentence. The agreement is then subject to the approval of the judge, who must be satisfied that the agreed-upon disposition is consistent with the interests of justice. In his or her discretion, the judge may decide that, although the disposition is acceptable to the prosecutor, the conduct attributed to the defendant is too serious to permit a plea to a lesser crime, or that the plea is acceptable but the promised sentence is too high or too low. In so doing, the judge assesses whether the promised sentence is appropriate and proportionate to the crime. *See People v. Farrar*, 52 NY2d 302 (1981).

Intervention by the court should in both appearance and effect favor neither prosecution nor defense. Section 100.2(A) of the Rules Governing Judicial Conduct requires a judge to "respect and comply with the law and . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *See also Matter of Sardino*, 58 NY2d 286, 290-91 (1983) (Every judge must not only be impartial, but act "in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property"). Section 100.3(B)(4) of the Rules provides that "a judge shall perform judicial duties without bias or prejudice against or in favor of any person."

New York Law
Regarding Involuntary Pleas

As discussed below, the judge's participation in negotiating and accepting a plea can exceed permissible bounds, rendering a guilty plea involuntary.

A judge may not induce a guilty plea by threatening to impose a heavier sentence should the defendant proceed to trial. *See People v. Stevens*, 298 AD2d 267 (1st Dept 2002); *People v. Christian*, 139 AD2d 896 (4th Dept 1988); *People v Hollis*, 74 AD2d 585 (2d Dept 1980). Under New York state law, "'a court wrongly burdens the defendant's exercise of his right to trial when it indicates he will receive the maximum sentence, or maximum consecutive sentences, after trial, but a significantly lighter sentence after a plea.'" *Stevens*, 298 AD2d at 268 (citation omitted).

A judge, however, does not exert any undue pressure on a defendant by discussing the potential sentence a defendant could receive upon conviction after a trial. *See People v. Villone*, 302 AD2d 866 (4th Dept 2003); *People v. Pagan*, 297 AD2d 582 (1st Dept 2002); *People v. Lambe*, 282 AD2d 776 (3d Dept 2001*); People v. Green*, 240 AD2d 513 (2d Dept 1997).

For instance, in *People v. Cornelio*, 227 AD2d 248 (1st Dept 1996), the Appellate Division held that the trial judge did not coerce a guilty plea by advising the defendant, who was charged with first-degree robbery, that he faced "a possible 100 years in prison which, based on the facts known to it, it would not hesitate to impose." New York state courts have also held that it was not coercive for a judge to remark that "if the defendant were to be convicted after trial, it would impose a sentence close to the maximum allowable under law." *Green*, 240 AD2d at 514. *See also Britt v. State*, 260 AD2d 6, 12-13 (1st Dept 1999) (lower court did not coerce guilty plea where it "merely advised claimant that, *in view of his four prior felony convictions*, he 'would not be getting closer to the minimum, but closer to the maximum'" [emphasis in original]).

New York state courts have held that discussion of possible sentences a defendant could face is improper when the judge unequivocally or explicitly states that upon conviction a heavier sentence will be imposed. *See Stevens*, 298 AD2d at 268; *Christian*, 139 AD2d at 897; *Hollis*, 74 AD2d at 585. *Cf. People v. Coleman*, 203 AD2d 729 (3d Dept 1994) (trial judge did not coerce guilty plea where the record "lack[ed] an explicit threat to give defendant a heavier sentence if he exercised his right to trial," and the judge informed the defendant that consecutive sentences were legally permissible upon multiple convictions.)

In *Stevens*, 298 AD2d at 268, the Appellate Division found that the trial judge coerced a guilty plea when, in the course of plea negotiations, the judge told the defendant,

> [O]nce we go forward, there will be no turning back. If you're convicted after trial, given the circumstances of this case under which you were apprehended and the nature of your record, 25 to life, that's what you're going to get.

The court reasoned that the trial judge's statements were "more than a description of the full range of possible sentences" or a "reasonable assessment of the sentencing prospects in the event of a conviction," and constituted "outright coercion." *Id.* at 268 (citations omitted).

In *People v. Fanini*, 222 AD2d 1111 (4th Dept 1995), the Appellate Division found

that the trial judge's statement to the defendant prior to his plea – "Eight to life... What you would receive in the event of a conviction would be twenty-five" – constituted coercion and rendered the guilty plea involuntary. *See also People v. Beverly*, 139 AD2d 971 (4th Dept 1988) (guilty plea coerced where prior to plea, the trial court told the defendant "if we have to go to trial and work" the court probably would impose the maximum sentence "on top of" the sentence for another crime).

In *People v. Wilson*, 245 AD2d 161 (1st Dept 1997), the trial court advised the defendant of its personal "policy" of sentencing predicate felons convicted after trial to "the high end of the sentencing chart." In reversing the conviction and vacating the plea, the Appellate Division concluded that the trial court "did not 'threaten' to impose a greater sentence — it virtually promised to do so, according to its stated 'policy.'" *Id*. at 163-64. The inexorable effect of the trial judge's statements, the Court found, was to coerce the defendant into pleading guilty.

Commission Action

Consistent with its obligation to enforce the Rules, the Commission will examine complaints which on their face provide credible indication that a judge may have coerced a guilty plea, in violation of the judicial obligations to be impartial, respect and comply with the law, be faithful to and professionally competent in the law, and accord the parties their right to be heard. The Commission has found it appropriate to issue confidential cautions where these Rules were violated in circumstances involving more than a good-faith error of law, such as where the judge attempted to elicit incriminating statements from the defendant; or declared as if speaking for the prosecutor that the plea offer would automatically increase every time the defendant rejected it, based on factors extrinsic to the case, such as the judge's view that the defendant's prior arrests should be held against him, without regard to whether acquittals or convictions had resulted from such arrests; or violated other rules in the process, such as the obligation to be patient, dignified and courteous toward litigants, lawyers and others.

Where the coercion is extreme and repetitive, public discipline is warranted. In *Matter of Bauer*, 3 NY3d 158 (2004), a city court judge was removed from office for *inter alia* coercing guilty pleas by setting exorbitant bail that defendants accused of minor offenses (such as bicycle violations) could not meet, then days later offering release if the incarcerated defendant pled guilty.

By calling attention to the informative appellate decisions addressing this issue, and also by suggesting here that OCA vigorously address it in judicial training and education programs, the Commission hopes to obviate its own involvement in the area by helping to eliminate the conduct that gives rise to it.

SOCIAL RELATIONS AMONG JUDGES AND LAWYERS

Judges are obliged by the Rules to be disqualified from cases in which their impartiality might reasonably be questioned. Section 100.3(E). Various examples are noted where disqualification is mandatory, such as where the judge or judge's spouse is related to a party or attorney in the proceeding. The Rules do not explicitly address the situation where judges and lawyers enjoy a social relationship.

It is not at all unusual, of course, for judges and attorneys to have social relationships that are not disqualifying, such as participation in bar association activities, or prior service in the same law firm, district attorney's office or legal services agency. The more active and personal the social relation is, the more sensitive the judge must be to the appearance of impropriety in presiding over the attorney's cases. The Commission cautioned one judge last year for failing to withdraw from a matter involving an attorney with whom the judge had recently vacationed. In *Matter of Lebedeff* and *Matter of Huttner*, in 2005, the Commission disciplined judges for presiding over matters involving a lawyer with whom they had very active social relationships.

The Commission reminds all judges to be sensitive to the impropriety and appearance of impropriety arising from such relationships and to seek guidance when in doubt from the Advisory Committee on Judicial Ethics.

THE COMMISSION'S BUDGET

In previous annual reports, for years, the Commission has reported with some urgency on the need for more adequate resources to fulfill its constitutional mandate. For years, we pointed out that the Commission's staff had been reduced from 63 to 28, while its caseload had increased from under 650 a year to over 1,500 a year.

In early 2007, for the first time in over a generation, the Commission's budget was significantly increased.

After public hearings chaired in the Senate by Judiciary Committee Chairman John A. DeFrancisco, and co-chaired in the Assembly by Judiciary Committee Chairwoman Helene D. Weinstein and Codes Committee Chairman Joseph R. Lentol, and after Joint Budget Hearings chaired by Assembly Ways and Means Committee Chairman Herman D. Farrell, Jr., the Legislature, with the support of the four legislative leaders – Assembly Speaker Sheldon Silver, Senate president pro tem Joseph Bruno, Assembly Minority Leader James Tedisco and Senate Minority Leader Malcolm Smith, each of whom appoints one member of the Commission – proposed an increase in the Commission's budget from $2.8 million to $4.8 million. The Governor agreed, and the budget bill was signed.

The Commission is now engaged in discussions with the Division of Budget over a staffing and management plan to deploy these additional resources and tackle a backlog that is substantially larger than at any time since 1978.

A comparative analysis of the Commission's budget and staff over the years appears below in chart form.

Selected Budget Figures, 1978 to Present

FISCAL YEAR	ANNUAL BUDGET*	COMPLAINTS RECEIVED*	NEW INVESTIG'NS	PENDING YEAR END	STAFF ATTORNEYS**	STAFF INVESTIG'RS	TOTAL STAFF
1978-79	$1,644,000	641	170	324	21	18 f/t	63
1988-89	$2,224,000	1109	200	141	9	12 f/t, 2 p/t	41
1992-93	$1,666,700	1452	180	141	8	6 f/t, 1 p/t	26
1996-97	$1,696,000	1490	192	172	8	2 f/t, 2 p/t	20
2005-06	$2,609,000	1565	260	260	10	7f/t	28½
2006-07	$2,800,000	1500	267	275	10	7f/t	28½

* Complaint figures are calendar year (Jan 1 – Dec 31); Budget figures are fiscal year (Apr 1 – Mar 31).
** Number includes Clerk of the Commission, who does not investigate or litigate cases.

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 C. DiPIRRO
RICHARD D. EMERY
PAUL B. HARDING
MARVIN E. JACOB
JILL KONVISER
KAREN K. PETERS
TERRY JANE RUDERMAN

APPENDIX

Biographies of Commission Members and Attorneys
Roster of Referees Who Served in 2006
The Commission's Powers, Duties & History
Text of the Rules Governing Judicial Conduct
Text of 2006 Determinations
Statistical Analysis of Complaints

2007 Annual Report

New York State
Commission on Judicial Conduct

Biographies of Commission Members

There are 11 members of the Commission on Judicial Conduct. Each serves a renewable four-year term. Four members are appointed by the Governor, three by the Chief Judge, and one each by the Speaker of the Assembly, the Minority Leader of the Assembly, the Temporary President of the Senate (Majority Leader) and the Minority Leader of the Senate.

Of the four members appointed by the Governor, one shall be a judge, one shall be a member of the New York State bar but not a judge, and two shall not be members of the bar, judges or retired judges. Of the three members appointed by the Chief Judge, one shall be a justice of the Appellate Division, one shall be a judge of a court other than the Court of Appeals or Appellate Division, and one shall be a justice of a town or village court. None of the four members appointed by the legislative leaders shall be judges or retired judges.

The Commission elects a Chair and a Vice Chair from among its members for renewable two-year terms, and appoints an Administrator who shall be a member of the New York State bar who is not a judge or retired judge. The Administrator appoints and directs the agency staff. The Commission also has a Clerk who plays no role in the investigation or litigation of complaints but assists the Commission in its consideration of formal charges, preparation of determinations and related matters.

Member	Appointing Authority	Year First Appointed	Expiration of Present Term
Raoul L.Felder	Former Governor George Pataki	2003	3/31/2008
Thomas A. Klonick	Chief Judge Judith Kaye	2005	3/31/2009
Stephen R. Coffey	Senator Joseph Bruno	1995	3/31/2007
Colleen C. DiPirro	Former Governor George Pataki	2004	3/31/2009
Richard D. Emery	Former Senator David Paterson	2004	3/31/2008
Paul B. Harding	Assemblyman James Tedisco	2006	3/31/2009
Marvin E. Jacob	Assembly Speaker Sheldon Silver	2006	3/31/2010
Jill Konviser	Former Governor George Pataki	2006	3/31/2010
Karen P. Peters	Chief Judge Judith Kaye	2000	3/31/2010
Terry J. Ruderman	Chief Judge Judith Kaye	1999	3/31/2008
Vacant*	Governor Eliot Spitzer		3/31/2011

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, and 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. Mr. Emery serves on the New York City Bar Association's Committee on Election Law, the Advisory Board of the National Police Accountability Project, and the Governor's Commission on Integrity in Government. He is also active in the Association of Trial Lawyers of America and the Municipal Arts Society Legal Committee, Governor's Commission on Integrity in Government. He previously served on the New York County Lawyers Association Committee on Judicial Independence and on the Board of Children's Rights, the national children's rights advocacy organization. His honors include the 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; the New York Magazine, March 20, 1995, "The Best Lawyers In New York" Award for recognition of successful Civil Rights litigation; the Park River Democrats Public Service Award, June 1989; and the 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, and Chairman of YouthBridge-NY. Mr. Jacob has published and lectured extensively on bankruptcy issues and has been recognized with many legal and community awards. He is the co-editor of Reorganizing Failing Businesses, recently published by the American Bar Association, and Restructurings, published by Euromoney Books. Mr. Jacob is listed in, among others, The Best Lawyers in America and The Best Lawyers in New York.

Honorable Jill Konviser is a graduate of the State University of New York at Binghamton and the Benjamin N. Cardozo School of Law. She was appointed to the Court of Claims by Governor George E. Pataki in 2005, has been designated an Acting Justice of the Supreme Court and currently hears criminal cases in New York City. She served as the Inspector General of the State of New York from December 2002 through March 2005. Prior to that, she served for five years as Senior Assistant Counsel to Governor Pataki, focusing on criminal justice issues. From 1995 until 1997, she was a manager with KPMG, and in 1997, she held the position of Deputy Inspector

General of the Metropolitan Transportation Authority. She also served as a New York County Assistant District Attorney from 1990 to 1995, and was an Adjunct Professor at Fordham Law School and Cardozo Law School.

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. She was reappointed by Governor George E. Pataki in 1999 and 2004 and by Governor Eliot L. Spitzer in 2007. 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 the Immediate Past 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 has served as the Presiding Member of the New York State Bar Association Judicial Section, 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 Cornell University President's Council of Cornell Women.

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* **William F. Howard** was appointed to the Commission by Governor George E. Pataki on December 22, 2006. Mr. Howard served as First Deputy Secretary to Governor Pataki. On January 11, 2007, after having been asked to serve as Assistant Deputy Secretary for Homeland Security under Governor Eliot L. Spitzer, Mr. Howard resigned from the Commission. There were no Commission meetings during this period, and Mr. Howard did not participate in any Commission matters.

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 served on the Advisory Committee to the American Bar Association Commission to Evaluate the Model Code of Judicial Conduct from 2003-07. He is on the Board of Directors of the Association of Judicial Disciplinary Counsel and previously served as a Trustee of the Westwood Mutual Funds and the United Nations International School, and on the Board of Directors of the Civic Education Project. Mr. Tembeckjian has served on various ethics and professional responsibility committees of the New York State and New York City Bar Associations, and he has published numerous articles in legal periodicals on judicial ethics and discipline.

Alan W. Friedberg, *Deputy Administrator in Charge of the Commission's New York office*, 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, *Deputy Administrator in Charge of the Commission's Albany office*, is a graduate of Potsdam College *(summa cum laude)* and the Albany Law School. In 1979, she completed the course superior at the Institute of Touraine in Tours, France. Ms. Cenci joined the Commission staff in 1985. She 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, *Deputy Administrator in Charge of the Commission's Rochester office*, is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission staff in 1980. 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.

Jean Joyce, *Senior Attorney*, is a graduate of Hamilton College (Russian Studies) and New York Law School (*cum laude*). Prior to joining the Commission staff, she clerked for Chief Judge Judith S. Kaye of the New York State Court of Appeals, and served as an Assistant District Attorney in the Bronx. She is a member of the New York City Bar Association.

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.

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 in the Bronx.

Stephanie A. Fix, *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 in Manhattan and 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. Fix 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. Fix is an adjunct professor at St. John Fisher College.

Brenda Correa, *Staff Attorney*, is a graduate of the University of Massachusetts at Amherst and Pace University School of Law in New York (*cum laude*). Prior to joining the Commission staff, she served as an Assistant District Attorney in Manhattan and was in private practice in New

York and New Jersey focusing on professional liability and toxic torts respectively. She is a member of the New York State Bar Association and the New York City Bar Association.

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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. Ms. Savanyu teaches in the paralegal studies program at Hunter College and previously taught legal research and writing at Marymount Manhattan College. Prior to joining the Commission staff, she was a travel writer and editor.

REFEREES WHO SERVED IN 2006

Referee	City	County
Mark S. Arisohn, Esq.	New York	New York
Hon. Herbert I. Altman	New York	New York
William C. Banks, Esq.	Syracuse	Onondaga
Hon. Frank J. Barbaro	Watervliet	Albany
Peter Bienstock, Esq.	New York	New York
Jay C. Carlisle, Esq.	White Plains	Westchester
Daniel S. Connelly, Esq.	New York	New York
William T. Easton, Esq.	Rochester	Monroe
Robert L. Ellis, Esq.	Scarsdale	Westchester
Vincent D. Farrell, Esq.	Mineola	Nassau
Maryann Saccomando Freedman, Esq.	Buffalo	Erie
Douglas S. Gates, Esq.	Rochester	Monroe
Trevor L. F. Headley, Esq.	Brooklyn	Kings
Victor J. Hershdorfer, 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
James C. Moore, Esq.	Rochester	Monroe
Hon. Edgar NeMoyer	Buffalo	Erie
Steven E. North, Esq.	New York	New York
Philip C. Pinsky, Esq.	Syracuse	Onondaga
John J. Poklemba, Esq.	Saratoga Springs	Saratoga
Hon. Felice K. Shea	New York	New York
Milton Sherman, Esq.	New York	New York
Shirley A. Siegel, Esq.	New York	New York
Hon. Richard D. Simons	Rome	Oneida
Robert J. Smith, Esq.	Binghamton	Broome
Robert Straus, Esq.	New York	Kings
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

The Commission's Powers, Duties & History

2007 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.

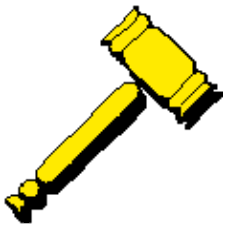
The Commission's Powers, Duties, Operations and History

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

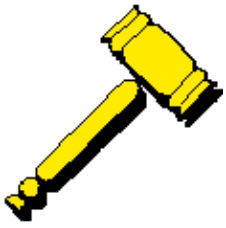
The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one by each of the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and 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)
William F. Howard (2006-07)
Marvin E. Jacob (2006-present)
Hon. Daniel W. Joy (1998-2000)
Michael M. Kirsch (1974-82)
Hon. Thomas A. Klonick (2005-present)
Hon. Jill Konviser (2006-present)
*Victor A. Kovner (1975-90)
William B. Lawless (1974-75)
Hon. Daniel F. Luciano (1995-2006)
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 (1990-98)
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.

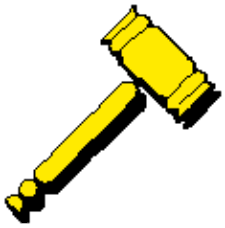
The types of complaints that may be investigated by the Commission include improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off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

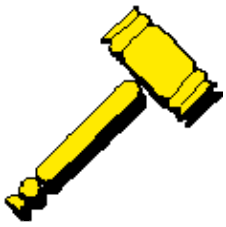
If the Commission finds after an investigation that the circumstances so warrant, it will direct its Administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint institutes the formal disciplinary proceeding. After receiving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



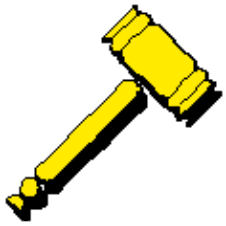
Temporary State Commission on Judicial Conduct

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.

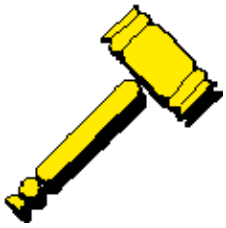
The former Commission also initiated formal disciplinary proceedings in the Court on the Judiciary against 45 judges and continued six proceedings left pending by the temporary Commission. Those proceedings resulted in the following:

- 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.

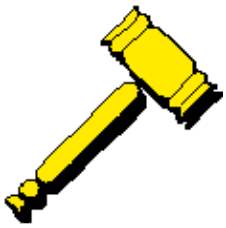


Continuation from 1978 to 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions

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, 35,823 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 28,945 were dismissed upon initial review or after a preliminary review and inquiry, and 6,878 investigations were authorized. Of the 6,878 investigations authorized, the following dispositions have been made through December 31, 2006:

- 926 complaints involving 712 judges resulted in disciplinary action. (See details below and on the following page.)
- 1396 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1297, 76 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 554 complaints involving 392 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 425 complaints were closed upon vacancy of office by the judge other than by resignation.
- 3302 complaints were dismissed without action after investigation.
- 275 complaints are pending.

Of the 926 disciplinary matters against 712 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.)

- 151 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);
- 282 judges were censured publicly;
- 215 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission.

Text of the Rules
Governing Judicial Conduct

2007 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

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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. (l) 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 (l)(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 prose 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. (l) 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 (l) 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: (l) 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 of the cost of the ticket if $ 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)(l), 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 2006 Determinations

2007 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 **WILLIAM A. CARTER**, a Judge of the Albany City Court, Albany County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.[1]
Marvin E. Jacob, Esq.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Walter, Thayer & Mishler (by Mark S. Mishler) for the Respondent

The respondent, William A. Carter, a judge of the Albany City Court, Albany County, was served with a Superseding Formal Written Complaint dated December 7, 2005, containing three charges. Respondent filed a verified answer dated December 28, 2005.

On April 10, 2006, 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 and providing for briefs and oral argument on the issue of sanctions or, in the alternative, that the Commission impose the sanction of censure without briefs or argument. The Commission accepted the Agreed Statement on April 20, 2006, and scheduled briefs and argument on the issue of sanctions.

Each side submitted memoranda as to sanction. Commission counsel recommended removal, and respondent's counsel recommended a sanction no greater than censure. On June 22, 2006, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been a judge of the Albany City Court, Albany County since January 1, 2002. He is an attorney.

As to Charge I of the Superseding Formal Written Complaint:

2. On or about August 17, 2004, Talib Alsaifullah was arrested and charged with Assault, 3d Degree, and was incarcerated in lieu of $5,000 bail set by Albany City Court Judge Thomas K. Keefe.

[1] Mr. Harding was appointed to the Commission on June 29, 2006. The vote in this matter was taken on June 22, 2006.

3. In October 2004, respondent arraigned Mr. Alsaifullah on an additional charge of Loitering, which also allegedly occurred in August 2004. Respondent set bail at $500. Mr. Alsaifullah remained incarcerated.

4. Respondent ordered that Mr. Alsaifullah be produced in court on November 22, 2004, as a result of a letter Mr. Alsaifullah had written to the court expressing concerns about the sufficiency of the accusatory instrument charging him with Assault and about the representation provided him by the public defender.

5. At the November 22, 2004, proceeding, Mr. Alsaifullah was represented by an assistant public defender, who stated at the outset of the proceeding that it was his understanding that the defendant wished to discharge the public defender and proceed *pro se*. Respondent questioned Mr. Alsaifullah concerning his contention that the accusatory instrument was defective because he had not been given a copy of the domestic incident report or advised by the court that he had a right to be prosecuted by Information as opposed to Complaint.

6. Respondent allowed the defendant to argue his position, and after the defendant became agitated and said he no longer wanted to participate in the proceeding because he claimed it was illegal, respondent became angry and, without adjourning the proceeding, abruptly removed his glasses, got up from the bench, removed his judicial robe and dropped it to the floor and proceeded rapidly in the direction of the defendant, in a manner indicating his purpose was to confront the defendant. Respondent was upset at the time of the incident and does not recall what he was thinking at the time he proceeded toward the defendant, but agrees that his conduct indicated his intent to confront the defendant.

7. One witness present in the courtroom heard respondent say of or to the defendant, "You want a piece of me?" Respondent does not recall making this statement, because he was upset at the time of the incident, but he does not deny making the statement.

8. As respondent left the bench, Police Officer Timothy Corbitt, who was responsible for guarding the defendant in the courtroom, quickly removed the defendant from the courtroom through a clerk's office. Another police officer, Mark Leonardo, physically blocked respondent's path by placing himself in front of respondent, who was headed in the direction of the clerk's office. Respondent tried to go around Officer Leonardo by stepping to one side and then another, but Officer Leonardo continued to block respondent by sidestepping along with him each time. Although respondent came within inches of Officer Leonardo, respondent did not touch the officer, and the officer did not touch or use physical force to restrain respondent. Officer Leonardo suggested that respondent leave the courtroom by another door. Respondent complied with Officer Leonardo's suggestion and did not pursue the defendant.

9. As the defendant was being escorted out through an adjoining courtroom where court was in session before another Albany City Court Judge, the defendant loudly exclaimed that respondent was trying to hit him.

10. Respondent is approximately 5'6" tall and weighs approximately 165 pounds. The defendant is approximately 5'8" tall and weighs approximately 168 pounds. Officer Leonardo and respondent are of similar size and build. Officer Corbitt is of significantly bigger

build than the defendant and respondent. Officer Leonardo is of similar build as respondent and the defendant. There is no claim of ethnic or other bias-related motivation for respondent's conduct. Both respondent and the defendant are African-American.

11. On November 22, 2004, the police returned Mr. Alsaifullah to the Albany County Jail.

12. The following day, in the absence of the defendant, his attorney, or the prosecution, respondent placed his recusal from the *Alsaifullah* case on the record, without specifying any reason for the recusal.

As to Charge II of the Superseding Formal Written Complaint:

13. On or about March 29, 2005, respondent conducted an arraignment of the defendant in *People v. Charles Willis* on a Class E felony charge of Possession of Imitation Controlled Substance, 2nd Degree, and on misdemeanor charges of Trespass, 3rd Degree, Resisting Arrest, Criminal Impersonation, 2nd Degree, and Criminal Possession of a Controlled Substance, 7th Degree.

14. Respondent granted Assistant District Attorney David Erlich's motion to amend two of the charges. Mr. Erlich then recommended that bail be set in the amount of $25,000.

15. Respondent released the defendant on his own recognizance, notwithstanding that pursuant to Section 530.20(2)(a)(ii) of the Criminal Procedure Law, respondent was required to remand the defendant without bail, since the defendant had two prior felony convictions.

16. At the conclusion of the arraignment, after being informed by the arresting officer William Van Amburgh that the defendant, who was still in the courtroom, had just displayed his middle finger toward the officer in the courtroom, respondent told the officer that he had not observed the defendant's alleged conduct and therefore was not going to take any action. Officer Van Amburgh expressed dissatisfaction with the judge's statement, and respondent said, "If you are so upset about it, why don't you just thump the shit [out] of him outside the courthouse, because I am not going to do anything about it."

17. Respondent informed the defendant that the police were angry with respondent for releasing him, that the police were angry with the defendant and that the defendant should "stay out of trouble."

18. Respondent was aware at the time of the *Willis* arraignment that he was under investigation by the Commission for his conduct with respect to the *Alsaifullah* matter.

As to Charge III of the Superseding Formal Written Complaint:

19. As set forth under Charge II, *supra*, respondent released Charles Willis contrary to the requirements of Section 530.20(2)(a)(ii) of the Criminal Procedure Law, notwithstanding that by letter of dismissal and caution dated February 5, 2004, respondent was cautioned by the Commission to observe the requirements of the Criminal Procedure Law in making his bail determinations. The February 2004 letter of dismissal and caution was issued to respondent after

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)(2) and 100.3(B)(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, II and III of the Superseding Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

The ethical rules require every judge to be an exemplar of dignity and decorum and to preside over disputes in a lawful, orderly manner (Rules Governing Judicial Conduct §§100.3[B][2] and 100.3[B][3]). Respondent has acknowledged that on two occasions he violated those standards, first by losing his composure and angrily leaving the bench to confront a defendant and, a few months later, by making a flippant comment to a police officer in which he suggested the use of physical violence towards a defendant. As respondent has conceded, his conduct was injudicious and utterly inexcusable.

In the first incident, after defendant Talib Alsaifullah, charged with Assault and Loitering, became agitated and said he did not want to participate in the proceeding because it was, he said, "unlawful," respondent angrily left the bench, threw off his glasses and judicial robes, and proceeded rapidly towards the defendant. To reach the well of the courtroom, respondent had to go out a door behind the bench and re-enter the court through another door. According to one witness, respondent said to the defendant, "You want a piece of me?", and respondent does not deny making that statement. Although a police officer quickly removed the defendant from the courtroom and another officer physically blocked respondent from pursuing the defendant, the defendant continued to yell that the judge was trying to hit him. This unseemly episode, in which respondent appeared on the verge of initiating a physical confrontation with the defendant, was an egregious breach of judicial decorum. *See Matter of Richter*, 42 NY2d (aa), 409 NYS2d 1013 (Ct. on the Judiciary 1977); *Matter of Allman*, 2006 Annual Report 83 (Comm. on Jud. Conduct). As this Commission has stated, "Self-control is an essential element of judicial temperament," and "crossing the line from verbal to physical confrontation is not just improper, but fundamentally inimical to the role of a judge." *Matter of Allman, supra*.

Some four months later, respondent made a crude comment from the bench in which he appeared to encourage the use of physical violence by a police officer against a defendant. According to the officer, the defendant, Charles Willis, had just made an offensive gesture after being released. Respondent told the officer, who was upset that respondent was not going to do anything about the gesture, "If you are so upset about it, why don't you just thump the shit out of him outside the courthouse, because I am not going to do anything about it." On its face, respondent's remark is outrageous. It suggests to a police officer, and to anyone else who heard respondent's words, that the court sanctioned violence as an acceptable means of retaliating

against unruly defendants. Respondent claims that the comment was not intended literally and did not reflect a loss of composure, but was a way of telling the officer to stop overreacting (respondent, a former police officer, characterized the comment as "cop speak"). Even if not meant literally, such a statement could aggravate heightened emotions and has no place in a judicial forum, where emotions should be tempered and issues resolved in a peaceful, orderly manner.

Significantly, respondent made the remark in *Willis* at a time when he knew he was under investigation by the Commission for the *Alsaifullah* incident.

The Commission has held that such comments are antithetical to a judge's obligation to be "patient, dignified and courteous" to litigants and others and to observe and maintain appropriate standards of decorum. *See Matter of Esworthy*, 77 NY2d 280 (1991) (in a proceeding involving an order of protection, judge called the parties "pigs" and "liars" and said, "If you kill each other, fine"); *Matter of Trost*, 1980 Annual Report 153 (Comm. on Jud. Conduct) (judge said during a proceeding, "As a matter of fact, these two people ought to get shotguns and get themselves in a room and kill each other"; told a litigant in another case, "Some night you ought to hit him on the head with an axe and it will be all over"; told another litigant's lawyer, "Why don't you give each of them a gun?...Let them use it"). In *Trost*, the Commission explicitly rejected the judge's explanation that it was effective at times for a judge to address litigants "at their own level" in order to be fully understood. The judge was censured in 1979 for these and other lapses of judicial decorum.

In addition, the parties have stipulated that respondent erred in releasing the defendant in *Willis* since the Criminal Procedure Law required that the defendant be remanded because of his prior felony record (CPL §530.20[2][a][ii]).

In determining an appropriate sanction, we have considered several mitigating factors.

Notably, in the *Alsaifullah* case, the record reflects that prior to the incident respondent was concerned about ensuring that the defendant was treated fairly, that the defendant's due process rights were protected, and even that he pronounced the defendant's name correctly. Indeed, respondent had placed the case on the calendar that day in response to the incarcerated defendant's letter expressing concerns about his representation by the public defender and other issues. Such conduct suggests that respondent's behavior, though inexcusable, was an aberration by an otherwise diligent, dedicated judge.

We also note that respondent has been cooperative and contrite throughout this proceeding.

As is apparent from the views expressed in the dissenting and concurring opinions, this is a difficult case that is very close to removal. While it is beyond dispute that respondent's misconduct is deplorable and warrants a severe sanction, we conclude that he should be censured rather than removed from office. As the Court of Appeals has stated: "[R]emoval is the ultimate sanction and should be imposed only in the event of truly egregious circumstances." *Matter of Kiley*, 74 NY2d 366, 369-70 (1989); *Matter of Steinberg*, 51 NY2d 74, 83 (1980). Here, although respondent's conduct was egregious, we believe that a sufficient basis for removal is

lacking, especially in view of the mitigating factors described above. The dissent correctly states that this case is more serious than *Matter of Allman, supra*. Nevertheless, we cannot conclude that it rises to the level of removal.[2]

In this regard, we note that there is a wide gap between the available sanctions of censure and removal. We have previously urged the legislature to consider a constitutional amendment providing suspension from office without pay as an alternative sanction available to the Commission (Annual Reports, 2002, 2000, 1997). We believe that such a sanction is appropriate for cases in which the judge's conduct is truly egregious but does not irretrievably damage the judge's effectiveness on the bench. Were suspension available to us, we would impose it in this case to reflect the severity with which we view respondent's conduct. Absent that alternative, we have concluded that a censure should be imposed.

This disposition should not be read as suggesting that conduct similar to respondent's could never rise to a level warranting removal. As the Court of Appeals recently stated, "Judicial conduct cases are, by their very nature, *sui generis*" (*Matter of Blackburne*, 7 NY3d 213, 219-20 [2006]). Indeed, such decisions "are essentially institutional and collective judgment calls based on assessment of their individual facts" (*Matter of Roberts*, 91 NY2d 93, 97 [1997]) along with mitigating or aggravating factors.

This decision places respondent on notice that any future ethical lapses will be viewed with appropriate severity.

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

Mr. Felder, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Jacob and Judge Peters concur, except that Mr. Felder and Mr. Coffey dissent as to Charge III and vote that the charge is not sustained.

Judge Klonick and Judge Ruderman dissent only as to the sanction and vote that respondent be removed from office.

Judge Luciano was not present.

Dated: September 25, 2006

[2] Notably, contrary to the thoughts expressed in the concurring opinion, we find the record neither "inadequate," nor the Agreed Statement "deficient."

CONCURRING OPINION BY MR. EMERY

Once again the Commission faces the unenviable task of disciplining a judge on an incomplete record. *See Matter of Clark* (Emery Dissent). Once again we are presented with an Agreed Statement seeking to have the Commission impose a sanction – in this case removal – without a hearing that would have developed a detailed record and findings. The Commission initially rejected the Agreed Statement, advising counsel that the record, "in the Commission's view, requires full development at a hearing before a referee." We were then presented with a renegotiated Agreed Statement, containing some additional facts, which the Commission voted to accept. Because I believed that the Agreed Statement in this case does not provide an adequate basis for removal, leaving unresolved thorny factual questions that if resolved might well mandate removal, I dissented from accepting the Agreed Statement. I continue to believe – contrary to the view of my colleagues – that the Commission has the authority and duty to direct that a full hearing be held in this case, and any others like it, where factual issues remain unresolved. Therefore, I am constrained to concur in the result here because of the inadequacies of the Agreed Statement even though I might well have voted to remove respondent if the record had been properly developed.

Since my vote in this case is necessary to reach the requisite minimum number of six commissioners to reach a result, I find this qualification to my concurrence to be particularly troubling. The simple fact is that the censure in this case is the direct result of an inadequate Agreed Statement rather than a thorough and thoughtful decision based on the plenary proceeding we should have required in this case.

As the Commission's decision describes, respondent behaved erratically and inexcusably on two occasions: first, when he attempted to physically attack a defendant who was not sufficiently appreciative of respondent's concern for the defendant's due process rights; and, second, when he suggested that a police officer "thump the shit out of [the defendant] outside the courthouse." With respect to the first incident, the Agreed Statement leaves open central factual gaps. Most significantly, the description of what occurred is so sparse and so equivocal that it cannot be determined from this record whether the officers prevented the judge from assaulting the defendant (as staff argued in recommending the sanction of removal) or whether the judge had any intent to commit an assault (which the judge's attorney denies). The stipulated language that the judge's conduct "indicated his intent to confront the defendant" permits staff to argue that the judge was on the verge of assaulting the defendant, and permits his attorney to argue, with equal justification, that no confrontation occurred.

To me, a finding as to the judge's intent, as determined by a fully developed record including respondent's own testimony, subject to cross-examination at a hearing, is critical on the issue of whether he should be censured or removed. Equally critical, in my view, is a determination as to whether and how the judge was physically restrained. If the judge came off the bench and was struggling in the well of the public courtroom in order to attack the defendant, he should be removed. If he came off the bench and attempted to confront the defendant and was easily deterred without any physical contact, the case is more like *Matter of Allman*, where the judge was censured for coming off the bench and confronting a lawyer in open court by grabbing his arms and insisting that the lawyer "listen." On such a crucial issue, a reliable determination of what occurred requires the testimony of all of the witnesses who were available,

not negotiated findings in which conflicting versions might be discarded or softened to reach a compromise acceptable to both sides. Moreover, when the negotiated "facts" are vague and the stipulated language (*e.g.*, "intent to confront") permits each side to present diametrically opposing scenarios as to what took place, the Commission is left guessing what actually happened. Clearly, there were many witnesses to the event in open court. Had there been a hearing – with examination and cross-examination – the Commission would have available a full record of all available testimony, and, most importantly, the factual findings of a referee. As a matter of policy, the Commission should not have to make a decision as to discipline in any case on a record so inadequate – particularly, as here, when the sanction of removal has been sought by Staff.

Also troubling is the stipulation that while one witness heard the judge say as he approached the defendant, "You want a piece of me?", the judge neither recalls making the statement nor denies making it. The Commission infers from those stipulated facts that he made the statement, but that is an inference, not a stipulated fact or a finding by a referee. A decision to discipline a judge should be based on facts, not inferences. It seems clear that the stipulation was negotiated to permit the Commission to conclude that the statement was made without requiring the judge to admit making the statement, but that is an exercise in semantics. In that context, the judge's refusal to acknowledge that the statement was made and his purported failure to recall key details of the episode raise concerns about his forthrightness.

The Agreed Statement is deficient in other respects. The judge's statement, appended to and incorporated in the Agreed Statement (see par. 24) contradicts the Agreed Statement by denying that he was "angry." The judge's appended statement contradicts the Agreed Statement on the question of whether he was ejected from the courtroom or left voluntarily. Finally, there is no indication of whether or when the judge realized his conduct was aberrant and, importantly, the record does not reveal whether he ever apologized to anyone.

The second incident and charge is, in some respects, even more serious than the first. It took place four months after the first, at a point when the judge knew that the Commission was investigating him about the first incident. Therefore, it is crucial to understand whether the judge's comment – "why don't you just thump the shit out of him" – was understood as a sarcastic remark or whether it was heard as a serious statement. Both are inexcusable, but a serious recommendation to engage in physical violence under these circumstances presents a basis to conclude that the judge is a continuing threat to the public. This, after all, is the Commission's core responsibility. (*Matter of Reeves*, 63 NY2d 105, 111 [1984]). And the Agreed Statement is opaque on this central issue.

We have no evidence from those in the courtroom who may have heard the statement, including the complaining police officer. At the oral argument before the Commission, the judge, a former police officer himself, characterized the comment as "cop speak." Was he alluding to a history of police brutality or at least physical revenge by the police? Why would he joke about that? Did he not realize that his words could be taken seriously? This could have been developed on cross-examination. The judge's later warning to the defendant that he should "stay out of trouble" because the police were angry at him should also be explored. On the surface, the judge's warning makes it more likely that his original statement to the police officer was serious. At a minimum, the judge's warning to the defendant in this setting, after what he

had said to the police officer, was independent misconduct and completely inappropriate.

After our decision in *Matter of Blackburne* and the Court of Appeals' affirmance of Justice Blackburne's removal for allowing a defendant to avoid a new arrest, the constellation of allegations against respondent takes on a most alarming hue. But what we do not know from this record is what actually happened in respondent's courtroom and what others in the courtroom perceived. Clearly, there was a serious degradation of justice taking place during these incidents. How serious, we will never know.

I am inclined to agree with the dissent, and I suspect that the dissent's characterization of the facts is correct and that respondent should be removed. But the dissent's approach to the record makes my point with respect to the inadequacy of the Agreed Statement because it reaches well beyond the Agreed Statement by which we are supposedly bound. For instance, on the central question of whether the judge had to be physically restrained after he left the bench and approached the defendant to confront him, the dissent appears to indulge in the inference that "respondent was physically prevented from making contact with the defendant" and that the event "escalated to a level which required physical intervention by several officers" (Dissent, pp. 1, 2). Though I suspect that the dissent is correct in describing what actually occurred, the Agreed Statement specifically restricts our consideration to the fact that while the officer "physically blocked" respondent's path, "respondent did not touch the officer, and the officer did not touch or use physical force to restrain respondent" (Agreed Statement, par. 8). If one dances on the head of a pin, all these statements might be viewed as literally consistent; however, I believe it is the Commission's responsibility to clarify what seems to me to be a practical and plain contradiction that is at the core of this decision.

Similarly, throughout the dissent, in order to support its description of the events, the dissent relies on statements made by respondent's counsel and by respondent, extracted in the course of questioning during oral argument, to expand a record left bare by the Agreed Statement. The dissent characterizes respondent's state of mind as "out of control" (Dissent, p. 2), based in part on respondent's statements during oral argument, rather than on a record and findings developed based on direct testimony and cross-examination. Given the obvious tactical pressure under which such statements are elicited, I think it behooves us to rely on admissible evidence and findings rather than concessions made during a ten-minute presentation by the judge before a panel that could well exercise "career capital punishment." *See Matter of Blackburne* (Emery Dissent).

Finally, the Agreed Statement by itself raises more questions than it resolves by appending and explicitly incorporating a statement by respondent as to what his testimony would be if he were to testify at a hearing (Agreed Statement, par. 24). As one would expect, respondent's testimony downplays his anger, minimizes the seriousness of the events and exaggerates his contrition and the asserted mitigating circumstances. This procedure – allowing judges to append statements to Agreed Statements – is not helpful. In this case, any reasonable inference drawn from the appended statement contradicts the reasonable inferences inherent in the Agreed Statement. If the appended statement is part of the record, then we, in effect, do not have an Agreed Statement. Certainly, any judge accepting a plea bargain would never accept an allocution that resembled the self-serving, exculpatory remonstrations incorporated by reference into this record. In my view, the appended statement by itself requires that a full factual record

be developed, if only to allow for a response to respondent's assertions.

I write the above not to criticize the dissent, with which, after the *Blackburne* decision, I probably would agree if it were based on a completed record and findings; or the staff, which is forced by its limited resources and overwhelming caseload to negotiate Agreed Statements. Moreover, I recognize that Agreed Statements are important, not only to conserve the very limited resources of the Commission, but also to lessen the financial, emotional and vocational burdens on judges who choose to resolve allegations of misconduct efficiently. But where a judicial career and our responsibility to the public to protect it from unfit jurists (*Matter of Reeves*, 63 NY2d 105, 111 [1984], citing *Matter of Waltemade*, 37 NY2d [a], [lll]) are at stake, I believe a more rigorous and conceptually disciplined approach than we see in this case is required. At a minimum, a far more complete and unequivocal Agreed Statement must be framed if removal is to be an option.

In fact, the import and tenor of the opinions of my fellow commissioners do not radically differ from my view that the Agreed Statement is inadequate to make the "right" decision in this case. Where we differ is our view of whether our acceptance of the Agreed Statement hog-ties us as a matter of contract, double jeopardy and/or due process, or whether our constitutionally mandated responsibility to protect the public from unfit judges overrides these concerns and requires the additional process of a hearing. The due process concerns are plainly nonsense: a plenary hearing provides more "process", not less, for the respondent to defend himself fully. Similarly, double jeopardy is inapposite in the administrative, non-criminal, context. The contract argument – that we are bound by our acceptance of the Agreed Statement – has more weight. But courts, as a matter of discretion, regularly reopen records after both sides rest. (*See, e.g.*, FRCP 52[b].) And administrative agencies have even more leeway than courts in the context of regulating government officials. *See, e.g., In re Rizza*, 288 AD2d 795, 733 NYS2d 308 (3rd Dep't 2001) (affirming decision by Unemployment Insurance Appeal Board to return matter to administrative judge for further development of factual record); *In re Dialogue Systems Inc.*, 231 AD2d 756, 647 NYS2d 300 (3rd Dep't 1996) (same). Plainly, the public policy inherent in our constitutional mandate to protect the public from martinets posing as judges overrides this misconceived notion of a restraint on our authority. This is not an enforceable contract; it is a stipulation between litigating parties mistakenly accepted by the ultimate decision-maker. That mistake cannot be allowed to frustrate our mandate.[3]

I have personal doubts that, except in the most exceptional circumstances, we should ever remove a judge without a full hearing. As I demonstrated at some length in my dissent in *Matter of Clark*, I think it is clear that, consistent with our constitutional mandate, we have the authority and duty to remand a case for fact-finding when the record presented to us is inadequately developed. This is plainly such a case and, I believe, we have failed in our duty by not directing that a hearing be held. Nonetheless, I join the majority on the basis that what is clear and undisputed in this incomplete record supports at the very least a sanction of censure. I suspect that the public would be better served and protected if Judge Carter were removed. However, I

[3] Notably, our rules (22 NYCRR §7000.7) do not address this issue, one way or the other. But the inference that a remand for added fact-finding is authorized can be drawn from the assiduous separation of the Staff's "prosecutive function" (§7000.7[b]) as distinct from the Commission's determinative function.

cannot reach that result on the record before us.

Dated: September 25, 2006

**DISSENTING OPINION BY JUDGE RUDERMAN,
IN WHICH JUDGE KLONICK JOINS**

I respectfully dissent from the determination of censure and vote to remove respondent. In my view, respondent's misconduct as stipulated to in the Agreed Statement is egregious and demonstrates a total lack of self-control and the necessary judicial temperament; thus rendering him unfit to serve as a judge.

In the *Alsaifullah* case, the record established that respondent angrily left the bench to confront a defendant, threw off his judicial robes and his glasses, and aggressively proceeded toward the defendant in a confrontational manner. A witness' statement that respondent then said to the defendant, "You want a piece of me?" was unrefuted by respondent.

But for the quick intervention of two police officers, who removed the defendant from the courtroom and physically blocked respondent from pursuing the defendant, the incident might well have escalated. The fact that respondent was physically prevented from making contact with the defendant should not redound to his credit. Respondent's own statements to the Commission indicate that he was so agitated that he does not recall what precipitated his loss of composure (Oral argument, pp. 44-45). He also purportedly has no recollection of throwing off his robes (Oral argument, p. 45) and maintains that he "does not recall what he was thinking" as he approached the defendant (Agreed Statement, par. 6). Respondent's state of mind and inability to retain the details of such a significant series of events evidence how out of control he was at that time.

Respondent's unseemly conduct is even more egregious given the context of his inability to regain his composure when, as explained by his attorney at oral argument, respondent had to leave the bench, go out one door and enter the well of the courtroom through another door. Despite this elapsed time frame, respondent was not able to stop what could have been merely a momentary lapse. Rather, it appears that respondent's temperament was beyond his control and the circumstances escalated to a level which required physical intervention by several officers. Respondent's conduct indicates a total lack of the self-restraint and the essential temperament to perform effectively his judicial duties. *See*, *Matter of Gibbons*, 98 NY2d 448, 450 (2002) (judge's anger was not a mitigating factor to a single incident that otherwise warrants removal from office); *Matter of Cerbone*, 61 NY2d 93, 95-96 (1984) ("respect for the judiciary is better fostered by temperate conduct [than] by hot-headed reactions to goading remarks").

It is shocking for a judge, in open court, to offer himself as a willing combatant when a judge's role is to maintain a neutral atmosphere in the courtroom. Respondent's conduct is outrageous, appalling and brings disgrace to the bench by implicitly suggesting that physical violence is an acceptable means toward resolution. Indeed, officers present in the courtroom are there to assist in maintaining a certain decorum in the judicial process of reaching a resolution on the merits. It is anticipated that, at times, despite counsels' attempts to control their clients, a

highly emotional litigant may become unruly. It is not to be anticipated that the judge presiding over the matter may be the one who needs to be restrained.

This incident is considerably more serious than the conduct in *Matter of Allman*, which resulted in the judge's censure. In *Allman*, the judge's argument with a lawyer escalated when the judge, after calling a recess, came down from the bench and placed his hands on the lawyer's arms while stating, "All I want you to do is listen to me." (The judge quickly withdrew his hands when the lawyer objected that the judge was "touching" him.) This case is even more egregious. Here, respondent's crude, bellicose language to the defendant ("You want a piece of me?") was an invitation to physical violence and a direct challenge to engage the defendant. Respondent's belligerent manifestation of a readiness to resolve a courtroom disagreement in such an aggressive, street-like manner flies in the face of the very reason litigants in our society proceed to court, *i.e.*, for an orderly and civilized resolution of disputes on the merits.

Additionally, in *Allman* the judge stepped back from the confrontation, and his unprompted, repeated apologies presented significant mitigating factors that are not present in this case. Judge Allman was censured for that single instance of misconduct, which was "an isolated lapse in an otherwise unblemished record."

This case presents more than a single incident. Respondent's comment in the *Willis* case is also deeply troubling. A remark by a judge that appears to condone and even encourage the use of physical violence to resolve disputes is fundamentally inimical to the judicial process. Even if respondent did not intend the comment to be taken literally, the fact that he made the remark during a time he knew he was under scrutiny by the Commission, when he was presumably on his best behavior, is a further indication of his lack of judgment and self-control. Based on this record, I am not persuaded that the public can have any confidence in the expectation that respondent will effectively perform his duties as a judge in the future.

I recognize that the ultimate sanction of removal is reserved for misbehavior that is "truly egregious" (*Matter of Kiley*, 74 NY2d 364, 369-70 [1989]) and that "exceed[s] all measure of acceptable judicial conduct" (*Matter of Blackburne*, 7 NY3d 213, 221 [2006]). I believe that the totality of respondent's misconduct meets those standards and has irretrievably damaged public confidence in his ability to properly carry out his judicial responsibilities.

Accordingly, I vote for removal.

Dated: September 25, 2006

OPINION BY MR. COFFEY CONCURRING IN PART AND DISSENTING IN PART, IN WHICH MR. FELDER JOINS

While I concur that respondent should be censured for his misconduct as stipulated in Charges I and II, I respectfully dissent from the finding of misconduct as to Charge III and vote to dismiss the charge. In my view, the finding that respondent's legal error constitutes judicial misconduct is plainly wrong and sends an unfortunate, confusing message to the judiciary.

Respondent released Charles Willis at arraignment although the Criminal Procedure Law required that the defendant be remanded because he had two prior felony convictions (CPL §530.20[2][a][ii]). Respondent claims, without contradiction in the record, that at the time he arraigned the defendant he focused primarily on deficiencies in the five accusatory instruments before him (two of which were amended at the arraignment). Although he acknowledges that he released the defendant without considering the above statute and, apparently, without focusing on the defendant's prior convictions, I cannot conclude that his error rises to the level of judicial misconduct.

Under the statute, a local court may not order recognizance or bail when "it appears that" a defendant who is charged with a felony has two previous felony convictions. Significantly, the record in *Willis* reflects that the prosecutor recommended that bail be set at $25,000, indicating that not even the prosecutor was aware that the law required that the defendant be remanded without bail. By all accounts, respondent simply erred in not focusing on the pertinent statute, and as a result the defendant was released.

While every judge is required to know and follow the law and while respondent was wrong in his decision, his error did not involve a well-established legal principle, nor did it deprive a defendant of a fundamental right or result in a defendant's unlawful incarceration (*compare*, *Matter of Bauer*, 3 NY3d 158 [2004]). Moreover, there is no indication that respondent acted based on favoritism or any improper influence.

In our Annual Reports setting forth our findings and decisions rendered during the previous year, we hope and, in fact, expect that judges throughout the state will familiarize themselves with our findings. But, with the finding of misconduct herein, what message are we now imparting?

Novel in its import, our decision quite simply puts judges on notice that they may very well be subject to our scrutiny if they make a simple legal mistake which hurts no one. Moreover, it is quite likely that the majority's unprecedented finding of misconduct could well intimidate judges who will legitimately become more fearful of making potentially controversial decisions, believing they could be disciplined for doing so. In fact, it is not a stretch to foresee that the long term effects regarding this particularly minor transgression will be much more far reaching than the rest of the decision herein. The ramifications of the majority's finding of misconduct, based on a single legal mistake and what it will convey to judges, cannot in my mind be underestimated.

The Commission's finding of misconduct is apparently based in significant part on the respondent's having previously been cautioned for violating the Criminal Procedure Law in

making a bail determination. That reliance seems misguided, in fact irrelevant, in my view. The prior caution involved a case in which respondent set $1,000 bail on each of four defendants, in a case in which his co-judge was the complaining witness, without considering the factors prescribed by law. Respondent's conduct in that case, which resulted in the defendants' incarceration, was contrary to well-established principles of law, and he was appropriately cautioned. In the *Willis* case, respondent's conduct involved a different statutory provision, one that does not involve a self-evident legal principle, and, most significantly, there was no harm to the defendant as a result of respondent's error. Accordingly, there is simply no basis for concluding that respondent in any way violated the prior caution. To use the prior caution to punish him for a subsequent, unrelated legal error is unfair, unwarranted, unnecessary and, in my opinion, unjust.

Accordingly, I dissent from the finding of misconduct as to Charge III.

Dated: September 25, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DAVID A. CLARK**, a Justice of the York Town Court, Livingston 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 David A. Clark, *pro se*

The respondent, David A. Clark, a justice of the York Town Court, Livingston County, was served with a Formal Written Complaint dated November 1, 2004, containing one charge. Respondent filed an answer dated December 3, 2004.

By order dated February 24, 2005, the Commission designated Maryann Saccomando Freedman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 19, 2005, in Rochester. The referee filed a report dated December 1, 2005.

Commission counsel filed a brief with respect to the referee's report, recommending that respondent be admonished. No brief was filed by respondent. Oral argument was waived.

On February 2, 2006, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the York Town Court, Livingston County, since January 1984. Respondent is not an attorney.

2. From on or about February 29, 2004, to on or about April 3, 2004, as set forth below, respondent engaged in a close, personal relationship with Barbara Osypiewski, the result of which was to lend the prestige of his judicial office to advance Ms. Osypiewski's private interests and to convey the impression that she was in a special position to influence him.

3. On or about February 29, 2004, at approximately 8:00 A.M., Ms. Osypiewski appeared at respondent's home and advised him that she wished to file a criminal complaint against Robert Volkmar for allegedly threatening to kill her. Ms. Osypiewski was upset and

crying.

4. At the time, Ms. Osypiewski resided in an apartment owned by Mr. Volkmar, her boyfriend, in the Town of York. Respondent had no personal relationship with Ms. Osypiewski prior to February 29, 2004. Respondent had seen Ms. Osypiewski around the community and when she appeared with Mr. Volkmar in respondent's court around December 2003 in connection with a landlord/tenant proceeding.

5. Respondent advised Ms. Osypiewski to contact the Sheriff's Department about her criminal complaint. Ms. Osypiewski had already done so. Ms. Osypiewski left stating she would return in about forty minutes. Shortly thereafter, a dispatcher from the Sheriff's Department telephoned respondent and inquired about Ms. Osypiewski's whereabouts, stated that an officer was on his way over pursuant to Ms. Osypiewski's request, and advised respondent that the Sheriff's Department had a report that Ms. Osypiewski was suicidal.

6. When Deputy Snyder arrived, Ms. Osypiewski was not on the premises. Deputy Snyder returned to his car, which was parked in respondent's driveway, to await Ms. Osypiewski's return. Upon her return, the deputy met with her in the driveway. Respondent remained in his house and took no part in the discussion. Deputy Snyder left about a half hour later.

7. Following the deputy's departure, Ms. Osypiewski, who was crying and distraught, sat on respondent's steps. Respondent told Ms. Osypiewski that she could not sit on his steps and asked what she was going to do. Ms. Osypiewski responded that she had nowhere to go and returned to her car, which was parked in respondent's driveway.

8. Ms. Osypiewski later returned to respondent's steps. Respondent again told her that she had to leave. She asked him if he would go with her to Mr. Volkmar's home to retrieve a three-wheeled vehicle. Respondent accompanied her to Mr. Volkmar's home, where respondent assisted her in retrieving the vehicle. While present, both Ms. Osypiewski and Mr. Volkmar referred to respondent as "Judge."

9. During this time, respondent observed behavior by Mr. Volkmar which led him to have some concern for Ms. Osypiewski's safety.

10. Upon his return to his home, respondent found Ms. Osypiewski sitting in her car in his driveway. Respondent again told her that she could not stay there, whereupon she started to cry and told him that she had no place to go.

11. Respondent felt that he could not leave Ms. Osypiewski sitting on the steps. Respondent told her that he was going to Chili for a dinner at his daughter's future in-laws' home and offered to drive her there. She accepted. When they arrived, Ms. Osypiewski remained in the car and respondent went inside. Someone saw Ms. Osypiewski and invited her inside. After dinner, respondent and Ms. Osypiewski drove back to respondent's home.

12. On the drive home, Ms. Osypiewski again told respondent that she had nowhere to go. Because she had nowhere to go and no resources, respondent told her that she could stay

at his home for a day or two in an extra room. She accepted the offer, and she continued to reside at respondent's home until April 3, 2004. On prior occasions respondent had allowed friends of his children who were unknown to him to stay at his house when they had no place to go.

13. During the entire period she stayed with respondent, Ms. Osypiewski slept in a separate bedroom. At some point in March 2004, the relationship between respondent and Ms. Osypiewski began to involve romantic feelings and physical contact. There was no sexual contact between them.

14. On or about March 5, 2004, respondent, two friends, his brother and Ms. Osypiewski went to Mr. Volkmar's home to retrieve Ms. Osypiewski's remaining property. They were met there by a deputy sheriff. While at Mr. Volkmar's home, the deputy referred to respondent as "Judge." Respondent did not refer to his judicial office.

15. Respondent did not take part in loading Ms. Osypiewski's belongings because he thought that doing so would lend the prestige of his office improperly.

16. Sometime after returning to his house on March 5, 2004, respondent learned that Ms. Osypiewski had a claim for damages allegedly caused by Mr. Volkmar to her personal property, and she told him that she wanted to bring a small claim. Respondent advised her to contact the court clerk. On March 10, 2004, Ms. Osypiewski met with the court clerk and commenced a small claims action in respondent's court seeking damages of $599.00 and $2,872.00.

17. Upon his first encounter with Ms. Osypiewski when she appeared at his house on the morning of February 29, 2004, respondent had advised her that because of her appearance at his home he would be disqualified from hearing her case.

18. Respondent notified the court clerk and his co-judge that he could not hear any action brought by Ms. Osypiewski.

19. On or about March 20, 2004, respondent drove Ms. Osypiewski to the Livingston County Sheriff's station in Lakeville. The station comprises a small building containing one small room. Respondent accompanied her into the station and waited for her there while she met with Deputy Dougherty to file a criminal complaint against Mr. Volkmar. Deputy Dougherty knew that respondent had accompanied Ms. Osypiewski, knew that respondent was a judge and referred to him as "Judge Clark" while he was at the station. Ms. Osypiewski listed respondent's address as her residence on the supporting deposition she filed with the Sheriff's Department.

20. On or about March 20, 2004, an accusatory instrument was filed in the York Town Court charging Mr. Volkmar with Aggravated Harassment 2nd Degree.

21. By March 23, 2004, as a consequence of respondent's personal relationship with Ms. Osypiewski, both respondent and his co-judge had disqualified themselves from the criminal and small claims cases involving Ms. Osypiewski that had been commenced in the York Town Court. All the matters were transferred to other courts.

22. Respondent properly disqualified himself from all matters involving Ms. Osypiewski's legal claims and actions.

23. Respondent took no action in any matter involving Ms. Osypiewski and did not contact any judge involved in any of Ms. Osypiewski's proceedings in any other courts. At no time did respondent attempt to influence, nor discuss Ms. Osypiewski's cases with, any judge or law enforcement officer or lay person.

24. Respondent believed that by disqualifying himself and taking no action in connection with the small claims and criminal matters, he was insulating his private conduct from his judicial office and upholding the integrity of the court.

25. Respondent belatedly realized that he should have acted to preclude Ms. Osypiewski from making reference to or using respondent's judicial office or her personal relationship with him in connection with her dealings with the courts or law enforcement officials.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C) and 100.4(A)(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. 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.

Respondent abandoned the proper role of a judge -- that of a neutral, impartial magistrate -- by commencing a personal relationship with a prospective criminal complainant and by lending the prestige of his judicial status to assist her both outside of court and in pursuing her legal claims.

On the same day that Ms. Osypiewski came to respondent's home and advised him that she wished to file a criminal complaint against her former boyfriend, respondent permitted her to move into his home and accompanied her to the boyfriend's home to retrieve her property. Thereafter, they began a romantic relationship, and while she continued to reside at respondent's home, respondent accompanied her again to the boyfriend's home while she retrieved her belongings, and to the sheriff's department while she filed a criminal complaint. At the station, Ms. Osypiewski provided respondent's address as her residence, and although respondent did not overtly assert his judicial status, the deputy was aware that respondent had accompanied her, and the deputy addressed him as "judge."

Respondent's conduct violated well-established ethical standards that prohibit a judge from using his or her judicial status to advance private interests and from conveying, or permitting others to convey, the impression that they are in a special position to influence the judge (*see* Rules, §100.2[C]). Both at her boyfriend's home and at the sheriff's station, respondent's very presence lent the prestige of judicial office to advance Ms. Osypiewski's personal interests and no doubt influenced the treatment she received. Respondent should have recognized that his presence at the boyfriend's home, while Ms. Osypiewski retrieved her belongings, could be construed as a quasi-official sanction for her behavior, and that his presence

with her at the sheriff's station might be interpreted as an implicit request for favorable treatment. As the Court of Appeals has stated:

> [N]o judge should ever allow personal relationships to color his conduct or lend the prestige of his office to advance the private interests of others. Members of the judiciary should be acutely aware that any action they take, on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved. There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. [Citations omitted.] *Matter of Lonschein v. Comm. on Judicial Conduct*, 50 NY2d 569, 571-72 (1980).

A judge's conduct, both on and off the bench, must be and appear to be beyond reproach if respect for the courts is to be maintained. Respondent's conduct showed poor judgment and a serious misunderstanding of the role of a judge in our legal system. *See, Matter of Kaplan*, 1997 Annual Report 96 (Comm. on Judicial Conduct) (judge was admonished for asserting his judicial influence in connection with his friend's claims against her former husband); *Matter of Friess*, 1982 Annual Report 109 (Comm. on Judicial Conduct) (judge was censured for providing overnight lodging at his home to a female defendant after arraignment and assisting her in obtaining counsel). Although respondent disqualified himself from both the criminal and civil proceedings involving Ms. Osypiewski and took no official action in either matter, his actions compromised his impartiality and diminished public confidence in the judiciary as a whole.

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

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

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

Mr. Emery dissents and votes to return the case to the referee.

Date: March 27, 2006

DISSENTING OPINION BY MR. EMERY

In the Josef Von Sternberg movie classic "The Blue Angel," Marlene Dietrich portrays a torch singer whose allure overwhelms an aging esteemed professor, transforming him from a respected community figure into a blathering fool. Respondent's behavior, which has led the Commission majority to censure him, was similarly foolish. He forthrightly admits to being smitten by a younger woman whom he characterizes as manipulating him. As instinctively sympathetic as one may feel for the professor, and respondent's plight as he presents it, the question before the Commission is whether his actions were merely foolish, constituting an

appearance of impropriety, or whether he attempted to manipulate, or actually did manipulate, the legal system, using his judicial prestige for his own, or his girlfriend's, benefit. Because the record in this case, which comprises only respondent's testimony and certain documentary exhibits, is inadequate to make that decision, *one way or the other*, I must dissent.

Originally, this case was presented to the Commission for disposition based upon an Agreed Statement. Finding that approach inadequate, we sent the case back for a hearing. But the hearing added little because the evidence came solely from the respondent, leaving open the same questions not answered in the Agreed Statement. What the limited record discloses is that respondent – on the bench of the Town of York since 1984, divorced for 17 years, father of four and 63 years old – befriended a younger, apparently unstable woman whom he found crying on his doorstep one morning. He knew that she knew that he was the town justice. She was seeking his help and influence to deal with her estranged boyfriend who had just evicted her from their residence. Respondent also knew the boyfriend: he had previously officiated at the boyfriend's wedding, and the boyfriend had appeared before him as a litigant and had recently inquired about purchasing respondent's car. Apparently, attracted to her and feeling sorry for her, respondent accompanied this woman to the boyfriend's house to pick up her property, which, with a judge present, went very smoothly. He then invited her to accompany him to visit his daughter and, later that day, to live with him at his home. His testimony was that they had no sexual relationship though they engaged in "romantic" physical contact, whatever that means.

After they began to live together, respondent helped his new friend with her continuing legal problems with her former boyfriend. According to him, he again went to the boyfriend's house (along with the woman and a sheriff's deputy) to retrieve more property; he assisted her in filing a small claims action in his court against the boyfriend; and he accompanied her to a local police station to swear out a criminal complaint against the boyfriend, all the while knowing that the deputies taking the complaint knew him to be a judge and allowing his new friend to use his address as her own. Exercising an abundance of caution, respondent disqualified himself from sitting on the small claims and criminal cases although it is unclear at what point in the sequence of events he took this action.

The problem I have with this record in attempting to determine whether censure or removal is the proper outcome is that I cannot tell whether respondent's actions constituted an appearance of impropriety, or whether he used his office to attempt to pervert, or actually to "pervert justice for [his] own benefit." *See Matter of Cook* and *Matter of LaClair* (Aug. 21, 2005) (Emery Dissents) and *Matter of Blackburne* (Nov. 18, 2005) (Emery Dissent). If respondent engaged in conduct that satisfies the latter characterization of his actions, he ought to be removed.

Without doubt respondent appeared to influence the deputies' actions against the boyfriend. But without their testimony it is impossible to conclude that he actually did. Notably, he did not exercise any formal judicial power on behalf of the object of his affections and, according to him, he did not try to influence any other judge or official, but when and how he notified others, including his girlfriend, his co-judge and the deputies, of his disqualification is not established. In fact, what the record does not illuminate, one way or the other, is whether he used the prestige of his office to attempt to influence, or actually to influence, the small

claims court, the deputies, or the former boyfriend in ways that made it far easier for his housemate, with whom he was concededly "romantically" involved, to gain an advantage in her disputes with her boyfriend.

Commission staff charged respondent with "len[ding] the prestige of judicial office to advance the private interests of [the woman], with whom respondent had a personal and romantic relationship" (Charge I, par. 5). To sustain this charge requires proof of actions which attempted to or actually "advance[d] [his] private interests," not merely created an appearance of the improper use of his judicial prestige. Were his or his new friend's private interests advanced by his actions? I cannot tell from the testimony and exhibits in this record. The testimony of the girlfriend, the boyfriend, the co-judge and the deputies – as well as evidence regarding the course and outcome of the small claims and criminal cases against the boyfriend – are critical to make this determination. Respondent's self-serving testimony is, at best, incomplete and sheds little light, in my view, on whether he attempted to or actually "advanced…private interests" for his own benefit. At a minimum, we need to know (1) whether he actually recused himself and when; (2) what the deputies did, or did not do, because the judge was present; (3) the circumstances under which his co-judge acted to transfer the cases in their court to other courts; and (4) whether the woman contradicts the judge's testimony describing the timing and course of his actions when he so overtly helped her with her legal problems.

After reviewing this evidence, I might well agree that censure is appropriate, if what he did was – as he testified – a foolish mistake in allowing himself to be manipulated so that his prestige would appear to play a role in the self-help actions and official proceedings against the boyfriend. On the other hand, full development of the testimony and evidence might convince the Commission that he should be removed for attempting to pervert, or in fact succeeding in perverting, the proper course of the judicial and law enforcement processes for his own benefit during his romantic interlude with this woman. Because I believe there is a "neutral principle" (*see Cook* and *LaClair*) on which to base removal decisions in cases addressing improper judicial attempts to influence outcomes for personal gain, a full review of the relevant facts is essential to draw fair conclusions. For this reason, I think finding censure without more development of the record is expedient in this case.

By taking this position, I do not fault the Commission staff in any way. As a member of the Commission, I take full responsibility for failing to specify the prerequisite facts that should have been developed after the Commission rejected the prior Agreed Statement. Ultimately, however, the issue of "fault" is irrelevant. The only salient point is that, in my view, the record lacks information that may well be crucial to making the appropriate determination in this case. Surely we would not render a determination if, hypothetically, we found that a respondent had been denied the right to present material evidence to the referee. We similarly should not render a determination where, as here, a more fully developed record might well reveal that the respondent is unfit to remain on the bench. *See, e.g., In re Rizza*, 288 AD2d 795, 733 NYS2d 308 (3rd Dep't 2001) (affirming decision by Unemployment Insurance Appeal Board to return matter to administrative judge for further development of factual record); *In re Dialogue Systems Inc*., 231 AD2d 756, 647 NYS2d 300 (3rd Dep't 1996) (same).

It bears emphasis that this Commission does *not* sit as an appellate tribunal reviewing determinations rendered by an inferior tribunal. The referee in this proceeding did not *decide* anything. The referee merely provided this Commission with *proposed* findings and conclusions, which is all that the referee was empowered to do. *See* 22 NYCRR §§7000.6(l), 7000.7. *We*, as members of this Commission, are the sole arbiters in proceedings that come before us. I therefore am not suggesting that we "remand" the case to the referee in the sense of ceding jurisdiction to an inferior court. I am merely suggesting that the fact-finding process that we have delegated to the referee is incomplete, and that we should take steps to ensure that it is completed before we rule. It is axiomatic that we are empowered – indeed, obligated – to ensure that an ample record has been developed before we dispose of a case, one way or the other.

My two colleagues suggest that it is not the proper role of the Commission to return this matter for additional evidence because "[s]taff counsel should not have a second chance to present a potentially stronger case" and because this judge should not "be required to undergo once again the anxiety and cost of a hearing." This, however, is not a criminal proceeding, and the Double Jeopardy Clause and other safeguards that attach when the stakes include the personal liberty of a criminal defendant obviously do not apply. Ironically, what really is at stake here is not respondent's personal liberty, but rather the liberty and other interests of those who appear before him and are subjected to his considerable judicial powers. We must not lose sight of the fact that our solemn responsibility is to preserve the integrity of the judiciary by thoroughly and completely investigating and adjudicating accusations of judicial misconduct, not to minimize the extent to which such proceedings may inconvenience judges who we have determined have been credibly accused of misconduct.

Because it may well be that respondent's actions require removal, I respectfully dissent and vote to return the case to the referee with a direction to Commission staff to present additional evidence.

Dated: March 27, 2006

DISSENTING OPINION BY MR. GOLDMAN, IN WHICH MR. COFFEY JOINS

I respectfully dissent from the Commission determination that respondent be censured. I believe that on the record presented the appropriate sanction is admonition.

A distraught 42-year-old woman went to the home of respondent, a divorced, 63-year-old, non-lawyer judge, for help. She told respondent she had no place to go, and respondent allowed her to stay in a spare room at his home. Eventually a romantic relationship developed. On two occasions respondent accompanied her to her former boyfriend's home, where she, once in the presence of a deputy sheriff, retrieved her belongings, and later respondent accompanied her to the sheriff's station to file a criminal complaint.[1] Respondent did not overtly assert his

[1] The other dissenting opinion states that respondent "assisted her" in filing a small claims action against her former boyfriend. The "assistance" given was that after she told him she wanted to pursue a small claims action, he advised her to contact the court clerk.

judicial influence or refer to his judicial office (though certainly most of the individuals involved in these events knew that he was a judge), and he notified his court clerk and co-judge that he would be disqualified from any matters involving the woman.

It seems apparent that respondent believed that by disqualifying himself from the woman's cases and by staying in the background while she pursued her claims, he could insulate his private conduct from his judicial office. There is no evidence that he intended to influence, or did in fact influence any official or other person. On these facts, I accept the recommendation of Commission counsel and vote to admonish respondent. I believe that the sanction of censure is too harsh.

I am constrained to respond to the view that it is the proper role of the Commission to return this matter for additional evidence, as suggested by the other dissenting opinion. The Commission has a two-tiered responsibility: in the early stages of a case it investigates and determines whether to charge, somewhat similar to a grand jury. Once charges are voted, however, the Commission sits in a judicial-like capacity. Here, there was no error by the referee in excluding evidence. The Commission should not remand for further witnesses or evidence simply because it feels that there might be more evidence to justify a more severe sanction.

It is staff's burden to prove by a preponderance of the evidence whether the facts are sufficient to warrant a finding of misconduct and an appropriate sanction. If the case presented is inadequate to justify either a finding of misconduct or a particular sanction, the Commission, sitting in its judicial and not its investigative capacity, should vote accordingly.

Here, staff counsel presented its case at a hearing. At this juncture, after an evidentiary hearing and a referee's factual findings, the Commission should not remand and suggest to staff -- or to the respondent -- whom to call as witnesses or what evidence to present.

This approach is not inconsistent with the Commission's right to reject an agreed-upon statement of facts upon the basis that the facts are insufficient and to suggest to both sides that the Commission would consider an agreed statement if certain further facts are included. At times we have rejected an agreed statement of facts, just as a judge occasionally rejects a plea of guilty, because there are insufficient facts to justify a finding of misconduct or a particular sanction. Here, however, there was a hearing at which both sides had a full opportunity to present their cases, and a referee's report has been filed. Staff counsel should not have a second chance to present a potentially stronger case. Nor should the judge be required to undergo once again the anxiety and cost of a hearing.

In any case, as I see it, there is no reasonable likelihood that a further hearing would provide a basis to remove respondent. I believe that even the determination of censure is too severe.

Dated: March 27, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN T. GREANEY**, a Justice of the Berlin Town Court, Rensselaer County.

THE COMMISSION:
Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Brian E. Donohue for the Respondent

The respondent, John T. Greaney, a justice of the Berlin Town Court, Rensselaer County, was served with a Formal Written Complaint dated April 19, 2006, containing five charges.

By motion dated May 24, 2006, Commission counsel moved for summary determination, pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR §7000.6[c]), based on respondent's failure to answer the formal written complaint. Respondent did not file a response to the motion. By Decision and Order dated November 1, 2006, the Commission granted the motion for summary determination and determined that the charges were sustained and that respondent's misconduct was established.

The Commission scheduled oral argument on the issue of sanctions for December 7, 2006. On November 21, 2006, Counsel to the Commission filed a memorandum recommending that respondent be removed from office. Respondent filed no papers on the issue of sanctions. By letter dated December 6, 2006, respondent's attorney waived oral argument. By letter dated December 6, 2006, Commission counsel waived oral argument but advised the Commission that he would appear if requested to do so. The Commission requested Commission counsel to appear for argument, which was held on December 7, 2006.

The Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Berlin Town Court, Rensselaer County since January 2004. He is not a lawyer.

As to Charge I of the Formal Written Complaint:

2. In or about July 2004, as set forth below, respondent engaged in prohibited partisan political activity on behalf of other candidates for elective office, in that he participated in the collection of signatures on designating petitions for Independence Party and Conservative Party candidates for local political office, and, thereafter, in the filing of such petitions with the Rensselaer County Board of Elections.

3. In or about July 2004, respondent asked Leonardo DiNova, a resident of the Town of Berlin and a registered member of the Independence Party, to assist him in collecting signatures on Independence Party primary designating petitions. Respondent then drove Mr. DiNova in respondent's vehicle to various locations in the Town of Berlin to collect the signatures on designating petitions, copies of which are attached as Exhibits 1 and 2 to the Formal Written Complaint. Respondent requested that Mr. DiNova sign and that Steve Bell witness two designating petitions, copies of which are attached as Exhibits 3 and 4 to the Formal Written Complaint.

4. Respondent thereafter filed or caused such petitions to be filed with the Rensselaer County Board of Elections.

5. In or about July 2004, respondent solicited the signatures of Walter Allen Yerton, James Jones, Arthur Griswold and others on Conservative Designating Petitions, copies of which are annexed as Exhibits 5, 6 and 7 to the Formal Written Complaint. Respondent requested that Berlin town resident James W. Jones sign as a witness to the signatures on Exhibits 5 and 6, notwithstanding that respondent was aware that Mr. Jones did not, in fact, witness the signatures on the petitions. Respondent then filed or caused to be filed the originals of Exhibit 5, 6 and 7 with the Rensselaer County Board of Elections. Mr. Jones was not aware that he was listed as a candidate for office.

6. In or about July 2004, respondent filed or caused to be filed with the Rensselaer County Board of Elections a Conservative Designating Petition, a copy of which is annexed as Exhibit 8 to the Formal Written Complaint, knowing that the signature of W. Allen Yerton thereon was not genuine.

As to Charge II of the Formal Written Complaint:

7. On or about February 13, 2006, during the Commission's investigation of the matters addressed in Charge I herein, respondent failed to cooperate with the Commission, in that he appeared at the Commission to give testimony and, notwithstanding that he had not been indicted or charged with a crime, he refused to answer questions regarding his conduct, asserting that to do so might incriminate him.

As to Charge III of the Formal Written Complaint:

8. From in or about August 2004 to in or about January 2005, as set forth below, while presiding over *People v. Christopher Unger*, in which the defendant was charged with Criminal Possession of Marijuana, 5th Degree, respondent failed to effectuate the defendant's right to counsel, attempted to elicit incriminating statements from the defendant, engaged in unauthorized *ex parte* communications and conveyed the impression that he was biased against the defendant.

9. On or about August 6, 2004, respondent conducted an arraignment of Christopher Unger on the charge of Criminal Possession of Marijuana, 5th Degree, and committed Mr. Unger to jail in lieu of bail, without effectuating the defendant's rights to counsel and assigned counsel as required by Section 170.10(4)(a) of the Criminal Procedure Law. The defendant pleaded not guilty.

10. On or about August 18, 2004, when Mr. Unger was produced in court, Assistant District Attorney Rebecca Bauscher argued for his release since he had no prior criminal record and had already been incarcerated in lieu of bail without counsel for twelve days. Respondent refused to release the defendant and questioned him as to where he had gotten the marijuana. After ADA Bauscher advised the defendant not to respond since he was unrepresented, respondent agreed to release him and adjourned the case to September 15, 2004.

11. On or about September 15, 2004, prior to the arrival in court of the assistant public defender now assigned to represent Mr. Unger, respondent advised ADA Bauscher that he wanted the maximum jail sentence for Mr. Unger, whom respondent characterized as a "liar" to Ms. Bauscher. Based on his out of court *ex parte* communication with the innkeeper of the boarding house in which Mr. Unger lived, respondent believed that Mr. Unger had lied to the innkeeper by saying he was a college student.

12. In or about late September 2004, while the *Unger* case was pending before him, respondent telephoned the Sand Lake barracks of the New York State Police and requested to speak with Trooper John Craney, who had arrested the defendant. When informed by Trooper Tracy Prusky that Trooper Craney was on vacation until mid-October, respondent informed Trooper Prusky that Christopher Unger would be a good person to speak with regarding "activities" in the Berlin area, that after a trooper spoke with Mr. Unger, the trooper should contact the DA's office and advise them of Mr. Unger's assistance, and that unless the ADA advised respondent that Mr. Unger had provided such assistance, respondent intended to sentence him to three months in jail. Respondent informed Trooper Prusky that the interview of Mr. Unger would have to take place prior to Mr. Unger's next court appearance scheduled on October 20, 2004.

13. Thereafter, on October 7, 2004, at respondent's behest, Trooper Prusky interviewed Christopher Unger concerning his knowledge of underage drinking and marijuana usage in the area. After the trooper reported the matter to ADA Bauscher, Ms. Bauscher notified Mr. Unger's attorney, Assistant Public Defender John Turi.

14. In or about January 2005, after Mr. Turi moved to disqualify respondent for having spoken to Trooper Prusky, respondent disqualified himself from the *Unger* case.

As to Charge IV of the Formal Written Complaint:

15. On or about November 17, 2004, as set forth below, respondent expressed bias and hostility toward the Rensselaer County District Attorney's Office and attempted to intimidate ADA Rebecca Bauscher and District Attorney Patricia DeAngelis from making a complaint about him to the Commission.

16. On or about November 17, 2004, respondent asked to speak with ADA Rebecca Bauscher in chambers. Respondent closed the door and said to Ms. Bauscher, *inter alia*:

A. that respondent had been the Republican Town Chairman for 20 years and knew a lot of people and had heard from a good source that the DA's office was trying to "take [respondent] down";

B. that he was never talking to Ms. DeAngelis again;

C. that respondent had worked for Senator Guy Vellela;

D. that respondent knew a lot of "powerful" people and mentioned his position on the Motor Vehicle Auto Theft and Insurance Fraud Prevention Board (which provides grants to the DA's office);

E. that respondent was expecting a call from Attorney General Elliot Spitzer concerning an insurance issue; and

F. that if a complaint were made to the Commission, respondent would not "go down lightly."

17. The District Attorney nevertheless made a complaint to the Commission about respondent's conduct.

As to Charge V of the Formal Written Complaint:

18. In and around 2004, as set forth below, while presiding over various criminal cases, respondent engaged in unauthorized *ex parte* communications and made statements or otherwise engaged in conduct indicating that his impartiality might reasonably be questioned.

19. In or about May or June 2004, while *People v. Corey Manchester* was pending before him, respondent spoke to a small group of students at the school attended by Mr. Manchester and said that they would not be seeing Corey for a long time because he intended to give Mr. Manchester the maximum sentence.

20. In or about May or June 2004, while Mr. Manchester's case was pending, respondent spoke *ex parte* to Ann Maxon, a local bank manager, about Mr. Manchester, told Ms. Maxon about the allegations of the charge against Mr. Manchester and stated that he felt that Mr. Manchester should be jailed for a long time.

21. In or about June 2004, in *People v. William Hammersmith*, respondent dismissed the charge without the required notice to the prosecution pursuant to Sections 170.45 and 210.45 of the Criminal Procedure Law.

22. In or about July or August 2004, shortly after issuing a warrant for the arrest of the defendant in *People v. Chad Rubin* for Robbery, respondent went to the bank the defendant had allegedly robbed, spoke to Ann Maxon, the bank manager, and offered to provide her with a copy of the court file.

23. In or about November 2004, in the absence of the defense attorney and ADA, respondent spoke with the sister and mother of the defendant in *People v. Darren Brust* at court and advised them not to pay for the damages allegedly caused by the defendant.

24. In or about November 2004, in *People v. Meagan Goodermote*, in which the defendant was charged with Harassment, respondent advised the defendant and the complaining witness that he was acting as an "arbitrator" in the case and persuaded Danielle Thompson, the complaining witness, to withdraw the complaint, and respondent dismissed the charge without notice to the district attorney's office, as required by Sections 170.45 and 210.45 of the Criminal Procedure Law.

25. On or about November 17, 2004, in court, in conversation with ADA Rebecca Bauscher, respondent referred to the mother of the defendant in *People v. Dustin Shamblen* as a "fat bitch."

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)(4), 100.3(B)(6) and 100.5(A)(1)(c), (d) and (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 V of the Formal Written Complaint are sustained, and respondent's misconduct is established.

As noted above, respondent failed to answer the Formal Written Complaint, did not respond to the motion for summary determination, and, on the issue of sanctions, submitted no papers and waived oral argument.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Harding did not participate.

Dated: December 18, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **EARL R. HARRIS**, a Justice of the Camden Town Court, Oneida County.

THE COMMISSION:

Alan J. Pope, Esq., Chair
Raoul Lionel Felder, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Marvin E. Jacob, Esq.
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
Diane Martin-Grande for the Respondent

DECISION AND ORDER:

The matter having come before the Commission on April 20, 2006; and the Commission having before it the Formal Written Complaint dated October 13, 2005, respondent's Answer dated December 10, 2005, and the Stipulation dated March 21, 2006; and the Commission having designated Steven Wechsler, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and a hearing having been scheduled to commence on March 22, 2006; and respondent having resigned by letter dated March 9, 2006, effective May 1, 2006, 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: May 1, 2006

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 Earl R. Harris, the respondent in this proceeding, and his attorney Diane Martin-Grande, 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 Camden Town Court, Oneida County, since January 1, 1996. Respondent is not an attorney.

3. In October 2005, respondent was served by the Commission with a Formal Written Complaint, alleging *inter alia* that respondent failed to deposit court funds in a timely manner, resulting in a cumulative deficiency in his court bank account of $3,702.80; failed to report and remit $685.00 in court funds to the state comptroller in 15 cases in the manner required by law; collected restitution in various cases and failed to distribute $1,842.00 to the appropriate recipients; failed to keep a cashbook as required by law; and failed to make dockets of small claims and civil matters as required.

4. Respondent submitted an Answer, dated December 10, 2005, in which he denied the allegations of the charges.

5. The Commission designated Steven Wechsler, Esq., as referee to hear and report to the Commission with respect to the charges against respondent. The referee has scheduled a hearing to be held on March 22, 2006.

6. Respondent tendered his resignation, dated March 9, 2006, effective May 1, 2006, 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.

7. 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.

8. All parties to this Stipulation respectfully request that 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: March 21, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **GEORGE O. HEWLETT**, a Justice of the Potsdam Town Court, St. Lawrence County.

THE COMMISSION:

Alan J. Pope, Esq., Chair
Raoul Lionel Felder, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Marvin E. Jacob, Esq.
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
Fischer, Bessette, Muldowney & Hunter LLP (by James P. Bessette) for Respondent

DECISION AND ORDER:

The matter having come before the Commission on April 20, 2006; and the Commission having before it the Formal Written Complaint dated November 9, 2005, and the Stipulation dated April 6, 2006; and respondent having resigned from judicial office by letter dated February 17, 2006, effective upon receipt, 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: May 1, 2006

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 George O. Hewlett, the respondent in this proceeding, and his attorney James P. Bessette.

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 Potsdam Town Court, St. Lawrence County, since 1992. He is not an attorney.

3. On or about November 12,2005, respondent was served by the Commission with a Formal Written Complaint, alleging *inter alia* that: (1) respondent granted default judgments to plaintiffs in approximately 44 cases without requiring the submission of the necessary documentation of the default upon which the judgment is based, as required by law; (2) respondent engaged in unauthorized *ex parte* communications with defendants in the absence of plaintiffs or plaintiffs' counsel, and entered judgments on the basis of information elicited from those improper *ex parte* communications, in 14 cases; (3) respondent failed to afford *pro se* defendants in 15 cases full and fair opportunity to be heard by entering judgments against defendants after an appearance, without scheduling trials or requiring the plaintiffs to appear or file motions for summary judgment to which the defendants could respond; (4) in two contested matters in which respondent held hearings, respondent failed to afford the defendants the opportunity to present evidence or cross-examine plaintiffs' witnesses before entering judgments in favor of the plaintiffs; (5) respondent failed to disqualify himself or otherwise disclose to the parties his relationship to a relative of respondent within the sixth degree who appeared in court to testify as a witness on behalf of the plaintiff in two matters; (6) respondent failed to transfer a criminal matter to the court of proper jurisdiction and granted a default judgment to the claimant in a small claims matter in which the attorney for the corporate respondent appeared, notwithstanding that the law provides that a corporate defendant may appear by counsel; and (7) for a period of over three months, respondent banned an attorney from appearing before him.

4. Respondent did not file an Answer to the Formal Written Complaint.

5. Respondent has tendered his resignation, effective February 17,2006, 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, to file a determination with the Court of Appeals. Pursuant to law, removal from office disqualifies a judge from holding judicial office in the future.

7. 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.

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, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROY H. KRISTOFFERSEN**, a Justice of the Saranac Lake Village Court, Franklin 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
Fischer, Bessette, Muldowney & Hunter, LLP (by John J. Muldowney) for Respondent

DECISION AND ORDER

The matter having come before the Commission on February 2, 2006; and the Commission having before it the Formal Written Complaint dated June 27, 2005, and the Stipulation dated December 12, 2005; and respondent having resigned from judicial office on October 17, 2005, effective November 25, 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.

Dated: February 14, 2006

STIPULATION

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter "Commission"), Roy H. Kristoffersen, the respondent in this proceeding, and his attorney John J. Muldowney, 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 Saranac Lake Village Court since 1985. He is not an attorney.

3. On June 28, 2005, respondent was served with a Formal Written Complaint, alleging that he presided over numerous criminal cases in which the defendant was the son of respondent's co-judge, and that in two of the cases, respondent rendered favorable dispositions to the defendant without notice to or the consent of the prosecution; that respondent presided over civil cases involving relatives of respondent's co-judge, without disclosure; and that respondent failed to take action to timely dispose of numerous civil and criminal matters.

4. Respondent did not answer the Formal Written Complaint.

5. Respondent tendered his resignation, dated October 17, 2005, effective November 25, 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.

December 12, 2005

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **PETER M. KULKIN**, a Judge of the Newburgh City Court, Orange 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 (Melissa R. DiPalo, Of Counsel) for the Commission
Briccetti, Calhoun & Lawrence, LLP (by Kerry A. Lawrence) for the Respondent

The respondent, Peter M. Kulkin, a judge of the Newburgh City Court, Orange County, was served with a Formal Written Complaint dated October 12, 2005, containing one charge. Respondent filed an answer dated November 30, 2005.

On February 28, 2006, 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 March 9, 2006, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Newburgh City Court, Orange County since January 1, 2005. Respondent has been an attorney since 1986. In 2004, he was an attorney with the Legal Aid Society of Orange County.

2. In May 2004 respondent became a candidate for Newburgh City Court Judge. The general election was scheduled for November 2, 2004.

3. In the general election, respondent was the nominee of the Democratic Party, the Independence Party and the Working Families Party.

4. Respondent's opponent in the general election was the incumbent Newburgh City Court Judge, Jeanne M. Patsalos. Judge Patsalos had been appointed a part-time judge of the Newburgh City Court in January 1998, and in January 2002 she became one of the two full-time judges of the Newburgh City Court.

5. Beginning in the early 1990s, before Judge Patsalos was a judge, the Newburgh City Court stopped hearing parking ticket cases due to an increase in the volume of criminal cases. After she became a full-time judge in January 2002, Judge Patsalos, at the time unknown to respondent, initiated talks with the Newburgh City Manager to arrange for the Newburgh City Court to resume hearing parking ticket cases. Judge Patsalos began hearing such cases on September 29, 2004. Judge Patsalos never refused to hear parking ticket cases during her tenure as a Newburgh City Court Judge.

6. In May 2004 respondent and Judge Patsalos attended a meeting of the Newburgh Democratic Committee at which candidates were questioned in connection with the committee's intention to endorse candidates. In response to a question by a committee member about the status of parking tickets in the City of Newburgh, Judge Patsalos stated that she was not required to handle parking tickets cases but had volunteered to do so when she became a full-time judge in January 2002.

7. In October 2004, approximately two weeks before the general election, respondent prepared, published and distributed to voters a piece of campaign literature entitled "The Truth about Jeanne Patsalos. It's time for a change in Newburgh City Court." Below the title were two columns with the headings "The Patsalos Claim" and "The Record." A copy of the literature is attached to the Agreed Statement of Facts as Exhibit 1.

8. Beneath the heading "The Patsalos Claim," respondent's literature states: "Patsalos claims that she is not 'required to handle parking ticket cases[']." In a footnote, respondent's literature states that Judge Patsalos made the quoted statement at an appearance before the Newburgh Democratic Committee.

9. Beneath the heading "The Record," respondent's literature states: "Patsalos' refusal to handle parking ticket cases has resulted in over $400,000 in delinquent parking tickets from 1999 and 2000 alone." In a footnote, respondent's literature attributes the information to an edition of the *Mid Hudson Times* and the City of Newburgh 2005 Budget.

10. Neither the *Mid Hudson Times* nor the City of Newburgh Budget stated that Judge Patsalos had caused the $400,000 delinquency by refusing to handle parking tickets cases. An article published in the October 20-26, 2004 edition of the *Mid Hudson Times* reported that the City of Newburgh "anticipate[d] more than $400,000 from the collection of delinquent parking tickets from 1999 and 2000," but the article did not attribute the delinquency to Judge Patsalos.

11. In his campaign literature, respondent misrepresented the facts of Judge Patsalos' conduct and wrongfully implied that Judge Patsalos was responsible for more than $400,000 in revenue owed to the City of Newburgh for delinquent parking tickets, in that: (a) respondent made out-of-context use of Judge Patsalos' remark that she was not required to handle parking tickets; (b) respondent created the false impression that Judge Patsalos had refused to handle parking tickets and that such refusal had resulted in $400,000 in delinquent parking tickets; and (c) respondent omitted facts relevant to an accurate portrayal of her conduct as it related to parking tickets, such as the fact that the Newburgh City Court stopped hearing parking ticket matters before Judge Patsalos was a judge, and the fact that Judge Patsalos had begun hearing parking ticket matters as of September 29, 2004.

12. In the November 2004 general election, respondent defeated Judge Patsalos by 3,351 to 2,364 votes, a margin of 59 to 41 percent, and was elected a Newburgh City Court Judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(4)(a) and 100.5(A)(4)(d)(iii) 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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Judicial candidates are held to higher standards of conduct than candidates for non-judicial office. Among other requirements, a judicial candidate is prohibited from knowingly misrepresenting facts about the candidate's opponent (Rules, §100.5[A][4][d][iii]). This requirement not only helps ensure that judicial campaigns comport with fundamental standards of honesty and fairness, but enables voters to choose judges based upon information that is fairly and accurately presented.

Respondent has acknowledged that he failed to comply with those standards when, two weeks before the election for City Court, he prepared and distributed to voters campaign literature that misrepresented facts about his opponent, the incumbent City Court judge, whom respondent went on to defeat in the election. Statements in the brochure wrongfully implied that the incumbent, Judge Patsalos, had refused to handle parking tickets and that such refusal had resulted in $400,000 in delinquent parking tickets. The brochure, which respondent himself had prepared, made out-of-context use of a remark by Judge Patsalos and omitted certain relevant facts, contributing to the false impression that the incumbent's conduct had deprived the City of $400,000 in revenue.

In fact, the decision not to handle parking tickets, brought on by an increase in the volume of criminal cases, was made before Judge Patsalos took office. Moreover, as Judge Patsalos had stated in respondent's presence, she had volunteered to handle the parking tickets. The omission of those facts totally distorted her conduct.

Distortions and misrepresentations have no place in campaigns for judicial office. Judicial candidates for judicial office are expected to be, and must be, above such tactics. It is especially important for judicial candidates to be truthful because judges are called upon to administer oaths and are "sworn to uphold the law and seek the truth." *Matter of Myers*, 67 NY2d 550 (1986).

Although it cannot be ascertained whether these distortions played a significant role in respondent's successful campaign, this judge's election is tarnished by his campaign statements which violated the ethical rules. *See, Matter of Watson*, 100 NY2d 290 (2003); *Matter of Hafner*, 2001 Annual Report 113 (Comm. on Judicial Conduct). As a candidate, respondent was obliged to be familiar with the relevant ethical standards. Respondent's misconduct during the campaign diminishes his credibility and makes it difficult for the public to trust his statements.

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

censure.

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

Ms. DiPirro and Judge Luciano were not present.

Dated: March 23, 2006

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

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Stafford, Owens, Curtin & Trombley PLLC (by Thomas W. Plimpton) for Respondent

DECISION AND ORDER:

The matter having come before the Commission on December 7, 2006; and the Commission having before it the Formal Written Complaint dated September 22, 2006, and the Stipulation dated November 28, 2006; and respondent having resigned by letter dated November 8, 2006, effective immediately, 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.

December 15, 2006

STIPULATION:

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter "Commission"), Daniel L. LaClair, the respondent in this proceeding, and his attorney Thomas W. Plimpton, 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 Clinton Town Court since 1990. He is not an attorney.

3. On September 26, 2006, respondent was served with a Formal Written Complaint, alleging that in August 2004, after being contacted by a state trooper who had arrested respondent's first cousin, once removed, respondent directed the arresting officer to file the charges in another town court, *i.e.* the Ellenburg Town Court, which did not have jurisdiction over the matter, and that respondent thereafter contacted Ellenburg Town Justice Dennis LaBombard to inform him that charges against respondent's relative would be coming before Judge LaBombard. The Complaint alleged that respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety in that he failed to respect and comply with the law, in violation of Section 100.2(A) of the Rules, allowed a family relationship to influence the judge's judicial conduct, in violation of Section 100.2(B) of the Rules, and lent the prestige of judicial office to advance his relative's private interest, in violation of Section 100.2(C) of the Rules; and failed to perform the duties of judicial office impartially and diligently in that he failed to be faithful to the law and maintain professional competence in it, in violation of Section 100.3(B)(1) of the Rules, and initiated an improper *ex parte* communication concerning an impending matter, in violation of Section 100.3(B)(6) of the Rules.

4. Respondent did not answer the Formal Written Complaint.

5. Respondent tendered his resignation, effective November 8, 2006, 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 and the Commission's decision with respect thereto will be made public if accepted by the Commission.

Dated: November 28, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOSEPH I. LALONDE**, a Justice of the Tupper Lake Town and Village Courts, Franklin 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
Jeremiah M. Hayes for Respondent

DECISION AND ORDER

The matter having come before the Commission on February 2, 2006; and the Commission having before it the Formal Written Complaint dated June 21, 2005, respondent's Answer dated August 17, 2005, and the Stipulation dated January 12, 2006; and the Commission, by order dated August 30, 2005, having designated Michael Whiteman, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and a hearing been scheduled to commence in January 2006; and respondent having resigned from judicial office by letter dated January 5, 2006, effective February 12, 2006, 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: February 14, 2006

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 Joseph I. LaLonde, the respondent in this proceeding, and his attorney Jeremiah M. Hayes.

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 Tupper Lake Village Court, Franklin County, since April 1999, and a Justice of the Tupper Lake Town Court, Franklin County, since January 2006. He is not an attorney.

3. In June 2005, respondent was served by the Commission with a Formal Written Complaint, alleging *inter alia* that respondent presided over the arraignments of criminal defendants while under the influence of alcohol, that respondent made injudicious remarks to or about police officers, defendants and others involved in matters before him and that respondent failed to comply with Sections 170.45 and 210.45 of the Criminal Procedure Law by dismissing Vehicle and Traffic Law violations involving accidents without giving notice to the prosecution.

4. Respondent filed an Answer in which he denied most of the allegations of the Formal Written Complaint. In signing this Stipulation, respondent continues to deny allegations that he presided over the arraignments of criminal defendants while under the influence of alcohol and asserts that this Stipulation constitutes neither an admission nor a finding of fact with respect to the charges.

5. The Commission designated Michael Whiteman, Esq., as referee to hear and report to the Commission with respect to all of the charges against respondent. The Referee scheduled the hearing to commence in January, 2006.

6. Respondent has tendered his resignation, dated January 5, 2006, effective February 12, 2006, and affirms that he will neither seek nor accept judicial office at any time in the future. Copies of respondent's letters of resignation are attached.

7. 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.

8. 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.

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.

January 12, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **KERRY R. LOCKWOOD**, a Justice of the Plainfield Town Court, Otsego County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the Commission
Honorable Kerry R. Lockwood, *pro se*

The respondent, Kerry R. Lockwood, a justice of the Plainfield Town Court, Otsego County, was served with a Formal Written Complaint dated March 10, 2006, containing two charges.

By motion dated May 24, 2006, the administrator of the Commission moved for summary determination, pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR §7000.6[c]), based on respondent's failure to answer the formal written complaint. Respondent did not file a response to the motion. By Decision and Order dated June 26, 2006, the Commission granted the administrator's motion and determined that the charges were sustained and that respondent's misconduct was established.

The Commission scheduled oral argument on the issue of sanctions for July 26, 2006. Oral argument was not requested and thereby was waived. Counsel to the Commission filed a memorandum recommending that respondent be removed from office. Respondent filed no papers on the issue of sanctions; an unsigned message was faxed to the Commission on July 28, 2006, stating that respondent would not attend "the Hearing scheduled for today [sic]" and would resign as of August 31, 2006.

On October 30, 2006, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Plainfield Town Court, Otsego County since 2000. She is not a lawyer.

2. Respondent's caseload as a judge is small, averaging fewer than four cases per month.

As to Charge I of the Formal Written Complaint:

3. From January 2004 through December 2005, as set forth on Schedule A of the Formal Written Complaint, respondent failed to report and remit court funds in a timely manner, *i.e.* within the tenth day of the month succeeding collection, as required by Sections 1803 of the Vehicle and Traffic Law, Section 27 of the Town Law and 2021 of the Uniform Justice Court Act. Eleven times in that period, respondent's reports and remittances were late by more than 113 days, and twice they were late by more than 640 days.

4. Respondent's failure to timely report and remit court funds for the months of April 2004, May 2004 and February 2005 resulted in the State Comptroller's office giving notice to the Town of Plainfield, by letters dated May 12, 2005, and December 2, 2005, that respondent's judicial salary should be withheld.

As to Charge II of the Formal Written Complaint:

5. As set forth below, respondent failed to cooperate with the Commission's investigation of her conduct with respect to the matters set forth in Charge I above.

6. On June 27, 2005, the Commission sent respondent a letter requesting her response to the allegation that she had failed to timely report and remit to the state comptroller as required. Respondent failed to respond to the letter.

7. On July 19, 2005, the Commission sent respondent another letter requesting her response to the allegations and enclosing a copy of the June 27, 2005, letter. Respondent failed to respond to the letter.

8. On August 4, 2005, the Commission sent respondent a third letter requesting her response to the allegations and enclosing a copy of the letters dated June 27, 2005, and July 19, 2005. Respondent failed to respond to the letter.

9. On September 12, 2005, the Commission sent respondent a letter confirming an appointment at the court on September 15th to examine court records. On September 15, 2005, a Commission investigator appeared at respondent's court pursuant to the appointment to examine numerous court records, including case files and bank statements. Respondent had left a letter for the Commission dated September 14, 2005, indicating that she had been unable to locate many of the records the investigator had come to examine but would attempt to do so. Respondent's letter claimed that she had not received the Commission's letters dated June 27, 2005, July 19, 2005, and August 4, 2005.

10. On or about September 15, 2005, respondent's employer, Richard N. Bach, Esq., told Commission staff that he or respondent would communicate with the Commission the following day to arrange for examination of the requested court records that had not been provided. On October 14, 2005, the Commission sent respondent a letter by certified mail, return receipt requested, memorializing the foregoing and requesting that respondent contact the Commission to arrange a date for the court records to be examined. Respondent received this letter on October 17, 2005, and personally signed the return receipt. Respondent failed to respond to the letter and failed to provide the requested court records.

11. On November 18, 2005, the Commission sent respondent a follow-up letter by certified mail, return receipt requested, seeking to make another appointment to inspect the remainder of respondent's court records and warning respondent that her failure to respond may be viewed as a failure to cooperate. Respondent received this letter on November 21, 2005, and personally signed the return receipt. Respondent failed to respond to the letter and failed to provide the requested court records.

12. On December 9, 2005, the Commission sent a letter to respondent by certified mail, return receipt requested, requesting her appearance on December 22, 2005, to give testimony at the Commission with respect to the matters herein. Respondent received this letter on December 12, 2005, and personally signed the return receipt. Respondent failed to appear on December 22nd and did not contact the Commission or provide an explanation for her failure to appear.

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(C)(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 and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

All funds received by a town or village justice must be properly documented and remitted to the State Comptroller by the tenth day of the month following collection (UJCA §2021[1]; Town Law §27; Vehicle and Traffic Law §1803). The failure to remit funds promptly to the State Comptroller constitutes neglect of a judge's administrative responsibilities and is improper even if the money is on deposit and even if the amounts are small. *See Matter of Hrycun*, 2002 Annual Report 109 (Comm. on Judicial Conduct); *Matter of Ranke*, 1992 Annual Report 64 (Comm. on Judicial Conduct). The mishandling of public funds by a judge is misconduct, even when not done for personal profit. *Bartlett v. Flynn*, 50 AD2d 401, 404 (4th Dept 1976).

Respondent's negligence with respect to her administrative duties is not excused by the demands of her private employment or other activities. The judicial responsibilities of a judge take precedence over all the judge's other activities (Section 100.3[A] of the Rules Governing Judicial Conduct).

Respondent seriously exacerbated her misconduct by failing to cooperate with the Commission's investigation into the allegations of negligence. *See Matter of Cooley v. Comm. on Judicial Conduct*, 53 NY2d 64 (1981); *Matter of Mason v. Comm. on Judicial Conduct*, 100 NY2d 56 (2003). The Commission is authorized to "request a written response from the judge who is the subject of the complaint" and to require a judge's testimony during the investigation (22 NYCRR §7000.3[c], [e]; Jud. Law §44, subd. 3). By refusing to answer the Commission's written inquiries and refusing to appear for testimony, respondent delayed and impeded the Commission's efforts to obtain a full record of the relevant facts and thereby obstructed the Commission's discharge of its lawful mandate. Her failure to cooperate demonstrates an unacceptable lack of respect for the process, created by Constitution and statute, under which the Commission is empowered to investigate the conduct of judges.

Although respondent claimed, in her letter dated September 14, 2005, that she had not received the first three letters from the Commission, the record establishes that after that date, she failed to respond to two subsequent letters from the Commission although she personally received them, and that she failed to appear for testimony at the Commission's office although she personally received the letter requesting her appearance. Such behavior establishes convincingly that her failure to cooperate was willful and pervasive.

We note that, in this proceeding, respondent has failed to answer the charges or respond to the motion for summary determination. Her failure to respond throughout the proceeding or to submit any papers on her own behalf may be construed not only as an admission of the allegations but as "an indifference to the attendant consequences." *Matter of Nixon*, 53 AD2d 178, 180 (1st Dept 1976).

In its totality, respondent's conduct shows "contumacious disregard for the responsibilities of her judicial office," which warrants removal from office. *Matter of Carney*, 1997 Annual Report 78, 79 (Comm. on Judicial Conduct).

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. Felder, Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Peters and Judge Ruderman concur.

Ms. DiPirro was not present.

Dated: November 7, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **THOMAS J. SPARGO**, a Justice of the Supreme Court, Albany 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
E. Stewart Jones, Jr., for the Respondent

The respondent, Thomas J. Spargo, a Justice of the Supreme Court, Albany County, was served with a Formal Written Complaint dated January 25, 2002, containing four charges. Respondent filed a verified answer dated February 22, 2002. Respondent was served with a Supplemental Formal Written Complaint dated May 13, 2002, containing one charge, and filed a verified answer dated July 8, 2002. Respondent was served with a Second Supplemental Formal Written Complaint dated March 23, 2004, containing one charge, and filed a verified answer dated April 23, 2004.

By order dated October 8, 2002, the Commission designated Robert L. Ellis, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The Commission proceedings were stayed pending the resolution of litigation commenced by respondent in federal and state courts.

On April 23, 2004, respondent moved to dismiss the Second Supplemental Formal Written Complaint. On May 13, 2004, counsel to the Commission filed papers in opposition to the motion, and counsel to respondent filed a response on May 21, 2004. By decision and order dated June 17, 2004, the Commission denied the motion.

On December 21, 2004, counsel to the Commission moved to disallow the substitution of E. Stewart Jones, Jr., as counsel to respondent. On January 3, 2005, Mr. Jones filed papers in opposition to the motion. By order dated January 20, 2005, after oral argument on that date, the referee granted the motion. After further litigation in state court, Mr. Jones was substituted.

A hearing was held on August 1, 2, 3, 22 and 23, 2005, in Albany. The referee filed a report dated December 15, 2005.

The parties submitted memoranda with respect to the referee's report. Counsel to the Commission recommended that respondent be removed from office. Counsel to respondent argued that the charges were not sustained. On February 2, 2006, 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 served as a Supreme Court Justice, Third Judicial District, since January 2002. Prior to that, respondent was a town justice of the Town of Berne, Albany County, from January 2000 through December 2001.

2. Respondent is an attorney who was admitted to practice law in 1971. As a practicing attorney, respondent had election law expertise.

As to Charge I of the Formal Written Complaint:

3. In the fall of 1999 respondent was a candidate for town justice of the Town of Berne. On one occasion shortly before the election, while campaigning outside of a convenience store near Berne, respondent handed out gift certificates worth $5.00 each to the first four or five individuals who bought gasoline at the store. The gift certificates were "Good for all products including gas" at the store. At the same time he handed out the gift certificates, respondent gave the recipients his business card and identified himself as a candidate for town justice.

4. On several occasions in the weeks preceding the election, respondent went to a local restaurant and, after being introduced as a candidate for town justice, bought the patrons a round of drinks. Respondent spent a total of approximately $2,000 on these occasions at the restaurant in the weeks prior to the election.

5. The town of Berne was heavily Democratic. Respondent, a Republican, won the election for town justice in November 1999 by approximately 85 votes out of a total of about 1,200 votes.

As to Charge II of the Formal Written Complaint:

6. In November 2000, while serving as a town justice in the Town of Berne, respondent accepted Paul Clyne, an assistant district attorney and a candidate for Albany County District Attorney, as a legal client in connection with a recount in the contested election for District Attorney. Respondent's work for the Clyne campaign lasted a week to ten days. Mr. Clyne was ultimately declared the victor and assumed office as District Attorney on January 1, 2001.

7. As a town justice, respondent presided over criminal and traffic cases prosecuted by the District Attorney's office. The District Attorney's office appeared in respondent's court one night a month, generally by an assistant district attorney.

8. In or about November 2000, respondent submitted to the Clyne campaign

committee a bill for $10,000 for his legal services in connection with the recount. Respondent was paid in two installments of $5,000 each on January 24 and January 31, 2001.

As to Charge III of the Formal Written Complaint:

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

As to Charge IV of the Formal Written Complaint:

10. On May 18, 2001, respondent, while a town justice, gave the keynote address at the 39th Annual Monroe County Conservative Party Dinner in Rochester, New York. The dinner was a fund-raising event for the Conservative Party in Monroe County.

11. Respondent's name was listed as the keynote speaker in the program. Prior to the event, respondent was aware that it was a fund-raiser for the Conservative Party.

12. In his keynote speech, respondent spoke concerning his activities on behalf of the Bush campaign in connection with the Presidential recount in Florida in November 2000.

13. In May 2001 there were two vacancies for Supreme Court in the Third Judicial District, which includes Albany County. (Monroe County is not in the Third Judicial District and is about 160 miles from Albany County.) Respondent had applied for appointment to one of the vacancies in early 2001.

14. At the dinner, respondent was introduced as a candidate for Supreme Court, although he had not yet formed a committee.

As to Charge I of the Supplemental Formal Written Complaint:

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

As to Charge I of the Second Supplemental Formal Written Complaint:

16. In May 2003, with respondent's knowledge and approval, the Thomas J. Spargo Legal Expense Trust was established for the purpose of paying legal expenses respondent had incurred in connection with federal litigation he had brought challenging the Commission's proceedings against him. Respondent's mother was the grantor of the trust; his long-time friend Brian Sanvidge was a co-trustee; and George Cushing, whose wife is a long-time friend of Albany County Surrogate Cathryn Doyle, a friend of respondent, was the other trustee.

17. In the summer of 2003, Sanford Rosenblum, a long-time friend of respondent, visited Albany attorney John Powers at Mr. Powers' law office. Mr. Rosenblum, an attorney who had been active in raising funds for political and charitable causes for many years, told Mr. Powers that a fund was being set up to assist in defraying respondent's legal expenses associated with his litigation with the Commission and asked Mr. Powers to contribute. Mr. Powers, whose firm's practice is limited to plaintiffs' personal injury litigation, told Mr. Rosenblum that he would have to check with the other attorneys in his firm before making a contribution. Mr. Rosenblum said that he was going to visit another attorney, E. Stewart Jones, Jr., and asked Mr.

Powers if he would like to come along.

18. Mr. Rosenblum and Mr. Powers then went to Mr. Jones' office, where they met with Mr. Jones. Mr. Rosenblum suggested that the attorneys contribute $10,000 to respondent's legal expense fund.

19. Mr. Rosenblum later made a follow-up visit to Mr. Jones, after which Mr. Jones wrote a check dated November 7, 2003, payable to the "Thomas J. Spargo Legal Expense Fund." At Mr. Rosenblum's direction, Mr. Jones mailed the check to Brian Sanvidge, who deposited the check into the Spargo fund bank account on November 17, 2003. At that point, the only other contributions to the fund were the initial $1,000 contribution from respondent's mother and a $200 contribution from a co-worker of Mr. Sanvidge, who contributed at his request.

20. Mr. Powers later determined not to make any contribution to the fund after he and his firm members heard complaints from the personal injury defense bar that the plaintiffs' bar was being asked to contribute and it appeared that this would become an issue in cases before respondent.

21. In 2003 respondent was assigned to Ulster County Supreme Court. Attorney Bruce Blatchly of New Paltz and his partner had approximately 20 cases pending before respondent in the fall of 2003, including a case in which Mr. Blatchly was representing attorney Alfred Mainetti and his partner, Joseph O'Connor, in a claim by a former partner of their law firm. Apart from their professional relationship, Mr. Blatchly had no personal relationship with respondent. Mr. Blatchly is also a part-time town justice of the Town of Gardiner.

22. On or about November 13, 2003, at the Ulster County Supreme Court, respondent approached Mr. Blatchly and asked to speak with him privately. Respondent asked Court Clerk Beth Cornell to leave the room because he had a "judge matter" to discuss with Mr. Blatchly, so Ms. Cornell stepped outside and closed the door, leaving Mr. Blatchly and respondent alone in chambers.

23. While they were alone in chambers, respondent told Mr. Blatchly that the legal expenses associated with his litigation against the Commission were rising, that he was going to be raising funds, and that he was looking for $30,000 from attorneys in Ulster County. Respondent's legal bills had reached over $140,000 by that point.

24. Respondent further told Mr. Blatchly that rather than solicit a number of lawyers for small contributions, he had decided to go to three attorneys who were often in court, Mr. Blatchly, Mr. Mainetti and Maureen Keegan, and that he would be asking for $10,000 from each of them. Mr. Blatchly said that he was not sure what he could do but that if respondent could get him some information, he would consider it.

25. Respondent knew at the time of this meeting with Mr. Blatchly that Mr. Blatchly had recently settled a case that was pending before respondent for $3 million dollars, and respondent assumed that Mr. Blatchly had received one-third of that amount as his fee.

26. On December 1, 2003, respondent telephoned Mr. Blatchly at his law office and invited him to lunch on December 11, 2003. Respondent said that the lunch was in furtherance

of what they had discussed previously. Respondent said that they would "meet some people" there and that Mr. Mainetti and Ms. Keegan were also invited. Respondent had never previously invited Mr. Blatchly out to eat.

27. Mr. Blatchly was concerned about attending the lunch and about the propriety of making a substantial contribution to respondent's legal expense fund since he had cases pending before respondent, including the one involving the Mainetti firm. Mr. Blatchly did some research and concluded that he could not ethically contribute to the fund.

28. Respondent also invited Kingston attorneys Mr. Mainetti, Ms. Keegan and her partner Eli Basch to the lunch on December 11. These practitioners have substantial plaintiffs' personal injury practices and had numerous cases pending before respondent at the time.

29. Respondent also invited his friends Sanford Rosenblum and Judge Doyle to the lunch, which took place at Le Canard Restaurant in Kingston on December 11, 2003.

30. Attending the lunch at Le Canard, in addition to respondent, Judge Doyle and Sanford Rosenblum, were attorneys Al Mainetti and his partner Joseph O'Connor, Maureen Keegan and her partner Eli Basch, and Bruce Blatchly. Respondent introduced his friends as "Sandy Rosenblum" and "Kate Doyle."

31. At the lunch, respondent's federal litigation against the Commission was a topic of discussion. Two days earlier, the U.S. Court of Appeals for the Second Circuit had issued an opinion remanding the case to the District Court with the direction to abstain from exercising jurisdiction.

32. Mr. Mainetti was the first to leave the lunch. Mr. Blatchly was the next to leave, and as he left the table to get his coat from the coatroom, Mr. Rosenblum followed him.

33. In the coatroom, Mr. Rosenblum said to Mr. Blatchly, "We're looking for $10,000 from you. Can you help us out?" Mr. Blatchly responded that he had concerns about contributing to the Spargo fund because he was a town justice and had cases pending before respondent. Mr. Blatchly asked Mr. Rosenblum for something confirming that it was appropriate to contribute to the fund. Mr. Rosenblum requested Mr. Blatchly's business card and said he would get back to him; he never did so. As the two of them were talking, respondent and Judge Doyle left the restaurant; Mr. Blatchly briefly said good-by to respondent and then went to the courthouse where he had a conference scheduled with respondent's law clerk.

34. After respondent had left, Mr. Rosenblum rejoined the remaining attorneys at the table, Mr. O'Connor, Ms. Keegan and Mr. Basch. Mr. Rosenblum told the attorneys that a group was forming to raise funds for respondent's legal expenses, and he asked the attorneys to contribute and mentioned $10,000 as an amount. Mr. Basch asked Mr. Rosenblum to provide something in writing. Mr. Basch paid the bill for the lunch. Ultimately, none of the attorneys contributed to the Spargo fund.

35. Despite respondent's denials, a fair preponderance of the evidence establishes that respondent knew in 2003 that Mr. Rosenblum was soliciting contributions to respondent's legal expense fund from attorneys with cases before respondent, and the lunch at Le Canard was

arranged for that purpose.

36. Eight days later, on December 19, 2003, respondent telephoned Mr. Blatchly's law office. Mr. Blatchly was out, and respondent was given Mr. Blatchly's cell phone number. Respondent reached Mr. Blatchly on his cell phone in his car. Respondent told Mr. Blatchly that the new judicial assignments had just been issued for the upcoming year and that respondent was going to be assigned again to Ulster County.

37. Respondent further stated that Judge Hummel's caseload had been assigned to Judge Doyle, and he reminded Mr. Blatchly that Judge Doyle had been at the lunch a week earlier. Respondent said, "It looks like a good Christmas for me," or words to that effect. Respondent knew that Mr. Blatchly's personal divorce case was then pending before Judge Hummel.

38. Respondent's telephone call was intended to induce Mr. Blatchly to contribute to respondent's legal expense fund.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.4(D)(1)(a), 100.4(D)(1)(b), 100.5(A)(1)(c), 100.5(A)(1)(d), 100.5(A)(1)(f) and 100.5(A)(4)(a) 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, II and IV of the Formal Written Complaint and Charge I of the Second Supplemental Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge III of the Formal Written Complaint and Charge I of the Supplemental Formal Written Complaint are not sustained and are therefore dismissed.

Faced with burgeoning legal expenses incurred in litigation challenging the disciplinary proceedings against him, respondent used the power of judicial office, directly and indirectly, to solicit contributions to his legal expense fund from lawyers who appeared before him. Respondent brazenly asked one local attorney, in a private meeting in chambers, to donate $10,000, then continued to pressure the attorney over the next few weeks to make the contribution. Over the same period, with respondent's apparent knowledge and approval, a close friend of respondent asked several other attorneys, all who regularly appeared before respondent, to contribute a similar amount to help defray respondent's legal expenses. Such conduct is totally inconsistent with the high standards of integrity and propriety required of members of the judiciary.

The record establishes that respondent was not only aware of, but involved in the solicitation of contributions to help pay his legal bills. Initially, with respondent's knowledge and approval, a legal expense fund was created in May 2003 with, as grantor, respondent's mother and, as co-trustees, a friend of respondent and another individual whose wife was a close friend of respondent's friend, Albany Surrogate Cathryn Doyle. As respondent's legal expenses mounted – reaching approximately $140,000 by the fall of 2003 – the strategy for raising funds became clear: large donations would be solicited from a few attorneys, many of whom had an active practice in respondent's court. It is undisputed that respondent's close friend Sanford

Rosenblum solicited $10,000 contributions from some attorneys. We accept the referee's findings that within the same time frame, in a private conversation in chambers, respondent personally asked attorney Bruce Blatchly to contribute a similar amount.

In that conversation, respondent raised the subject of his rising legal expenses with Mr. Blatchly, an attorney who regularly appeared before respondent in Ulster County, and said that he would be seeking contributions of $10,000 from Mr. Blatchly and several other local attorneys. As the referee concluded, Mr. Blatchly was a credible witness whose testimony was corroborated by persuasive evidence supporting respondent's involvement in the fund-raising scheme. Moreover, respondent knew at the time he approached Mr. Blatchly that the attorney had recently settled a $3 million dollar case and thus was likely to have received a million dollar fee. Respondent's version of this conversation – that he raised the subject of money only to say, "I'm not soliciting anything" in response to Mr. Blatchly's asking, "How are you doing?" (Comm. Ex. 5, p. 16; Tr. 745-46) – is not just illogical, but incredible.

A legal expense fund for a judge, in which attorneys are asked to help pay a judge's legal expenses in connection with a disciplinary proceeding (or, as here, a court challenge to the disciplinary proceedings), raises serious ethical issues. The money collected helps pay the judge's personal debt, and every dollar raised is one less dollar the judge has to spend from personal funds. Judges have been disciplined by the Commission for soliciting and accepting *loans* from attorneys (*e.g.*, *Matter of Garvey*, 1982 Annual Report 103 [Comm. on Judicial Conduct]; *Matter of Katz*, 1985 Annual Report 157 [Comm. on Judicial Conduct]); the egregious impropriety of soliciting what is essentially a monetary *gift* for the judge is self-evident, and having an intermediary solicit money on the judge's behalf does not diminish the impropriety.

The Advisory Committee on Judicial Ethics has opined on one occasion that a legal defense fund for a judge was ethically permissible (Adv. Op. 96-33), although the Committee cautioned that its opinion was limited to the unique circumstances of that case and did not constitute a blanket authority for the future. It is notable that respondent, who repeatedly professed familiarity with the ethical advisory opinions, claims to have relied on that opinion apparently without noting either its strongly worded cautionary language or the two subsequent opinions holding that such a fund under the circumstances was not permitted (Adv. Op. 97-94, 03-12); nor, indeed, did he seek an opinion in his own case. Most significantly, in the opinion respondent purportedly relied on, the Committee underscored in emphatic terms that a judge must "take no part whatsoever" in soliciting such funds in order to protect public confidence in the integrity and independence of the judiciary. Whether a legal expense fund for a judge is appropriate clearly depends on the circumstances and must be considered on a case-by-case basis. Before consenting to the establishment of such a fund, it would be prudent for a judge to seek an opinion from the Advisory Committee. Here, the circumstances reveal that respondent's participation in the solicitation of contributions lent the prestige of judicial office to advance his private interests, contrary to Section 100.2(C) of the Rules.

A few weeks after their conversation in chambers, respondent invited Mr. Blatchly to lunch, along with several other local attorneys. While respondent maintains that the lunch was intended as a purely social gathering, the evidence elicited at the hearing demonstrates convincingly that the lunch was an integral part of an ongoing scheme to solicit specific attorneys to contribute to respondent's legal expense fund. Respondent had no apparent social

relationship with the attorneys; he had never invited Mr. Blatchly to lunch previously; and the invited attorneys had a significant caseload before respondent in Ulster County. Moreover, respondent also invited his friend Sanford Rosenblum, who, not coincidentally, had already asked at least two other attorneys to contribute $10,000 to respondent's legal expense fund. Nor was it coincidental that after the lunch, when Mr. Blatchly rose to leave, Mr. Rosenblum followed him to the coatroom and advised him, "We're looking for $10,000 from you" and that, after respondent had departed, Mr. Rosenblum delivered the same message to each of the attorneys who remained.

In a final effort to induce a contribution, respondent telephoned Mr. Blatchly a week later – going to the trouble to reach him on his cell phone – to advise him that Judge Doyle, who had been at the lunch, would be taking over Judge Hummel's caseload, which included Mr. Blatchly's own pending divorce case. As part of a course of conduct over several weeks in which Mr. Blatchly had been importuned to "donate" $10,000, that message, which respondent admits delivering, was implicitly coercive, even without respondent's strange parting comment that "It looks like a good Christmas for me." As the referee concluded, respondent's call to Mr. Blatchly was a pointed reminder of respondent's influence.

This series of overt acts by respondent convincingly establishes his role as an active participant in raising funds for his personal benefit from lawyers with cases before him, including his direct solicitation of a $10,000 contribution from Mr. Blatchly. Respondent has conceded that if the Commission finds that he solicited funds from Mr. Blatchly as alleged, he should be removed. At the oral argument, he stated: "Frankly, if you find that, you must remove me" (Oral argument, p. 77). We agree. Having found that respondent engaged in such conduct, we concur that ultimate sanction of removal is required.

In addition, in considering the remaining charges, we find several other instances of misconduct. As demonstrated by these disparate acts of wrongdoing, respondent failed to recognize and avoid misconduct as a judicial candidate, as a part-time town justice, and as a full-time jurist.

First, as a candidate for town justice, respondent failed to abide by the high standards of conduct required of judicial candidates by giving away $5.00 coupons ("good for all products including gas") at a convenience store to prospective voters and by buying drinks for patrons at a bar while identifying himself as a judicial candidate. While a candidate is permitted to distribute promotional literature and materials, distributing items of more than nominal value is strictly prohibited. *See, Matter of Therrian*, 1987 Annual Report 141 (Comm. on Judicial Conduct) (judicial candidate was removed for giving $5.00 bills to prospective voters). Indeed, giving "money or other valuable consideration" to prospective voters as an inducement to vote constitutes a crime (*see* Election Law §17-142). We need not find that respondent's activities literally constituted "vote-buying" in order to conclude that such campaign conduct was unseemly and should be avoided. Respondent, who asserts that he acted in the good faith belief that his actions were consistent with the ethical standards, has apologized for this conduct.

Second, it was improper for respondent, as a town justice, to accept the District Attorney-elect as his law client in connection with a recount. Since the District Attorney was the attorney of record in the criminal cases in respondent's court, respondent's voluntary business

relationship with the District Attorney-elect created an appearance of impropriety and a potential ongoing conflict with his duties as a judge. Respondent should have avoided business dealings that would raise such issues (Rules, §100.4[D][1][b]).

Third, respondent engaged in impermissible political activity by speaking at a political party's fund-raising dinner in 2001. As the keynote speaker for the event, respondent permitted his name to be used in connection with the fund-raising activities of a political organization, which is improper regardless of whether he was a declared candidate at the time (Rules, §100.5[A][1][d]; *see* Adv. Op. 01-27). (Although respondent had not yet created a committee, he was introduced at the dinner as a candidate for Supreme Court [*see* Rules, §100.0[A].) While a judicial candidate may *attend* political fund-raising events and "speak to gatherings on his or her own behalf" (Rules, §100.5[A][2][i], [v]), respondent's participation in this event exceeded the boundaries of permissible conduct.

As the Court of Appeals has stated, removal is "a drastic sanction which should only be employed in the most egregious circumstances" (*Matter of Steinberg*, 51 NY2d 74, 84 [1980]), but may be necessary "to remove the stain from the judiciary" created by conduct that implicates a judge's integrity (*Matter of Cohen*, 74 NY2d 272, 278 [1989]). Such is the case here. By engaging in a series of acts that conveyed an appearance of "exploiting his judicial office for personal benefit" (*Matter of Cohen*, *supra*; Rules, §100.4[D][1][a]), respondent diminished public confidence in the integrity of the judiciary as a whole and has irretrievably damaged his usefulness on the bench.

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

Mr. Goldman, Mr. Pope, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano and Judge Ruderman concur as to the sanction of removal and concur as to misconduct, except as set forth below.

As to Charge II, which is sustained in part, Mr. Coffey, Mr. Emery and Mr. Pope dissent and vote to dismiss the charge in its entirety.

As to Charge III, which is dismissed, Mr. Felder, Judge Klonick, Judge Luciano and Judge Ruderman dissent and vote to sustain the charge insofar as it alleges that respondent engaged in improper political activity by attending the Florida recount sessions.

As to Charge IV, which is sustained, Mr. Coffey, Ms. DiPirro and Mr. Emery dissent and vote to dismiss the charge.

Judge Peters did not participate.

Judge Klonick did not participate as to the Commission's consideration of Charge IV.

Dated: March 29, 2006

OPINION BY MR. EMERY CONCURRING IN THE RESULT AND DISSENTING IN PART, IN WHICH MR. COFFEY JOINS

The *Spargo* case is a sad tale and, at the same time, a paradigm for what is wrong with our adversarial elective system for selecting judges. More to the immediate point, the Commission majority's tableau of dispositions starkly demonstrates how enforcement of the misconduct Rules in the context of judicial campaigns undermines our articulated noble goals: to preserve and instill dignity, independence and integrity in the judiciary during hotly contested, partisan judicial election campaigns (Rules, §100.5[A][4][a]). Regrettably, though I concur in the ultimate result in this proceeding, I am compelled to explain, at some length, both my policy and constitutional concerns with many of the interstitial results we have reached.

With his competitive juices overflowing, after an accomplished career in one of the most combative specialties of New York lawyering – election law – Tom Spargo decided to run for town justice against the dominant party candidate in his home district. Employing creative but blatantly unseemly tactics, he won by a few votes. His victory apparently encouraged him to seek elevation to the Supreme Court. Again, against seemingly overwhelming odds, Spargo played a typical political game and secured cross-endorsements which assured his victory. *See, Lopez Torres v. NYS Board of Elections*, NYLJ, 2/3/06, p. 18 (Eastern Dist NY) (Gleeson, J.). Newly invested in his robes, he then embarked upon what most observers concluded was the beginning of a distinguished judicial career, only to let his competitive juices once again get the best of him when the Commission challenged him for his earlier excessive electioneering zeal.

The initial Commission charges were focused on alleged misconduct during respondent's campaign for town justice. Charge I asserts that he violated Section 100.1 of the Rules by failing to maintain high standards of conduct, Section 100.2(A) by not complying with law and for impropriety in conducting his campaign, and Section 100.5(A)(4)(a) by failing to maintain dignity and integrity in his political activities. These charges stem from his providing to potential voters free coffee and doughnuts, $5.00 product coupons, free pizza, free half gallons of cider and free rounds of drinks. In what I can only describe as a Solomonic parsing of these admitted campaign activities, we find that the product coupons and $2,000 worth of drinks at a bar were essentially an attempt to buy votes, but that the other conduct is *de minimis*, more in the nature of party favors or refreshments at typical campaign events.[1]

[1] With respect to these charges, I believe that, at least in the campaign context, *Republican Party of Minnesota v. White*, 536 US 765 (2002), casts considerable doubt on the validity of Section 100.1, requiring judges to "maintain[] and enforc[e] high standards of conduct...so that the integrity and independence of the judiciary will be preserved"; Section 100.2(A), requiring judges to "promote[] confidence in the integrity and impartiality of the judiciary"; and Section 100.5(A)(4)(a), requiring, generally, a judicial candidate to "maintain the dignity appropriate to judicial office...." These sections would seem to suffer from constitutional overbreadth and vagueness infirmities, sweeping plainly permissible campaign conduct within their ambit, to the extent that can be determined from their language. Therefore, I think it would be the wiser course for the Commission to no longer charge under these sections. I do not reach this question, however, because I conclude, along with my fellow members of the Commission, that two of the ingratiating measures respondent employed to get elected Town Justice were akin to an attempt

Charge II focuses on alleged violations of Sections 100.1, 100.2(A) and (C), 100.3(E)(1) and 100.4(D)(1)(a), (b) and (c) of the Rules, which prohibit judges from conveying the impression that a litigant is in a position of special influence, or from engaging in business relationships with litigants or organizations "that ordinarily will come before the judge." Respondent admits that he accepted, as an election law client, the local District Attorney-elect who was defending a recount of election results and who later, when he had assumed office, appeared himself on one occasion, and whose assistants regularly appeared, before respondent. The newly elected District Attorney's campaign committee paid respondent's $10,000 fee during the first month of the new District Attorney's term. A majority of the Commission concludes that this relationship violated all of the above rules, except Sections 100.4(D)(1)(c) (prohibiting business dealings that involve the judge in "continuing business relationships" with lawyers or persons likely to come before the judge) and 100.3(E)(1) (requiring that a judge recuse when his or her impartiality might reasonably be questioned).

I dissent from this finding of misconduct because I do not believe that an improper business relationship exists when a part-time judge represents a candidate, not yet in office, in an election law matter that does not relate in any way to the matters at issue later, when the former client appears before his former counsel – the judge. *See* Adv. Op. 02-68 of the Advisory Committee on Judicial Ethics (permitting a part-time judge to represent a candidate for election to public office provided the judge avoids involvement in the candidate's political campaign and is fairly compensated); and *Matter of Voetsch*, 2006 Annual Report ___ (Comm. on Judicial Conduct) (judge engaged in business dealings with the family of a defendant he had recently sentenced and in a matter involving property that was subject of a holdover proceeding over which he had presided). Moreover, I think that no one could reasonably believe – and there is no evidence – that as a result of this past relationship, respondent conveyed the impression that the District Attorney was in a special position to influence him. The $10,000 payment from the campaign committee was for past work and could not have been viewed as a factor in any of respondent's decisions in low level criminal matters during the few weeks it was a debt. The main point is, however, that this was not an ongoing business relationship and the fact of respondent's prior one-time representation was well-known. Peculiar to this case is the circularity of the alleged offense: if respondent had lost the recount for his client-elect, then his former client would have never appeared before him as District Attorney and there would be no arguable misconduct. Our misconduct findings should not hinge on whether a representation was successful.

Certainly, town justices know, and have all sorts of relationships with, many who appear before them. More is required than a single, short, attorney-client relationship to disqualify a judge who later sits on matters unrelated to that relationship. *E.g.*, *Matter of Jacon*, 1984 Annual Report 99 (Comm. on Judicial Conduct) (judge granted a favorable disposition to a defendant who was the judge's long-time client, after negotiating the disposition himself); *Matter of Latremore*, 1987 Annual Report 97 (Comm. on Judicial Conduct) (judge disposed of numerous cases involving clients of his insurance business); *Matter of Hayden*, 2002 Annual Report 105 (Comm. on Judicial Conduct) (judge presided over a small claims case involving a party who was the judge's client in a matter involving the same incident). That is why the rules require a

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to buy votes – conduct that is plainly impermissible and a potential violation of Election Law §17-142.

"continuing business relationship" (Rules, §100.4[D][1][c]) or "a special position to influence" the judge (Rules, §100.2[C]).

In addition, in this case, the lawyer appearing before the judge represented the State in his official capacity, rather than as an individual with personal interests. The District Attorney and his assistants appear before courts very differently than ordinary litigants. It is far more reasonable to conclude that the individual criminal cases and their particular facts determine outcomes rather than any residual prejudice in favor of the individual who, on behalf of the State, employs the assistant district attorney appearing in any particular case. This is a situation very different from civil litigants appearing before a judge who has previously represented one of them, where there is some continuing duty of loyalty, arguably, at stake. In any event, I cannot conclude that respondent conveyed the appearance in any way that he was swayed in favor of his former client's office under these circumstances. And, of course, there is no allegation that he was actually influenced.

Charge III accuses respondent of improper partisan political activity violating Sections 100.1, 100.2(A), and 100.5(A)(1)(c), (d) and (e) of the Rules, based on a trip he took to Florida at the behest of his client, the Bush for President committee, to assist in the Bush-Gore recount in November 2000. At the time, he was a town justice who remained a high profile election lawyer. As many other election lawyers did at the time, respondent went where the action was, to aid his client. Once there, he admits that he was part of a nationally televised brief demonstration calling for the Florida recount to be performed in the presence of the press.

A majority of the Commission votes not to sustain this charge. I agree that this is the right result for the simple reason that respondent's partisan political activities in Florida are protected by his First Amendment rights notwithstanding his part-time judgeship. After all, he was permitted to have the Bush campaign committee as a client (*see*, Adv. Op. 02-68) while he was a judge. So it would be strange indeed if he were punished for expressing his own views, or his client's views, during a demonstration in Florida, just because CNN happened to cover it for a New York audience. Were it otherwise – if Section 100.1 or 100.2(A) or 100.5(A)(1)(c), (d) and (e) were applied to prohibit this conduct – then such application would suffer from constitutionally fatal underinclusiveness, in that it would restrict unambiguous First Amendment rights within a regulatory scheme that, at the same time, allowed the practice of election law by a sitting part-time judge on behalf of unadorned political entities. It seems to me fairly clear that such a result could not pass constitutional muster. *See infra* at pp. 13-15; and *Matter of Farrell*, 2005 Annual Report 159 and *Matter of Campbell*, 2005 Annual Report 133 (Comm. on Judicial Conduct) (Emery Concurring Opinions).

Charge IV accuses respondent of violating Sections 100.1, 100.2(A) and 100.5(A)(1)(c),(d),(f) and (g) of the Rules, prohibiting partisan political activity, use of his name in connection with the activities of a political organization, speech on behalf of a political party and attending a political gathering. These charges flow from a speech respondent gave at the Monroe County Conservative Party fund-raising dinner in May 2001, describing his Florida presidential recount effort on behalf of the Bush campaign. He asserts that, at that time, he was running for the Supreme Court seat in Albany he later won. There is no dispute that he was introduced to the gathering as a candidate for the Supreme Court. There is also no dispute that

he had not yet formed a campaign committee. Apparently, the press had reported that he was running, though he had not "announced" his candidacy at a formal press conference.

I dissent from the Commission's majority vote to sustain the charge for the simple reason that whatever formalities becoming a candidate may entail – the Rule requires either "a public announcement of candidacy" or "authoriz[ing] solicitation or acceptance of contributions" (Rules, §100.0[A]) – these activities are not sufficiently defined anywhere by the rules or precedent to warn judicial candidates, who consider themselves running, that they may not engage in their First Amendment right to campaign. What constitutes a "public announcement of candidacy" is apparently unclear, since Commission counsel argued in this case that respondent was not an announced candidate notwithstanding that he was introduced as a candidate at this major political dinner. Either because the rules are unclear or because any rule that did prohibit such campaign activity in seeking judicial office would unequivocally violate his First Amendment rights after *Republican Party of Minnesota v. White*, respondent's speech, attendance and activities in support of the Conservative Party (even outside of the geographical location of his election) cannot be misconduct.

Becoming a candidate is not a talismanic act. Publicly declaring or forming a campaign committee has little significance for constitutional purposes in the context of multiple other undisputed campaign activities in the face of an impending election for office. It may be that the state can regulate who is, and who is not, a declared candidate by publishing relevant and realistic specific rules. But it has not done so. In the absence of carefully crafted rules, the benefit of the doubt must go to a person who undisputably was seeking the office at the time of the campaign activities we seek to circumscribe. This makes sense as a matter of fairness and it is compelled as a matter of constitutional right. In fact, at the time of the Monroe County speech, it is undisputed that respondent was seeking the office. He had sought appointment from the Governor to the unfilled position just three months earlier. The press had apparently reported that he was running and he had done nothing to deny the reports. And he was introduced as a candidate when he took the podium.

The majority states that respondent's conduct was wrong regardless of whether he was a candidate since he "permitt[ed] his… name to be used in connection with [an] activity of a political organization" (Rules, §100.5[A][1][d]). Once again, such a prohibition on a declared candidate is plainly foreclosed by *Republican Party of Minnesota v. White*, particularly in a system that permits partisan judicial elections. *See Republican Party of Minnesota v. White*, 416 F3d 738 (8th Cir 2005) (decision on remand), *cert. denied*, __ US __, 126 S Ct 1165, 163 L Ed2d 1141 (2006). It is hard to conceive of a more dramatic example of the constitutional infirmity of underinclusiveness than a rule which allows a judge to campaign and run on a party line, with a slate of party nominees, and, at the same time, prohibits the judicial candidate from "permitting his…name to be used in connection with any activity of a political organization" during a campaign for office. *See*, discussion of *Minnesota v. White*, *infra* at pp. 13-15; *see also*, *Matter of Farrell* and *Matter of Campbell* (Emery Concurring Opinions), *supra*.

In the first place, it appears to be an oxymoron, if it is read literally. In the real world of campaigns, it certainly is implausible to pretend that this Rule can be rationally applied. At best, it is double-speak, worthy of Kafka or Carroll. In any event, to discipline respondent for this core First Amendment activity when he plainly was a candidate is unfair and unconstitutional.

Charge I of the Supplemental Formal Written Complaint was not sustained by the referee, and the Commission unanimously agreed, dismissing this allegation. Though I agree with this result, it is in some sense the most remarkable disposition of any among the myriad charges against respondent. The Commission originally charged respondent with violating Sections 100.1, 100.2(A) and 100.5(A)(4)(a) of the Rules mandating judicial integrity, high standards, independence, promotion of public confidence and avoidance of any appearance of impropriety. It is alleged that respondent's campaign payments of $5,000 each to Thomas S. Connolly, Jr. and Jane McNally gave the appearance of improper *quid pro quos* for their respective nominations of respondent at the Independence and Democratic judicial nominating conventions.

The undisputed facts were that Connolly was a media consultant who was retained by respondent during the summer before the election to reserve electronic media advertising time in the event he had a contested race. Perhaps not so coincidentally, Connolly also happened to be the chair of the Rensselaer County Independence Party. It is common knowledge that no candidate can win contested judicial races in this district (and many others) without two ballot lines, by virtue of the nomination of two parties. *See, Lopez Torres v. NYS Board of Elections, supra* at p. 2; *see also,* testimony of Gerald Jennings in this proceeding (Tr. 466-76). What raised suspicion in this case and led to the Commission's charge of misconduct was that the media services Connolly performed for the $5,000 he was paid by the Spargo campaign were preliminary, at best, since there was no campaign after respondent secured the cross-endorsements. Moreover, Connolly issued an invoice for this amount on October 9, 2001, one day after he nominated respondent for, and respondent won, the Independence Party ballot line at that party's judicial nominating convention.

The Jane McNally story is somewhat similar. McNally was a long-time supporter of respondent's, though she was a Democrat. She had volunteered to help respondent's campaign for Supreme Court and, as once again luck would have it, she was also a delegate to the Democratic judicial nominating convention in 2001. At the convention, she nominated respondent to be the Democratic Party choice, and he won this nomination by the slimmest of margins – 20 to 18. Subsequently, respondent's campaign paid McNally an unexpected (Tr. 134) $5,000 bonus for her "volunteer" work.

I describe these events not to cast doubt on the referee's and our unanimous finding that no *quid pro quo* was proven. There simply is no proof that either of these Spargo supporters or respondent himself did anything wrong. And that is in fact my point.

I find it ironic that the Rules and cases condone the indisputably corrosive appearance that these payments create and, at the same time, punish $5.00 coupon giveaways and buying drinks at the bar. The Rules prohibit judicial candidates from making a campaign contribution to a political party or other candidate (Rules, §100.5[A][1][h]); yet, we allow candidates to receive substantial contributions from the very party officials they cannot support, as well as from the lawyers whose livelihoods depend on the judges who receive their contributions (Rules, §100.5[A][5]). Judicial candidates cannot even anonymously participate in a phone bank (*see, Matter of Raab*, 100 NY2d 305 [2003]), though they can publicly buy tickets to, and attend, political party functions (Rules, §100.5[A][2][v]). Judicial candidates can join and campaign on a political party slate (Rules, §100.5[A][2][iii]); yet, we routinely discipline judicial candidates who "endorse" any other candidate (Rules, §100.5[A][1][e]; *see, e.g., Matter of Campbell*, 2005

Annual Report 133 [Comm. on Judicial Conduct]; *Matter of Crnkovich*, 2003 Annual Report 99 [Comm. on Judicial Conduct]; *Matter of Cacciatore*, 1999 Annual Report 85 [Comm. on Judicial Conduct]; *Matter of Decker*, 1995 Annual Report 111 [Comm. on Judicial Conduct]).

In effect, the misconduct Rules regulating judicial campaigns are a patchwork of compromises and *ad hoc* judgments which fail to address the central causes of the unseemliness of judicial campaigns: party control and the candidate's need to raise money. We allow our judicial elective system to metastasize the appearance of judgeships for sale and judgeships under party control by obliviously punishing penny ante partisan and financial campaign activities -- nipping around the edges of the real problem -- while, at the same time, like the proverbial ostrich, we permit judicial candidates to engage in financial and partisan activities which stain the majesty of their function.

This is precisely what the Supreme Court forbade in *Republican Party of Minnesota v. White*, 536 US 765 (2002). *White* held that the First Amendment forbids a state from compelling judicial candidates to run for office and then unnecessarily restricting the scope of their core political expression: "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles" (*Id.* at 788). As Justice O'Connor put it in her concurring opinion:

> [By] cho[osing] to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system . . . the State has voluntarily taken on the risks to judicial bias . . . . As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges. *Id*. at 792

See also id. at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech"). Applying strict scrutiny, *White* made unmistakably plain that in order to be constitutional, rules regulating judicial campaign activity can be neither overinclusive nor underinclusive -- that is, they can neither burden more speech than is necessary, nor leave unregulated those activities that directly undermine the State's supposedly compelling interest in restricting speech. New York's patchwork quilt approach -- half lion and half ostrich -- comes nowhere close to surviving the searching scrutiny required by *White*.

One has to admire the ranks of New York State Supreme Court Justices for maintaining their composure, their high standards of ethics and their independence in the face of such an onslaught of corrupting influence. It is almost impossible to imagine rising above the cynicism and depression which a system such as ours must engender in those whose legal idealism leads them to the financial sacrifice of serving as an elected judge. But scores of excellent judges do it. How they maintain a sense of moral and ethical equilibrium when they are forced to curry

favor with, and be obsequious to, self-important political martinets, as well as, unavoidably, solicit contributions from the practitioners whose cases they judge, is far more than I can fathom.

To make matters worse, this Commission subjects judicial candidates to the State's confusing and ill-conceived campaign rules during the very season when candidates are required to pander to the powerful. This baroque dichotomy between their sublime aspirations of judicial excellence and the ridiculous rules to which they have to conform while they pirouette to the demands of politicians and titans of the bar must bend the minds of the best and idealistic judicial candidates like a pretzel. We are destroying the very institution we are trying to save. And the public, for all its self-preservative ignorance of the specifics, knows well enough what is going on.

Hopefully reform is in the offing, thanks to the Chief Judge, Dean John Feerick, the Brennan Center for Justice, and U.S. District Court Judge John Gleeson. *See*, "Panel Recommends Overhaul Of Nominating Conventions," NYLJ, 2/7/06 (p. 1); *Lopez Torres v. NYS Board of Elections*, *supra*. But it cannot come soon enough for those of us who care about New York's judiciary and its vaunted legal system. I, for one, hope that reform is not patchwork and political, perpetuating the scheme of requiring judges to run for office between the Scylla and Charybdis of currying favor, raising money and campaigning, on the one hand, and pretending to maintain the majesty of the robes while a candidate on the other. This is a cruel joke, the price for which we all pay in the pervasive cynicism about our legal system. At least an appointive system has only one-half of the vise that squeezes elected judges – currying favor with leaders – and takes unseemly campaign antics out of our courts and off the streets. As long as elections are associated with parties, nominations, contributions, and public campaigns on hot button issues, our judiciary will never be able to rise much above its current bipolar state. As a half measure, though, at least this Commission can struggle to rationalize the application of New York's judicial campaign rules so as to lessen the burden on the current crop of judicial candidates.

In this case, tellingly, aside from the last galaxy of charges, the majority finds that respondent's misconduct is limited to dispensing $5.00 coupons and drinks during a campaign, representing a DA-elect who later appeared before him, and speaking at a political fund-raiser before his candidacy was "officially" declared. By any stretch, these are not removable offenses, more like a slap on the wrist. Nonetheless, we are voting to remove him, *as he concedes we must*,[2] because we find that he was responsible for personally soliciting funds to defray his legal expenses in litigating his challenges to our authority to discipline him for these minor violations. *See*, *Spargo v. Commission*, 351 F3d 65 (2nd Cir 2003); *Spargo v. Commission*, 23 AD3d 808 (3d Dept 2005). His tragic overzealousness can only be characterized as a self-inflicted wound. The story is not pretty.

By the fall of 2003, respondent owed his lawyers $140,000 for litigating against the Commission. His friends had started a defense fund and collected $11,200. Respondent vehemently asserts that he had no knowledge of and no role in raising and attempting to raise

[2] At the oral argument, respondent stated: "…I'm trusting that you don't find that I solicited money. Frankly, if you find that, you must remove me" (Oral argument, p. 77).

funds. Yet the referee found by clear and convincing evidence that he did. And no matter how much of the benefit of the doubt I give to respondent, I am constrained to agree.

The Commission opinion convincingly sets forth facts that make it clear that respondent arranged a luncheon to raise money for his defense from several lawyers who had many cases pending before him, including one case in which the lawyers at the luncheon were defendants. One lawyer in this group, without any apparent reason to lie, testified that respondent repeatedly, personally solicited him, during a court conference, on the telephone and on a cell phone call, during which respondent informed him that he and another judge, with whom respondent was friendly, were assigned for the next year to continue on this lawyer's cases. This lawyer said that respondent emphasized that the other judge – respondent's friend – was to take over the caseload of the judge handling that lawyer's pending personal divorce. Respondent acknowledges making this strange call, no matter what its exact content. A court clerk corroborates the fact, though not the content, of the *ex parte* conversation after a court conference. And the lawyer's reasonably prompt report to the Commission of the solicitations, with no ulterior motive of any type, as well as the very real possibility of severe adverse personal and career consequences to him, corroborate his credibility and confirm the referee's and Commission's unanimous conclusions. Regrettably, this very thoroughly developed record leaves no room for an alternative innocent explanation of these events.

Thus, a finding of very serious misconduct is required for violating, at a minimum, Sections 100.2(C) and 100.4(D)(1)(a) of the Rules, which prohibit lending the prestige of judicial office for personal gain and engaging in personal financial dealings that could be perceived as exploiting judicial office. Therefore, I am constrained to concur in the result.

Dated: March 29, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **KAREN M. UPLINGER**, a Judge of the Syracuse City Court, Onondaga 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
Emil M. Rossi for the Respondent

The respondent, Karen M. Uplinger, a judge of the Syracuse City Court, Onondaga County, was served with a Formal Written Complaint dated August 17, 2005, containing two charges. Respondent filed an answer dated October 17, 2005.

On March 3, 2006, 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 March 9, 2006, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Syracuse City Court, Onondaga County since January 1, 2002.

As to Charge I of the Formal Written Complaint:

2. On or about June 2, 2004, respondent presided over *People v. Frederick H. Lawton*, in which the defendant was charged with Petit Larceny. Onondaga County Assistant District Attorney Christy Caratozzolo was the prosecutor. Tylan Bozeman was defense counsel.

3. The proceeding in *People v. Frederick H. Lawton* began at about 9:30 A.M. with discussions between respondent, Ms. Caratozzolo and Mr. Bozeman. *Voir dire* and jury selection concluded around 11:00 A.M.

4. The proceeding continued with instructions to the jury by respondent and opening statements by the Assistant District Attorney and defense counsel.

5. Prior to the testimony of the first witness, respondent stated that she preferred that the proceeding progress until 1:00 P.M. before taking a break. Respondent asked Ms. Caratozzolo if she was prepared to proceed, and Ms. Caratozzolo said that she had one witness whose testimony would be quick. Respondent told Ms. Caratozzolo, "…lets see how it goes" and "we'll play it by ear." Ms. Caratozzolo sent Michael Bosak and David Nolan, her second and third witnesses, to lunch, advising them to return by 1:30 P.M. Ms. Caratozzolo did not tell this to respondent.

6. At the conclusion of the first witness's testimony at about 11:45 A.M., Ms. Caratozzolo checked to see if her next witnesses were available. The witnesses were not available and respondent learned that they were not in the building. Ms. Caratozzolo advised respondent that the witnesses had been present at 10:00 A.M. Respondent recessed the proceeding for a few minutes, and at about 12:10 P.M., after a short discussion with counsel, she recessed again for lunch and to handle other court matters until 3:00 P.M.

7. Proceedings reconvened at 3:00 P.M. Mr. Bosak and Mr. Nolan appeared before respondent and the following ensued:

> THE COURT: I don't know what happened this morning, and I'm going to ask you a couple questions, but I'll tell you, I can hold you in contempt of court right now, and you don't have permission to go anywhere until I excuse you, that means to the bathroom. If I have to get a deputy down here to watch the witness room, I will. I want to know where both of you were this morning, and why you left this building?
>
> MR. BOSAK: Your Honor, my name is Mike Bosak. I did 26 years in law enforcement.
>
> THE COURT: I appreciate that.
>
> MR. BOSAK: The DA advised us that we wouldn't be heard before noon.
>
> THE COURT: Who at the DA's office?
>
> MR. BOSAK: Right here.
>
> THE COURT: She said you could go to lunch.
>
> MS. CARATOZZOLO: I said I didn't believe we would be going past noon.
>
> THE COURT: All right, and then you said you were three blocks away, and it took you 45 minutes to get back.
>
> MR. BOSAK: We were having lunch.

THE COURT: I ask where?

MR. BOSAK: It was an Irish restaurant over here by the Armory.

MS. CARATOZZOLO: Judge, they are not from the area.

MR. BOSAK: I'm from New York City, your Honor.

THE COURT: But I am really not happy. This cost me – don't argue with me. If you have been in law enforcement that long, you know how trials go. You know they can go one way or the other, and I cannot imagine that you would be that far away from this building and not get back here in at least 45 minutes or an hour.

MR. BOSAK: I'm sorry if we offended the Court.

THE COURT: I appreciate your apology.

MR. NOLAN: I apologize to the Court.

THE COURT: You sit out there in the witness room until called. You don't go to the bathroom without permission, understand?

MR. BOSAK: We won't, your Honor.

8. The witnesses were escorted by Ms. Caratozzolo to the witness room where they waited to be called. After about 30 minutes, the witnesses were advised that they could leave because a mistrial had been granted on grounds having nothing to do with them. The witnesses were not actually denied the use of bathroom facilities, and they never asked to use such facilities.

9. Respondent acknowledges that her actions toward the witnesses were impatient, undignified and discourteous.

As to Charge II of the Formal Written Complaint:

10. On or about October 13, 2004, respondent presided over *People v. Artis Bey*. The defendant had been convicted of Assault, Third Degree, and was before respondent for sentencing. Onondaga County Assistant District Attorney Darlene Donald was the prosecutor. Oscar McKenzie was defense counsel.

11. Pursuant to the regular practice in Syracuse City Court, Mr. Nushwat, the victim, began reading a statement to the court. Respondent repeatedly interrupted Mr. Nushwat. At one point, as Mr. Nushwat was reading his statement, respondent said to him in a loud, angry voice, "I don't believe half of anything you said so I'd appreciate it if you'd sit down."

12. At another point, as Mr. Nushwat was reading his statement, respondent said to

the defendant: "You don't have to listen to this if you don't want to."

13. When Mr. Nushwat concluded his statement, respondent ordered him to leave the courtroom. When Ms. Donald objected, respondent sharply told Mr. Nushwat to sit in the back of the courtroom, stating: "Please leave the courtroom… Please get away from here. Get away from this bench. Sit in the back."

14. During her discussion of the defendant's sentence, respondent compared Mr. Nushwat to "Tommy Flanagan," a fictitious pathological liar played by Jon Lovitz on the television program "Saturday Night Live," by stating in a mocking voice that was intended to be an impression of the "Tommy Flanagan" character:

> [T]his man testified *first* that he did not follow him into the elevator. *Oh yes*, then he testified that he did follow him into the elevator. *Then* he testified to something else, and *then* he testified to some – I thought I was watching Saturday Night Live.
>
> * * *
>
> I think if you listen to Jon Lovitz, you might get an impression of how I felt when I was listening to this testimony.

15. Respondent acknowledges that her treatment of Mr. Nushwat was insulting and demeaning. Respondent understands that it does not excuse her behavior and actions but wishes the Commission to know that at the time of the *Bey* sentencing proceeding she had been under stress stemming from the care that she was providing to her 94 year old mother for the two prior days resulting from an accidental fall and hospitalization.

16. After the proceeding, respondent recognized that her actions were inappropriate. Respondent immediately sought counsel from a superior court judge. In December 2004 respondent was contacted on Mr. Nushwat's behalf by Charles Keller, Esq., who discussed Mr. Nushwat's objection to the proceeding, and that all he wanted was an apology. Respondent agreed to apologize to Mr. Nushwat, but Mr. Nushwat did not thereafter have further contact with Mr. Keller and respondent had no further contact with Mr. Nushwat. Respondent on her own volition attended an educational session designed by OCA for dealing with control in the courtroom.

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)(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 insofar as they are consistent with the above findings, and respondent's misconduct is established.

Every judge is required to be "patient, dignified and courteous" to litigants and others with whom the judge deals in an official capacity (Rules, §100.3[B][3]). The record here establishes that on two occasions respondent exhibited rude and demeaning conduct toward witnesses in proceedings before her.

In June 2004 respondent sternly admonished two witnesses who had been unavailable to testify earlier that day. Unbeknownst to the judge, the witnesses had left after being told by the prosecutor that they could go to lunch. Angry at the delay occasioned by the witnesses' absence, respondent threatened to hold the witnesses in contempt, ordered the witnesses to be confined in a witness room until they testified, and forbade them from using the bathroom facilities without her permission. Even after learning that the witnesses had been absent with the prosecutor's permission, respondent reiterated her order confining them to the witness room and prohibiting them from using the bathroom without permission. Whether or not respondent meant her statements about not going to the bathroom without permission to be taken literally, her comments were undignified and discourteous, as respondent has acknowledged.

In another case four months later, respondent demeaned and mocked the victim of an Assault, who was delivering a statement prior to the sentencing. Respondent repeatedly attempted to curtail the victim's statement, mockingly compared him to a comedic character, and directed him to leave the courtroom when he finished speaking although he had a right to remain for the sentencing; she permitted him to stay after the ADA objected. While a judge has considerable leeway at sentencing to explain the reasons for the sentence imposed, respondent's insulting, demeaning comments to and about the victim in the case were completely gratuitous. *See*, *Matter of Hanophy*, 1998 Annual Report 135 (Comm. on Judicial Conduct) (judge was censured for making inappropriate statements at sentencing in a highly publicized case, including discourteous remarks about the defendant's parents and gratuitous comments about the British legal system).

In mitigation, we note that respondent has acknowledged that her comments were inappropriate and that, subsequent to the events described above, she voluntarily attended an educational session sponsored by the courts for dealing with control in the courtroom.

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

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

Mr. Coffey and Mr. Emery dissent and vote to reject the Agreed Statement on the basis that the proposed disposition is too harsh and that respondent should be admonished.

Ms. DiPirro and Judge Luciano were not present.

Dated: March 15, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JAMES E. VAN SLYKE**, a Justice of the New Hartford Town Court and New Hartford Village Court, Oneida County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

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

The respondent, James E. Van Slyke, a justice of the New Hartford Town Court and New Hartford Village Court, Oneida County, was served with a Formal Written Complaint September 14, 2006, containing one charge. Respondent filed a verified answer dated October 18, 2006.

On November 28, 2006, 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 December 7, 2006, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a justice of the New Hartford Town Court since 1985, and justice of the New Hartford Village Court since 1986. He is not an attorney.

2. On or about September 27, 2005, respondent held a bench trial in *People v. Sebastiano Pagano,* in which the defendant was charged with Harassment, 2nd Degree. The defendant was represented at the trial by attorney Carl Scalise, and the People were represented by Michael Coluzza, Esq.

3. As set forth in the transcript annexed as Exhibit A to the Agreed Statement of Facts, respondent summarily found Mr. Pagano in contempt of court and imposed a $50 fine, without having warned Mr. Pagano concerning his allegedly contemptuous conduct or provided him with an opportunity to desist or to make a statement on his own behalf. Thereafter, respondent failed to issue an order stating the facts which constitute the offense, as required by Section 755 of the Judiciary Law.

4. When Mr. Scalise attempted to make a record, respondent summarily found him in contempt of court and imposed a $50 fine, without having warned Mr. Scalise concerning his allegedly contemptuous conduct or provided him with an opportunity to desist or to make a statement on his own behalf. Thereafter, respondent failed to issue an order stating the facts which constitute the offense, as required by Section 755 of the Judiciary Law.

5. 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 decisional 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), 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. Charge I of the Formal Written Complaint is sustained, 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; *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 when, in *People v. Pagano*, he held both the defendant and his attorney in summary contempt.

It was respondent's obligation to warn the alleged contemnors that their conduct could result in a summary contempt holding and to give them an opportunity to desist from the conduct, and he has stipulated that he failed to do so. The transcript of the proceeding indicates that, without issuing an appropriate warning, respondent held the attorney in contempt for arguing that he had a right to make a response to the prosecutor's summation. An attorney has a right to attempt to assert his client's interests in an appropriate manner, and it would be improper for a judge to use the contempt power to punish him for doing so. *See*, *Matter of Hart*, 7 NY3d 1 (2006) (judge was censured for holding a litigant in contempt because his attorney attempted to make a record of an out-of-court encounter between the litigant and the judge). Moreover, respondent also owed the defendant a clear warning that his actions could result in a contempt citation, notwithstanding that respondent had earlier expressed annoyance at the defendant's comments and behavior.

The omission of such warnings is not simply an error of law. Had the appropriate warnings and opportunity to desist been provided, it might not have been necessary for respondent to exercise the awesome power of summary contempt in an effort to maintain order.

Additionally, in neither case did respondent issue an order "stating the facts which constitute the offense and which bring the case within the provisions of this section," as required by Section 755 of the Judiciary Law. Such an order makes possible an appeal of a summary contempt conviction.

Respondent's failure to adhere to mandated contempt procedures constitutes misconduct warranting public discipline. *See Matter of Hart, supra*; *Matter of Lawrence*, 2006 Annual Report 206 (Comm on Judicial Conduct); *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).

In mitigation, we note that the defendant and his attorney did not suffer a loss of liberty as a result of respondent's actions (*compare, Matter of Mills, Matter of Teresi* and *Matter of Recant, supra*). We also note that respondent commits himself to exercise restraint and to observe scrupulously the applicable statutory and decisional mandates should he ever have occasion to exercise the summary contempt power in the future.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: December 18, 2006

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DAVID M. WIATER**, a Justice of the Batavia Town Court, Genesee County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Marvin E. Jacob, Esq.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Michael Mohun for the Respondent

The respondent, David M. Wiater, a justice of the Batavia Town Court, Genesee County, was served with a Formal Written Complaint dated December 14, 2005, containing one charge. Respondent filed an answer dated January 25, 2006.

On May 22, 2006, 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 22, 2006, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Batavia Town Court, Genesee County since January 1, 1993.

2. On or about April 6, 2002, David Ksiezopolski was charged with No Front Windshield, a violation of Section 375.12-a of the Vehicle and Traffic Law. The case was returnable before respondent on April 22, 2002. Mr. Ksiezopolski did not appear in court on April 22, 2002, or enter a plea by mail. As a consequence of Mr. Ksiezopolski's failure to appear, respondent notified the Commissioner of the Department of Motor Vehicles to suspend his driver's license pursuant to Sections 510.4(a) and 514.3(a) of the Vehicle and Traffic Law.

3. In August 2002 Mr. Ksiezopolski was advised by the Department of Motor Vehicles that his driver's license was to be suspended in 30 days for failure to answer the ticket and that to avoid such license suspension, he would have to appear in the Batavia Town Court.

4. On or about September 14, 2002, Mr. Ksiezopolski telephoned the Batavia Town Court and left a message on the court's answering machine, asking to be contacted about his ticket and stating that he would file a notice of claim against the town if he was not contacted.

5. On or about September 16, 2002, respondent received a note from his court clerk indicating that Mr. Ksiezopolski had called the court and left a "nasty" message concerning his suspension. Respondent never listened to the message Mr. Ksiezopolski had left on the court's answering machine.

6. On September 16, 2002, respondent contacted Mr. Ksiezopolski by telephone and in the course of their discussion spoke to Mr. Ksiezopolski in a rude, harsh and nasty tone, making the following statements:

Judge Wiater:	It's ridiculous, very insulting and nasty message on my machine, which I am not pleased with. Do you understand me? Do you have any idea of who you left this message for? Do you realize who I am?
Mr. Ksiezopolski:	I've tried to get in touch with you for a whole month, sir.
Judge Wiater:	You listen to me.
Mr. Ksiezopolski:	Yes, sir.
Judge Wiater:	Because I think I'm going to send you to the Genesee County Jail. What do you think about that?
Mr. Ksiezopolski:	What would I have said on that tape that would have--
Judge Wiater:	You're calling me and leaving me, telling me what I'm supposed to do? Do you have any idea of who you're talking to? Do you?
Mr. Ksiezopolski:	Well, you're trying to make that point across, sir, but I--
Judge Wiater:	--Do you know who you're talking to?
Mr. Ksiezopolski:	Sir, I didn't say anything that would warrant me going to jail. I requested--
Judge Wiater:	--Listen to me, do you know who you're talking to--
Mr. Ksiezopolski:	--I requested a copy of the--
Judge Wiater:	--who are you talking to? Who are you--
Mr. Ksiezopolski:	--you said--
Judge Wiater:	Do you understand? I'm going to hang up and I'm going to do a warrant for you. You're interrupting me. Who are you talking to?
Mr. Ksiezopolski:	You won't let me answer you.
Judge Wiater:	Here's what I'm going to do. What's your address?
Mr. Ksiezopolski:	My address is 434 7th Street, Buffalo, New York.
Judge Wiater:	Give me that pen. 434--
Mr. Ksiezopolski:	--7th Street--
Judge Wiater:	--what street?
Mr. Ksiezopolski:	7th Street, Buffalo, New York.
Judge Wiater:	7th Street, um, huh.
Mr. Ksiezopolski:	And you're Judge Wiater?
Judge Wiater:	I think I'm going to send somebody down to your house in a short time.
Mr. Ksiezopolski:	Okay, sir, okay, I'll be here.
Judge Wiater:	Next time when you call--
Mr. Ksiezopolski:	--yes, sir--
Judge Wiater:	--make sure you know who you're talking to.

Mr. Ksiezopolski: Sir, I have been--
Judge Wiater: --You're talking to a New York State Judge--
Mr. Ksiezopolski: --sir, sir--
Judge Wiater: --not somebody next door--
Mr. Ksiezopolski: --I did not leave a threat--
Judge Wiater: --or some of these friends that you hang around with.
Mr. Ksiezopolski: I did not leave a threat.

* * *

Judge Wiater: Well, what do you want to ask the nice judge now?
Mr. Ksiezopolski: Sir, I had been in a car accident. My truck was taken and impounded in Batavia that day of the car accident.

* * *

Judge Wiater: I look forward to meeting you. Do you understand that?
Mr. Ksiezopolski: Yes, sir.
Judge Wiater: Your name, your first name again is what?
Mr. Ksiezopolski: David John.
Judge Wiater: David, I'd probably bring a couple thousand dollars in bail money when you come down too, okay?
Mr. Ksiezopolski: Why, sir?
Judge Wiater: Do you have the address of this court?
Mr. Ksiezopolski: It is written here, 3833--
Judge Wiater: --That's the one, yup--
Mr. Ksiezopolski: -- W. Main Street--
Judge Wiater: --you're right. I've got to get going, but listen when you come in, bring a couple thousand for some bail money. Thank you very much for the nice phone message you left the judge, okay?

7. It is not respondent's practice to set bail or to commit defendants to jail in lieu of bail in traffic violation cases. Respondent acknowledges that he had no basis in law to threaten to incarcerate Mr. Ksiezopolski in the Genesee County Jail.

8. Mr. Ksiezopolski did not appear in court, and his license remained suspended until respondent vacated the suspension in September 2005, because of his having recognized that his statements in their prior discussion may have discouraged Mr. Ksiezopolski from appearing.

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

After being told by his court clerk that a defendant had left a "nasty" message about his license suspension on the court answering machine, respondent reacted in an inappropriate, intemperate manner. Without even listening to the message, respondent telephoned the defendant and, while repeatedly referring to his judicial office, angrily berated him and

threatened to send him to jail. Respondent's lengthy harangue was laced with threats, sarcasm and repeated references to his judicial power. Although respondent had no basis in law to incarcerate the defendant, who had failed to respond to a ticket for an equipment violation, he told the defendant that he was about to issue a warrant and was thinking of sending the defendant to jail. As the defendant attempted to explain that he had not done anything to warrant jail, respondent repeatedly stated, "Do you know who you're talking to? … You're talking to a New York State judge." Respondent told the defendant twice that he should "bring a couple thousand dollars in bail money," and he added sarcastically, "I look forward to meeting you. Do you understand that?"

Respondent's angry, threatening diatribe was a grossly inappropriate response to the message left by the defendant. Although the court clerk had described the defendant's message as "nasty," the record indicates that the defendant merely had asked the court to contact him and said he would sue the town if he were not contacted. (The defendant told the judge he had been trying for a month to contact the court.) Significantly, respondent did not even know what the defendant had said in the message before responding so injudiciously, and the defendant's attempts to explain that he had done nothing to warrant jail did not prompt respondent to determine for himself exactly what the defendant had said. Respondent's conduct was contrary to his duty as a judge to observe high standards of conduct at all times, both on and off the bench, and to be patient, dignified and courteous to litigants and others with whom he deals in his judicial capacity (Rules Governing Judicial Conduct, §100.3[B][3]).

Even if provoked by a perceived lack of respect for the court, respondent's conduct cannot be excused. As the Court of Appeals stated, "respect for the judiciary is better fostered by temperate conduct [than] by hot-headed reactions to goading remarks." *Matter of Cerbone*, 61 NY2d 93, 95-96 (1984).

The consequences of respondent's conduct were significant. Although respondent never acted on his threats to issue a warrant and send the defendant to jail, the defendant's license was suspended as a result of his subsequent failure to appear. Not until three years later did respondent vacate the suspension, after belatedly recognizing – apparently after being contacted by the Commission – that his threatening statements may have discouraged Mr. Ksiezopolski from appearing.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Jacob, Judge Peters and Judge Ruderman concur.

Judge Luciano was not present.

Dated: June 29, 2006

Statistical Analysis of Complaints

2007 Annual Report

New York State
Commission on Judicial Conduct

COMPLAINTS PENDING AS OF DECEMBER 31, 2005

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		21	22	9	7	1	9	69
DELAYS		4	6	5	4	0	0	19
CONFLICT OF INTEREST		3	3	3	1	0	1	11
BIAS		5	4	1	0	1	0	11
CORRUPTION		7	3	0	0	0	2	12
INTOXICATION		0	0	0	0	0	0	0
DISABILITY/QUALIFICATIONS		0	0	0	0	1	0	1
POLITICAL ACTIVITY		8	9	2	0	0	4	23
FINANCES/RECORDS/TRAINING		6	3	10	3	0	1	23
TICKET-FIXING		0	1	1	0	0	0	2
ASSERTION OF INFLUENCE		5	2	1	1	0	0	9
VIOLATION OF RIGHTS		12	13	8	4	3	0	40
MISCELLANEOUS		0	1	0	0	0	0	1
TOTALS		71	67	40	20	6	17	221

*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 2006

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	692							692
NON-JUDGES	266							266
DEMEANOR	114	55	10	1	1	0	0	181
DELAYS	28	11	4	4	0	0	0	47
CONFLICT OF INTEREST	20	23	7	2	0	0	0	52
BIAS	35	8	1	1	0	0	0	45
CORRUPTION	19	4	0	0	0	0	0	23
INTOXICATION	1	2	0	0	0	0	0	3
DISABILITY/QUALIFICATIONS	0	0	0	0	0	0	0	0
POLITICAL ACTIVITY	10	16	3	0	0	0	0	29
FINANCES/RECORDS/TRAINING	6	7	4	5	0	0	0	22
TICKET-FIXING	0	9	0	0	0	0	0	9
ASSERTION OF INFLUENCE	6	17	2	1	0	0	0	26
VIOLATION OF RIGHTS	22	49	7	6	1	1	1	87
MISCELLANEOUS	14	3	1	0	0	0	0	18
TOTALS	1233	204	39	20	2	1	1	1500

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ALL COMPLAINTS CONSIDERED IN 2006: 1500 NEW & 221 PENDING FROM 2005

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	692							692
NON-JUDGES	266							266
DEMEANOR	114	76	32	10	8	1	9	250
DELAYS	28	15	10	9	4	0	0	66
CONFLICT OF INTEREST	20	26	10	5	1	0	1	63
BIAS	35	13	5	2	0	1	0	56
CORRUPTION	19	11	3	0	0	0	2	35
INTOXICATION	1	2	0	0	0	0	0	3
DISABILITY/QUALIFICATIONS	0	0	0	0	0	1	0	1
POLITICAL ACTIVITY	10	24	12	2	0	0	4	52
FINANCES/RECORDS/TRAINING	6	13	7	15	3	0	1	45
TICKET-FIXING	0	9	1	1	0	0	0	11
ASSERTION OF INFLUENCE	6	22	4	2	1	0	0	35
VIOLATION OF RIGHTS	22	61	20	14	5	4	1	127
MISCELLANEOUS	14	3	2	0	0	0	0	19
TOTALS	1233	275	106	60	22	7	18	1721

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ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	13,738							13,738
NON-JUDGES	4339							4339
DEMEANOR	2956	76	1041	300	107	91	227	4798
DELAYS	1206	15	134	70	27	14	18	1484
CONFLICT OF INTEREST	586	26	414	144	46	22	116	1354
BIAS	1784	13	241	54	27	18	26	2163
CORRUPTION	400	11	101	11	35	19	33	610
INTOXICATION	51	2	33	7	9	3	24	129
DISABILITY/QUALIFICATIONS	53	0	31	2	16	11	6	119
POLITICAL ACTIVITY	280	24	245	159	11	19	40	778
FINANCES/RECORDS/TRAINING	240	13	254	173	117	83	93	973
TICKET-FIXING	23	9	74	158	40	61	163	528
ASSERTION OF INFLUENCE	163	22	123	63	13	7	54	445
VIOLATION OF RIGHTS	2392	61	376	175	78	37	69	3188
MISCELLANEOUS	734	3	235	80	28	40	57	1177
TOTALS	28,945	275	3302	1396	554	425	926	35,823

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